

REASONABLE ACCOMMODATION OF RELIGIOUS DIVERSITY IN THE NEW ZEALAND WORKPLACE

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Introduction

This paper focuses on the human right to freedom from discrimination on the grounds of religion and the right of religious expression, with specific reference to these rights in the workplace. Greater religious diversity in workplaces across the world has highlighted the issues of accommodating different religious expressions at work and the urgent need for increased levels of awareness about religious diversity as it impacts on people in the workplace. Before discussing religious diversity in the New Zealand workplace we need to clarify what we are talking about. There are three principal dimensions to the issue that I shall first identify analytically as the framework for this paper.

First, there is the three levelled, tripartite, legal dimension. Beginning with the constitutional level, freedom of religion and conscience are included in almost all formal state constitutions. In the US it is the Constitution, First Amendment;ⁱ in Canada the Charter;ⁱⁱ in Europe the European Community Treaty,ⁱⁱⁱ and so on. This most fundamental level is the highest articulation and protection of the right to religion. Necessarily this can also embrace federal, state or provincial levels of rights protection. Beneath this is a secondary level of human rights legislation that prohibits discrimination on a number of grounds.^{iv} Religion is usually included in such anti-discrimination legislation, listed alongside other diversities including gender, sexual orientation, disabilities, race and ethnicity. Religion has often been a later addition to such lists, although its specific recognition has grown rapidly in the last three decades. The third legal level of interest to us is that of labour law, the framework that governs and guides the relationships between employers and employees or workers. Internationally, much of this has now integrated anti-discrimination/human rights protections as part of workplace regulation.

Keeping these three nominally separate is helpful as there are inconsistencies between each, both conceptually and in application. Indeed, the third often functions to either neutralise or greatly restrict the other two.

After the legal, the second dimension that we need to consider is that of the historical and political. An exploration of the issues raised by religious diversity in the workplace, and in different countries around the world, shows that they have a broad correlation with the position of religion in different countries. The secularity of post-revolutionary republics, such as France, Turkey and the US, where the place of religion in the public sphere tends to be formally limited, reveals that the same is true of religion in the workplace. By contrast, and in parts of the post-British imperial world, such as Canada, Australia, Britain and New Zealand, a multicultural/multi-religious ethos generally allows a greater role to the public expression of different religious traditions.

We need to begin with historical models of religious diversity. Many of the developed countries, including most of the European states, the US and the British Commonwealth

settler-states, continued to have dominant Christian majorities; religious diversity was largely restricted to the management of different forms of Christianity, and very small minorities, such as Jewish communities. Here there is a long history of the recognition of sectarian and denominational differences. For example, the need for a different Sabbath for Jews and Seventh Day Adventists was widely acknowledged, as were the rights of Huguenots and other Protestants in France, Brethren and unions in New Zealand, and Jehovah Witnesses elsewhere.

The dominance of Christianity, Catholic or Protestant (or both as in Holland and Germany), was simply a national fact as the religion of the vast majority. The calendar of these states was the sacred Holy Days of the Christian church, and these became statutory holidays even in ostensibly secular polities. Likewise Christian symbolism and practices loomed large in public life – from parliamentary prayers to Christmas cards, parties and carols with mince pies, all incorporated into workplace practices. Religious minorities had little to say in this although, generally speaking, Christian European states religious minorities; Christian and Jewish, as opposed to indigenes, were tolerated and accommodated within the framework of the dominant Christian ethos. In New Zealand, for example, the vast majority of Pākehā and Māori were Christian, albeit of increasingly different sorts, and the calendar and public incorporation of Christianity went largely unquestioned. In many countries there was a formal secularity, although this differed markedly in how it served to create a specific, privileged and circumscribed place for Christianity or Christianities. In most cases such privileging of Christian traditions effectively undermined much of the claim of the secularity of the state.

The new religious diversity

This framework has dramatically changed in the last three decades giving rise to what I call the new religious diversity. Here two factors are significant. There first is that there has been a decline in the number of practising Christians, as measured by church attendance and self-identification. There has also been a rise in the number of those who do not identify with any religious tag or community, along with an increase in what we might call migrant religions and new forms of religiosity. There are now significant Hindu, Buddhist, Sikh and, most importantly, Muslim communities in many of these developed states. Migrants from different religious backgrounds often have strong religious lives, migration serving to intensify religious identity. On the Christian front too, partly as a response to secularisation and the presence of religious ‘others’, there have been parallel intensifications of religious identity.^v

The new religious diversity raises a whole set of novel issues about the equitable management of such diversity, in education, health care, indeed across a policy spectrum extending from policing to identity services, food manufacture to export dealings and, our subject here, employment. Increasingly, we live and work with people of different religions than our own, or none, which generates new issues for everybody. On the one hand we work with and for people of different faiths, people who dress and eat differently, who have different public behaviours relating to gender and, importantly, who live according to different sacred calendars, and often have very different values. Also the decline in the public significance of Christianity has led to a rise in in secularity, and the previously privileged place of Christianity in our society is increasingly questioned by secularists and by those not Christian. The percentage of the non-Christian religious is still small in most developed polities but it is rapidly growing; they are often communities with strong and publicly evident religious commitments. The numbers of non-religious are also increasing just as, if not more, rapidly.

