

# Indirect discrimination, employment and equality in the workplace: a comparison between the UK and Australian equality legislation

Discriminación indirecta, empleo e igualdad en el lugar de trabajo: una comparación entre la legislación de igualdad del Reino Unido y Australia

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*Resumen:* The Directive 2000/78/EU establishes a general framework for equal treatment in employment law and prohibits direct and indirect discrimination on several grounds, including religion or belief. The Equality Act 2010 implements this provision in the UK on the principle of equal treatment, and a rule or dress code that targets a specific religious group, such as a ban on Muslim women wearing hijab would be direct discrimination. A more neutral dress code which applies equally to all employees may have an indirectly discriminatory effect on those who wish to wear religious clothing or symbols at work such as a general ban on wearing religious clothing. The central issue in English law in most cases will be justification and whether the employer had a legitimate aim and if the ban was proportionate under Article 9 of the European Convention of Human Rights (ECHR). In Australian law there is a policy that bans religious discrimination on an institutional level and there is a free exercise clause under section 116 of the constitution. There is a more flexible policy because is no protection of religious belief in the equality legislation towards the hijab as a right of the employee in the workplace. Both jurisdictions have socio-economic as well as organisational policies on diversity management informed by a multilevel framework that contributes to integrating the individuals and organisations in the workplace. This paper adopts a comparative approach between the two common law systems where the UK follows a multinational framework based on the Equality Act and the ECHR case law and the Australian accept the federal and state law which have concurrent jurisdictions in the legal framework.

*Keywords:* Directive 2000/78/EU, Equality Act 2010, ECHR Article 9, Indirect discrimination, Australian Human Rights and Equal Opportunities Commission, Free Exercise Clause, Racial Discrimination Act 1975.

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*Abstract:* La Directiva 2000/78/CE establece un marco general para la igualdad de trato en el empleo, y prohíbe diversas formas de discriminación directa o indirecta, incluyendo la religión y las creencias del trabajador. La “Equality Act 2010” (Ley de Igualdad de 2010) traspone estas normas al Reino Unido bajo la lógica del principio de igualdad de trato. Las reglas o códigos de vestimenta dirigido a un grupo religioso determinado, como la prohibición a las mujeres musulmanas de vestir hiyab es un caso de discriminación directa; una regulación neutra que se aplique por igual a toda la plantilla puede producir una discriminación indirecta en aquellas personas que quieran utilizar determinadas ropas o símbolos asociados a su confesión religiosa tanto como la prohibición directa de uso de dichas prendas. La clave de la ley británica, en la mayor parte de los casos, será la eventual existencia de un objetivo legítimo en el empresario y el análisis de la proporcionalidad, a la luz del art. 9 de la Convención Europea de Derechos Humanos. En la Ley Australiana, por su parte, se prohíbe la discriminación por motivos religiosos en un nivel institucional, y se reconoce la libertad de culto en la sección 116 de la constitución. La regulación es más flexible, porque no existe protección de las creencias religiosas en la legislación de igualdad que ampare un derecho a vestir hiyab en el centro de trabajo. Ambas jurisdicciones tienen políticas socioeconómicas y organizativas en materia de gestión de la diversidad informadas por un marco multinivel que contribuye a la integración en el ámbito laboral de individuos y organizaciones. Este trabajo plantea una aproximación comparativa entre los dos sistemas de common law, en el que Reino Unido sigue un esquema de multinacionalidad basado en la Ley de Igualdad y la Convención Europea de Derechos Humanos y Australia acepta la legislación federal y estatal, que tienen competencias concurrentes en materia legislativa.

*Palabras clave:* Directiva 2000/78/CE, Ley de Igualdad (Equality Act), artículo 9 de la CEDH, Discriminación indirecta, Comisión Australiana para los derechos humanos y la igualdad de oportunidades, Libertad religiosa y de culto, Ley de discriminación racial de 1975.

## Introduction

The right to freedom of religion is a recognised principle of international law which is limited by the demands of justice.<sup>1</sup> This has been argued in the courts in the UK that have had to consider issues regarding female employees of the Muslim faith who have adopted an avowed symbol of religious manifestation. It affirms an identity for some of the women but it also presents a separation from the mainstream employees who may not have a religious belief. This presents an employer with a choice to accept the employee as a member of a minority who has a protected characteristic or to make western dress obligatory. The discrimination in the workplace is forbidden by the Equality Act 2010 in English law which is superimposed by the ECHR, and is multinational, while the Australian law which is also based on common law the federal government and states have promulgated statutes that apply to employees and which impact on wearing of religious symbols. The issue which better protects the employee in the workplace from indirect discrimination.

<sup>1</sup> The right of all persons to equality before the law and protection against discrimination constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of All Forms of Discrimination against Women, United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human

Rights and Fundamental Freedoms, to which all Member States are signatories. Convention No 111 of the International Labour Organisation (ILO) prohibits discrimination in the field of employment and occupation.

The European Convention for the Protection of Human Rights and Fundamental Freedoms has a framework for the protection of rights.<sup>2</sup> Article 9 states "(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance; (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others". Article 14 states 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

There is further protection under Article 1 of Protocol No 12 to the ECHR is entitled 'General prohibition of discrimination'. Paragraph 1 states:

'The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'<sup>3</sup>

This obligation is reinforced by Charter of Fundamental Rights of the European Union Article 10<sup>4</sup> entitled 'Freedom of thought, conscience and religion' Paragraph 1 affirms this duty as follows:

'Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.'<sup>5</sup>

There is Council Directive 2000/78/EC that establishes a