The more militant and vocal of them object to the special status of Christianity and construe this as discrimination against their status as non-Christians.

This has been coupled with a heightened awareness of religious and religious identification after the 9/11 terrorist attack on New York. Finally, while all polities subscribe to the religious freedoms enshrined in the *Universal Declaration of Human Rights* (1948), Article 18, the contexts are very different.^{vi} It is also important to note that the countries of the European Community are continuing to integrate their human rights and employment law frameworks. The issues are increasingly similar across the European Community in spite of its considerable historical differences.^{vii}

The third factor is religion itself. Issues of religious diversity in the workplace are necessarily human rights questions of discrimination and employment law just as they embrace ethnic, racial and cultural aspects. Yet we all too readily forget that these are also issues of religion. We are not very good in secular polities at recognising or managing religious issues, lacking a developed public discourse about how to do so. The mandate for religious behaviour is often unlike that of cultural practices which may well be much more flexible. Commitments to particular forms of behaviour and practices are often religiously and authoritatively, sometimes divinely, mandated. This is recognised within, but not clearly beyond, communities.

My considered view is that we need to take religion seriously in its own right. It has its own contours and dynamics, patterns of belief and behaviour. It is not reducible to ethnic affairs, although this is a vital component. Nor is religion reducible to multiculturalism although it, too, might well prove conducive to the recognition of religious freedoms. The point to underline is that religious commitments are neither simply pragmatic nor cost-benefit analysis decisions, nor reducible to patterns of self-interest. Rather, religious issues assume authoritative, communal, identity and transcendental values not easily translated or grasped through non-religious discourses. The most interesting development of the last three decades has been a growing recognition of this reality so that religion is distinctly specified in anti-discrimination lists, and increasingly acknowledged as an important and discrete factor in labour law. Multi-religious is not the same as multicultural or multi-ethnic: the recognition of such is a significant first step to adequately addressing these issues.

There are two dimensions to freedom of religion: freedom from discrimination and religious coercion on the one side, and freedom to manifest or express one's religion on the other. The first is essentially a negative freedom; the latter is a positive and more difficult and interesting freedom. Accordingly, we have an infinitely more complex and complicated picture than in the past; nothing less than a cultural revolution.

In most countries labour laws meet human rights over the issue of accommodation, or reasonable accommodation. But what is "reasonable" in reasonable accommodation? And can an employer reasonably accommodate religious diversity in the workplace? Can there be flexibility over hours and days off to allow for daily prayer sessions and other sacred calendars? Just what is reasonable here?

There are further issues about religiously sanctioned clothing: skullcaps, headscarves, turbans and burqas. Can these be accommodated within the framework of corporate uniforms or work wear? For example, can a hijab be worn in a retail store? Or beards? What are we to do with turbans and hard hats or safety helmets, or about health and safety regulations? Should

canteen food reflect the dietary laws of different religious groups? Increasingly, and as indicated, this is very recent. Indeed, enhanced labour laws that include sections on religion have sought to give guidance and governance. There is a significant increase in the number of cases which looks set to continue. There are literally thousands of cases ranging across countries, occupations and religions.

Religious diversity in the international workplace

The evidence from European, North American, British, Australian and New Zealand courts and bodies reveals a steady increase in the number of complaints, concerns and enquiries about religious diversity at work. This will continue with the increasing religious diversity of the workforce. For example, the Equal Employment Opportunity Commission (EEOC) in the US reports an increase of formal complaints about religious discrimination at work from 1,138 cases in 1992, to 3,386 in 2009.^{viii} It further reports that this is currently the fastest growing category of employment complaint. Despite different employment law and human rights regimes, a clear patterning of issues emerges, although how these are dealt with differs markedly.

In many cases, conflicts over religious rights at work are matters of attempting to balance competing rights rather than merely an application of a set of guidelines or directives. For example, the right to manifest one's religion can threaten the rights of others to do likewise, or the need to balance the employee's right to express their religious identity and the employer's right to run a business, or the right to share one's faith with acknowledgment of the rights to safety and dignity of those of a different faith.

Next we can briefly examine the situations in the US, France, Britain, Australia and Canada for a comparison with New Zealand developments.

In the US, there are variant regulations for federal employees, state employees and those employed by private concerns. Roughly 20 million people fall into the first two categories and are protected by the Fourteenth Amendment of the Constitution, and reiteration at federal and state levels of prohibitions of any law establishing religion, namely the First Amendment. The vast majority of US workers, approximately 130 million, are not protected by the Constitution but governed by employment law, common law or contractual agreement. Hence while prayer in a government office would fall foul of the Constitution, this is not the case for private businesses. There are, however, both government and private guidelines for disputes and complaints about religion in the workplace. Until comparatively recently, the US was a clearly Christian majority country, both numerically and culturally; most cases that involved religion being imposed at work rather than a more recent history of issues concerning calendars and practices of other religions than Christianity.

The *Civil Rights Act of 1964*, Title VII,^{ix} renders illegal discrimination, positive and negative, including generally on the basis of religion, hiring and firing, and in conditions of employment. This law excludes religious organisations and activities. Further there can be no coerced religious participation as a condition of employment, and employers are required to attempt "reasonable accommodation" (Section 703 a.1) of the religious practices of employees. The Act was also understood to affirm the right to expression of religion, the protection of employees from religious harassment, and the policy requirement of no retaliation against complainants.^x Title VII of this Act was amended in 1972 to require employers (Section 701), including the US military and federal government, to

“accommodate religious practices” provided this was done “without detriment” or “undue hardship” to the enterprise or organisation.^{xi} Unfortunately, the Supreme Court in 1977 rendered “undue hardship” as anything above the marginal (*De Minimis*) cost for the reasonable accommodation of religiously diverse practices.^{xii} In 1980 the EEOC revised its *Guidelines* in light of this decision. The Supreme Court redefined religious accommodation again in 1986,^{xiii} and this decision was unsuccessfully challenged by the proposed Religious Accommodation Amendment of 1989.

In 1997 President Bill Clinton issued the *White House Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*. This went considerably further in its interpretation of the 1964 Act by recognising the right to express religion in the government workplace, and by encouraging the accommodation of religious differences, including affirming the *Adjustment of Work Schedules for Religious Observances* (Title 5, USC 5550a). The EEOC issued revised and comprehensive guidelines in 2008 to implement the more recent interpretations of the *Civil Rights Act* (Title VII) – *Compliance Manual Regarding Workplace Discrimination on the Basis of Religion* (2008). It helpfully defined religiously based practice – traditional and non-traditional, organised and individual – and “sincerely held beliefs”, whether religious or non-religious ethical beliefs (Section 12-i), and gave examples and precedents of reasonable accommodation (Section 12-iv). Its range is truly impressive, extending from the implications of court decisions on reasonable accommodation, via the potential coercive religious and spiritual components of New Age management training courses, to a new set of guidelines for the wearing of religious clothing in the workplace. The whole volume is illustrated with US best practice of religious accommodation, mediation, and templates for the inclusion of religious difference in contracts, with complaints processes when all else fails.^{xiv} The cases are interesting and extend from Seventh Day Adventist requests to have their ‘biblical Sabbath’ on Saturday rather than Sunday, Wiccan calls for time off to celebrate Samhain Sabbat (aka Halloween), to people with unique belief systems in a community that can be counted on the fingers of two hands. There are requests for turbans, headscarves and bindi (Hindu forehead markings), and for the religious decoration of personal workspaces, desks and offices. Certain claims for reasonable religious accommodation have been rejected by the EEOC, such as ‘Goth’ style piercing and tattoos.

In 1996 John Kerry introduced the *Workplace Religious Freedom Act* (WRFA), which went further in its interpretation of existing legislation, and sought to amend Title VII of the *Civil Rights Act of 1964* by increasing employers’ responsibilities for reasonable accommodation of workers’ religious beliefs and practices. Although amended and re-introduced in 1997, 1999, 2000, 2002, 2003-05 and 2009, it has been blocked each time in part by arguments that it would open the floodgates of accommodations of religious practices, and compromise commercial interests. Accordingly, it has yet to be passed into US federal law (in 2009 the *Workplace Freedom Act* was passed into law in Oregon). This amends the bar for the rejection of the accommodation of a religious practice in the workplace from “undue hardship” to “an accommodation requiring significant difficulty or expense” so as to bring the reasonable accommodation of religious diversity into line with the standard of the *Americans with Disabilities Act* (ADA).

The general pattern seems one of growing awareness about the need to address issues of religious accommodation, and to develop processes that prevent the costly and acrimonious legal battles that have reached the headlines in recent years. They include the refusal to allow Muslims to take time off during Ramadan, or issues over the wearing of religious attire. These

issues grow more complex, as in the recent cases of meat packaging plants in Nebraska and Colorado, where the meeting of Muslim demands for changed work schedules led to a counter-protest by non-Muslim workers on grounds of discrimination that resulted from this reasonable accommodation! There have also been cases taken up by religious communities and organisations at local, state and national levels.

The US has a plethora of different religious communities and sects, including more than 1,500 registered religions, of which there are more than a thousand Christian denominations, more than a 100 Hindu groups and over 80 distinct Buddhist communities. Notwithstanding growing evidence that the number of non-religious Americans is steadily increasing, albeit from a low base, more than 83% claim a religious affiliation and 56% consider religion an “integral part of their lives”.^{xv} Thus they cannot simply leave this dimension of themselves at the factory or office entrance. In fact, the Institute of Corporate Productivity’s 2008 survey reported that 31% of employers found “unsolicited sharing of religious view in the workplace” a problem.^{xvi} The justification in the human resource literature tends to emphasise the value to a business of a stable and committed workforce, the accommodation of religious diversity among employees being an important factor in this regard.^{xvii} What seems clear is that the religious neutral workplace raises as many questions as it has attempted to answer. And in spite of a sustained public debate, power still seems to reside with the employers.^{xviii} America has some of the worst examples of workers’ rights in relation to religion compared to *DiversityInc*’s Top 50 companies representing exemplars of accommodation of religious diversity. Hence the US manifests some best practice of reasonable accommodation, along with innovative and generous schemes promoting religious tolerance and awareness and clear guidelines for the necessity of reasonable accommodation. Yet the bias has largely remained in favour of the employer at the expense of employees and their rights, especially in regard to any costs involving reasonable accommodation.

France represents a more extreme version of what I call ‘post-revolutionary secularism’ where a firm line is maintained between public life that is secular (*laïcité*) and private life that is a personal matter. Although much of the academic literature has dealt with the issue of the employment (or not) of Catholic priests and other ministers of religion, the last two decades have witnessed a growing debate about religion in public life, including the workplace, particularly in relation to France’s large Muslim population. In 2004, the Upper House of the French Parliament reiterated the *laïcité* provisions and clarified them to exclude the wearing of all conspicuously religion symbols and clothing in the public state sphere. This included the civil service and public institutions, including schools, colleges and universities.^{xix} The impact has been the prohibition of headscarves, turbans, skullcaps, large crosses and other distinctive accoutrements. More recently a public debate has followed the rejection of citizenship to a woman whose burqa indicated that she had not adequately ‘assimilated’ to the dominant French culture. Currently there is a case of a Sikh student denied the wearing of his turban at school and referred to a United Nations General Assembly Committee responsible for Human Rights. Sikhs also have had difficulties renewing French identity papers should they refuse to remove their turbans for the required photographs.

In a major article in *Les Echos*, an economic newspaper,^{xx} the author cited a recent study (April 2008) by IFOP (French Institute of Public Opinion). In a survey of 393 directors of human resources, 26% of businesses consider that worker demands linked to religious practices are increasing (in Ile-de-France the figure rose to 37%). The issues reported are headscarf wearing, prayer times and dietary requirements. Generally these managers expressed deep disquiet about the situation. Véliocas focuses on the L’Oréal factory which has

a prayer room and woman workers permitted to wear headscarves – in fact one such woman has joined the managerial group – while halal food is available in the canteen. According to Véliocas, “legally a company cannot impose *laïcité* on its salaried employees” as this does not legally apply in the private sector. L'Oréal represents an example of positive developments taken beyond legal requirements but clearly to the benefit of both company and employees. While there are other such positive examples, the general public climate in France seems to favour the employer and to insist that there is no legitimate place for religion in the public sphere.

In 2004, a new government funded independent body was established responsible for dealing with discrimination in France. This was the *Haute autorité de lutte contre les discriminations et pour l'égalité*, or HALDE, modelled at least in part on the US's EEOC. A number of recent cases have been concerned with religion (dietary provision, provision for time off for religious activities, and religious attire) and suggest that the balance is moving away from ‘the employer as sole judge’, to favour a degree of reasonable accommodation of religious diversity. Whether this will challenge the rigidities of France's historical public secularity remains indeterminate.

The *Employment Equality (Religion and Belief) Regulations* came into force in 2003 in Britain as part of a series of new labour laws dealing with age, sexuality, disability, race and gender discrimination.^{xxi} The new regulations were expressly formulated to comply with the European Union directive 2000/78/EC.^{xxii} These regulations pertaining to religion include direct and indirect discrimination, harassment and victimisation, and cover staff recruitment, retention, and ending employment. They are designed to reduce religious discrimination, and include a special clause that protects Sikhs from the requirements of wearing safety helmets (Section IV, 26). ACAS (Advisory, Conciliation and Arbitration Service), the largely government funded but independent body, founded in 1975, advises employers and employees over matters of employment, and gives guidelines on religious discrimination that expressly address the new regulations. The Regulations do not define reasonable accommodation or regulate for religious observance, as for example in the workplace, but ask employers to consider whether their rules, policies and procedures discriminate against staff who hold particular beliefs or observe specific practices, directly or indirectly. The *ACAS Employers' Guide*^{xxiii} also gives advice on processes to discuss religious requirements and the needs to balance these with business interests. There are also suggestions for meeting dress codes, dietary requirements, prayer times and the provision of facilities without undue costs being incurred. The regulations also provide details of taking cases to Employment Tribunals and of the appeals procedures.

A number of interesting cases have served to delineate the interpretations of the 2003 Regulations. For example, in *McClintock v Department of Constitutional Affairs*,^{xxiv} and in *McFarlane v Relate Avon Ltd*, Lord Justice Laws refused the appeal application by Guy McFarlane, a Christian relationship counsellor who worked for the charity Relate.^{xxv} He asked to be exempted from relationship advice relating to sexual matters to same sex couples but was refused and was dismissed in 2008. Laws L.J. decreed that:

... the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled ... The promulgation of law for the protection of a position held purely on religious grounds cannot therefore be justified. ... We do not live in a society where all the

people share uniform religious beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy, which is of necessity autocratic. The law of a theocracy is dictated without option to the people, not made by their judges and governments. The individual conscience is free to accept such dictated law; but the State, if its people are to be free, has the burdensome duty of thinking for itself.

There are also interesting developments in Italy, Germany, Canada and, closer to home, Australia that are beyond the scope of this presentation. When considering US, European and Canadian cases and materials a list of the principal common concerns is discernible:

(1) *Religious display, attire and style*: This reveals a cluster of issues embracing religious attire and style, including health and safety factors, amendments to corporate uniforms, the use of turbans, skullcaps, headscarves and burqas, and the wearing of beards. There have also been issues about religious insignia and the decoration of personal workspaces with religious pictures and objects.

(2) *Sacred and holy day timetables*: Sacred and holy day timetables and calendars and the securing of alternative work schedules to accommodate them. They include daily and weekly prayer times at work and religious places of worship, festival and feast days, and funerals and other religious events.

(3) *Conflict between religious and work practices and beliefs*: Limitations to work practices on religious grounds, such as the handling of particular forbidden meat products, for example pork, or the refusal to undertake specific workplace activities on moral or religious grounds, such as not processing civil union documentation, or calculating tax relief for clinics that undertake pregnancy terminations.

(4) *Appropriate levels of discussion and proselytising at work*: This includes missionary activities with workmates, as well as having formal and informal religious groups active at work.

(5) *The dominance of Christianity in the workplace*: Statutory times off work for all workers in many places are scheduled according to the dominant Christian sacred calendar. There are objections from secular, non-religious groups and adherents of religions other than Christianity that this discriminates against non-Christians. The same point is made in relation to Christmas festivities at work, for example, that include overt religious symbolism and customary traditions.

(6) *Discrimination on the grounds of religion*: There are also clear cases of discrimination in hiring and firing, promotion, and in the treatment of workers on religious grounds in religious and non-religious organisations.

Religious diversity in the New Zealand workplace

New Zealand is a signatory to the *Universal Declaration of Human Rights* (1948), Article 18, which reads:

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

This country has ratified (1978) the *International Covenant on Civil and Political Rights* (1966, ICCPR) which prohibits discrimination on the basis of religion (Articles 2, 4, 24, 26) and defines legal “limitations” (Article (18) 3) to the freedom to “manifest one’s religion” in order to “protect public safety, order, health, or morals or the fundamental rights and freedoms of others”.

In addition, freedom from discrimination on religious grounds and freedom of religion have been developed in New Zealand’s human rights legislation. The *Bill of Rights Act* (1990), under the civil and political rights of New Zealanders¹ includes freedom of thought, conscience and religion (Part 2, 13) and the right to “manifest” religion and belief in “worship, observance, practice, or teaching, either in community with others, and either in public or in private” (Part 2, 15).

The *Human Rights Act* (1993) prohibits discrimination on grounds of religious or ethical belief while allowing employment of adherents of particular faith in designated contexts (28.1) and also provision of educational institutions expressly for students of specific religious traditions (28.2). Section 28.3, is of particular significance for religious diversity in the workplace. It requires that “an employer must accommodate” a particular practice required by “religious or ethical belief” so long “as the practice does not unreasonably disrupt the employer’s activities”.

In New Zealand there is increasing employer and employee religious diversity, as many more are working for, and with people of different religions and beliefs. The Muslim, Hindu and Buddhist and Sikh communities now account nationally for approximately 7% of the population and this is still increasing. This figure has more than doubled in each of the last two decades. In the major urban centres, the percentage figure is considerably higher. The number of people who profess “no religion”, or register none on the census, is currently one-third of all New Zealanders (NZ Census 2006). The number of professing Christians is down to about 50% of the population. Yet it is important to note that, in total, more than two-thirds of New Zealanders do profess some form of faith and this would include those in the workforce.

This rise in religious diversity has increased the number of complaints, issues and enquiries about religion in the workplace. This has highlighted a need for guidance for all stakeholders, including employees, employers, unions, employer associations and human resource management personnel. Given current New Zealand legislation, the primary concerns are: What are the limits and extents of “reasonable accommodation” on the part of employers? and What might we do to improve the situation in the future?

To gain an idea of the extent and types of issues in New Zealand, the records of the Human Rights Commission (HRC) were explored. The HRC received a total of 194 complaints and enquiries pertaining to religion and the workplace from 2002 until early May 2009. The

¹ See, Paul Rishworth, ‘The Religion Clauses of the New Zealand Bill of Rights’, *New Zealand Law Review*, 4/2007, 631-58.

number is increasing per annum, but the average of 26 per year gives an idea of the scale of the issue. The most common issue (24%) relating to religion in the workplace was the need to accommodate regular weekly holy days, with 46 approaches received. The majority of these were closed after discussion with an Infoline advisor or a mediator. Many of the most recent approaches were closed after provision of advice on the Human Rights Act by a mediator, or by reference to the Commission's booklet on pre-employment guidelines. A further 13 approaches were made to the Commission regarding employees requiring time off for annual religious holy days, or time off for other religious purposes.

Ten approaches were made to the Commission relating to the accommodation of Muslim employees' need to take time to pray during the day and on Fridays. To cite an example (name changed):

Mahmood, who is Muslim, wanted to take his lunch break outside his employer's designated lunchtime so he could attend Friday Jama't at the local mosque. He explained to his employer that it was compulsory as a Muslim male to participate in this communal prayer on Fridays. His employer refused to let him take a later break so Mahmood contacted the Commission. At mediation, Mahmood reiterated to his employer's representatives how he and fellow Muslim males in the workplace were required by their faith to pray during a specific time on Fridays. He also explained what it would mean to him if he could not do so. The employer's representative spoke about how their manufacturing company operated with a fine margin and that any interruption to production was costly. The absence of one person from the production line would negatively affect business. Mahmood said he understood maintaining production was a priority but believed his religious belief could be accommodated. It was agreed that Mahmood would nominate a 'conciliatory' mullah to meet his employer and talk to him about Muslim religious practices and realistic options for both parties. The employer stated the need for the mullah to understand that any changes could not affect the company's production. Mahmood said mediation hadn't resolved the complaint but had provided a step towards resolution.

The second most common approach related to the right of employees to hold, or follow, their own belief, regardless of those of the organisation or its other members. Here more than 35 approaches were received and comprising three main types, namely:

- (1) Christian organisations wanting to employ only Christians. Approaches came from employers wanting to check the legality of advertising in this way, as well as potential employees (10 approaches).
- (2) People who were dismissed, threatened with dismissal, or told that they should not be employed at their organisation because of their difference in belief. This included organisations both formally religious in nature, as well as secular organisations, a majority of staff belonging to a single religious group (10 approaches).
- (3) People declined employment or advised not to apply for a role because of their religious beliefs (eight approaches).

A third category of complaints and enquiries to the Commission related to visible expressions of religion (32 approaches). The most common related to Muslim women wearing headscarves in the workplace, and associated difficulties (nine approaches). For example (details changed for anonymity):

Azizah was a recent migrant with excellent English and experience working in a global fast food franchise in Pakistan. Newly arrived in New Zealand, she applied for a job at the same franchise, and at her interview asked if she could wear her hijab at work. Her interviewer said she thought there would not be a problem, but she would have to check the policy with the store manager. The interviewer then booked Azizah for a trial shift, for which she had to buy the store uniform, including shoes. Before she went in for her trial shift, the interviewer called her and said the store manager's policy was that she could not wear her hijab on the job. Azizah said that she would be unable to work without her hijab, and had to decline the trial. She then applied for work at a second branch of the same fast food franchise, where she again inquired about the branch's hijab policy at the interview. The interviewer said they would check the policy with the store manager, but did not call her back. She applied at a third branch, and was declined with no explanation. She believed that this was a reflection of a franchise-wide policy against the hijab, and made a complaint to the Commission against the franchise as a whole. She said, 'I want them to accept a Muslim woman for who I am, and not just see the headscarf'. When contacted by the mediator, the head office management of the franchise said that it was definitely not the franchise policy to forbid people from wearing the hijab. They agreed to a mediation meeting. Azizah was in a hurry to mediate the complaint as she had pressing family business to take care of in Pakistan. This meant there was not enough time to organise a community representative to be Azizah's support person and the mediation. The franchise head apologised to Azizah and offered her work at another branch. However, Azizah had to decline the offer of work, due to her family emergency in Pakistan.

Six approaches were also made to the Commission relating to Sikh turbans in the workplace and to prohibitions against wearing religious icons/jewellery and taonga (eight approaches). Two approaches relating to Sikh turbans involved accommodating the religious requirement of wearing a turban, and health and the safety requirements of wearing a hard hat while on construction sites. In a more recent approach, the enquirer was provided with contact details of a Sikh community member so that these issues could be further discussed.

Eleven approaches were made to the commission relating to general harassment in the workplace because of religion. An example included (details changed for anonymity):

Mohammed, a Muslim, resigned from his job after four and a half years. He said he left after conversations with his employer, John, and requirements and behaviour that had the effect of putting down his religion and culture and gave a clear message that he needed to change his belief system. Mohammed made a complaint to the Commission and during the subsequent mediation process said that he found some of John's requests to be offensive to him as a Muslim man. An example was asking him to put out rubbish – but with a specific message about not letting his male ego and beliefs get in the way, because he was now in New Zealand. He said he was asked to give himself an Anglicised version of his name, although John disputed this. Mohammed spoke about the stress he felt at being unable to challenge John more directly and over John's behaviour towards his wife. He explained how he felt as a migrant brought to New Zealand by John, who spoke and dined with him and his wife as friends. John said he believed his discussions with Mohammed had not been one-sided and that all employees were free to believe what they wanted and to practise

their own religion. Mohammed had been able to pray, as he required. John apologised for missing any cues Mohammed and his wife may have tried to give him about discussions and behaviour, for example physical contact with his wife. Mohammed accepted \$9800 for loss of dignity and injury to his feelings in full and final settlement of his complaint. After the settlement, John offered to provide Mohammed with a positive reference and to apologise to Mohammed's wife for any offence caused. Mohammed accepted this offer.

Five approaches relating to the avoidance of certain animals concerned employees required to handle meat of some type which militated against their religious beliefs. The complainants pursued all these cases independently. Three related to employers using dogs to search vehicles, and Muslim employees who objected on the basis that dogs are considered unclean in Islam. All matters were closed at the initial stage 1 level. One complaint involved an employee who worked for a Muslim employer. The employer would not allow the employee to cook or heat food containing pork products. The complainant and respondent attended a mediation meeting where they reached an amicable and practical resolution to their concerns. One approach was made by a person who left his job because of Jewish jokes at work and a failure to accommodate his dietary customs when food was provided in the workplace. Although further information and a complaint form were sent, this person did not return the form so the matter was subsequently closed.

Finally, there have been four approaches to the Commission by people who reported that their employers had told them not to discuss their religion, or to preach at work. Three were referred to obtain further information on religious discrimination in the workplace, as well as information on the freedom to, as well as from, religion.

Following the 2009 report of an advisory group to the Minister of Labour, Kate Wilkinson, reviewing the *Holidays Act 2003*, employees are permitted to transfer the observance of a public holiday listed in the Act to another day. For example, the final day of Ramadan might be swapped for Good Friday, or Easter Sunday, or Christmas.

The Religious Diversity in the New Zealand Workplace project

In partnership with the HRC, the Religious Studies Programme at Victoria University chaired: (a) a Working Party of academics, representatives of Business New Zealand, the Department of Labour, and the CTU; and (b) a religious reference group consisting of representatives of the Rationalists and Humanists, Islam, Judaism, Buddhism, Christianity, Sikhism, Hinduism and the Bahá'í. Both groups met twice with a third combined meeting. Draft guidelines were drawn up; there were consultations with religious communities and interested parties, and a period of public consultation. These consultations highlighted the issues of significance in New Zealand including the six listed above plus concerns with Maori *ritenga* (including *karakia* and *waiata*) within institutional and corporate life. The guidelines were published in 2011 and designed to: raise awareness about the religious requirements of New Zealand workers; foster "reasonable accommodation" within existing New Zealand legislation; and reduce the number of HRC and Employment Tribunal cases dealing with religious issues at work. Some issues are relatively straightforward; others such as the Sikh wearing of safety helmets are more problematic.

Even a cursory glance at conditions in other countries indicates that the human right to religion is a very lively area of legal and policy deliberation, and likely to become more so.

There is much to learn from a study of workplace religious diversity in different countries, both negatively and positively. Wariness is justified in moving further in favour of employers at the expense of employees as, formally at least, exists in the US and France. Many overseas issues will transplant to New Zealand in future as diversity increases. Considering this country's legislation, it is clear that here too the priority is with the employer, as for example compared with Britain. Yet New Zealand has a high level of national commitment to a robust human rights regime and a general openness to other religions and cultures. The majority of HRC and Tribunal cases could have avoided proceedings with a little knowledge and a degree of openness and goodwill. Ignorance of other religious cultures plays a considerable role in these breakdowns of communications across religious and secular cultures.

New Zealand has in place adequate legislation and this, coupled with an awareness campaign about religious diversity in the workplace, and knowledge of suitable contacts for further advice and pertinent information, will foster a climate of trust across religious divides. New Zealand has the advantage of coming to some of these issues later than other places and with a strong human rights tradition and experience. Also recent is a degree of bicultural accommodation. Religion has been often hidden in New Zealand's public life over the last four to five decades, although it does surface for religious and moral campaigns. Recent immigration has raised the profile of religion, and served to activate some sectors of the Christian community. New Zealand seems to fall somewhere between the multiculturalism of Britain and Australia, and various forms of European and American secularism.

Endnotes

ⁱ "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances", <http://www.gpoaccess.gov/constitution/browse.html>. See, also, John Richard Conway, *A Look at the First Amendment: Freedom of Speech and Religion* (Melrose Park, Ill., Enslow, 2009); Barry Adamson, *Freedom of Religion: The First Amendment and the Supreme Court* (Gretna, LA, Pelican, 2008); and Bruce T. Murray, *Religious Liberty in America: the First Amendment and Contemporary Perspective* (Boston, University of Massachusetts Press, 2008).

ⁱⁱ The Charter of Rights and Freedoms/*La Charte canadienne des droits et libertés*, <http://laws.justice.gc.ca/eng/charter>, see, in particular, Fundamental Freedoms (Section 2): "Everyone has the following fundamental freedoms: (i) freedom of conscience and religion; (ii) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (iii) freedom of peaceful assembly; and (iv) freedom of association". For a concise overview of the Charter on religion, its context and development, see, Richard Moon (Ed.), *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008).

ⁱⁱⁱ See, *European Community Treaty*, Article 13 (as amended by the treaty of Nice, 2001, operational in 2003): 1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PD>.

^{iv} Most nation states subscribe to both international agreements and conventions and have developed national human rights legislation.

^v See, *NZ Census 2006* (Statistics, Wellington, 2006) for figures on "migrants' religions".

^{vi} *Universal Declaration of Human Rights*, Article 18: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance", <http://www.un.org/en/documents/udhr/index.shtml#a18>

^{vii} Based on the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 1950, usually referred to as the European Convention on Human Rights (ECHR), which established the European Court of Human Rights/*Cour européenne des droits de l'homme* in Strasbourg in 1959. Article 9 of the ECHR provides a right to freedom of thought, conscience and religion, including the freedom to change a religion or belief, and to

manifest a religion or belief in worship, teaching, practice and observance, subject to certain restrictions that are “in accordance with law” and “necessary in a democratic society”. Article 14 is a prohibition of discrimination, specifically but not exclusively based on “sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,
<http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> .

Decisions can be accessed via the Court database at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en>.

^{viii} See the *EEOC Compliance Manual*, Section 12, Religious Discrimination (EEOC, Washington DC, 2011, 6); and *Questions and Answers: Religious Discrimination in the Workplace*, http://www.eeoc.gov/policy/docs/qanda_religion.html).

^{ix} Title VII of the Act, codified as Subchapter VI of Chapter 21 of title 42 of the United States Code, prohibits discrimination by covered employers on the basis of race, color, religion, sex or national origin. Title VII also prohibits discrimination against individuals because of his or her association with another individual of a particular race, color, religion, sex, or national origin. For further background and the complete text, see Robert Loevy (Ed.), *The Civil Rights Act of 1964* (Albany, NY: State University of New York Press, 1967).

^x *Guidelines on Religious Accommodation* (EEOC, Washington DC, 1966).

^{xi} See, Michael Wolf et al, *Religion in the Workplace* (American Bar Association, Chicago, 1998).

^{xii} *TWA v. Hardison* 432 US 63.

^{xiii} *Ansonia v. Philbrook* 479 US 60, 1986.

^{xiv} EEOC, Washington, 2008, also, Christopher Eisgruber & Lawrence Sager, *The Vulnerability of Conscience: Religious Freedom and the Constitution* (Cambridge, Harvard University Press, 2006); also the excellent and comprehensive, Michael McConnell, ‘Accommodation of Religion’, *Supreme Court Review* (1985) 1-59; and by the same author, ‘The Origins and Historical Understanding of Free Exercise of Religion’, *Harvard Law Review* 103 (1990) 1409-1517; also Michael McConnell & Richard Posner ‘An Economic Approach to Issues of Religious Freedom’, *The University of Chicago Law Review* 56/1 (1989) 1-60.

^{xv} Pew Forum on Religion and Public Life, 2008, <http://religions.pewforum.org/reports>.

^{xvi} The survey which polled 206 organisations was undertaken by the Institute of Corporate Productivity in association with HR.com, see *Taking the Pulse: Diversity and Inclusion* (Seattle, ICP, 2008).

^{xvii} For example, Patricia Digh, ‘Religion in the Workplace: Make a Good Faith Effort to Accommodate’, *HR Magazine* 43/13 (1998) 84-92; Karen Cash & George Gray, ‘A Framework for Accommodating Religion and Spirituality in the Workplace’, *Academy of Management Executive*, 14/3 (2000), 124-134, and more generally, *Religion and Corporate Culture* (Society for Human Resource Management, Virginia, 2008); Georgette Bennett, ‘Religious Diversity in the Workplace – An Emerging Issue’, *Diversity Factor* 9/2 (2001) 15-21; Samuel Estreicher & Michael Gray, ‘Religion and the U.S. Workplace’, *Human Rights*, 33/3, 2006).

^{xviii} See, David Miller, *God at Work* (NY, Oxford University Press, 2006); Douglas Hicks, *Religion and the Workplace* (Cambridge, Cambridge University Press, 2003), where he advocates “respectful pluralism”; and Eileen Kelly, ‘Accommodating Religious Expression in the Workplace’, *Employee Responsibilities & Rights Journal* 20 (2008) 45-56 for a number of recent cases across the US.

^{xix} See http://www.ucl.ac.uk/laws/global_law/legal-news/french/index.shtml?archive

^{xx} 26 June 2008 by Joachim Véliocas, ‘Islamisation des entreprises françaises’; see also his book, *L’islamisation de la France* (Editions Godefroy de Bouillon, 2007).

^{xxi} See <http://www.legislation.gov.uk/ukxi/2003/1660>

^{xxii} See <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>

^{xxiii} *Religion & Belief in the Workplace: ACAS Employers’ Guide* (London, ACAS, 2004).

^{xxiv} [2008] IRLR 29.

^{xxv} [2010] EWCA Civ 880; [2010] IRLR 872; 29 BHRC 249.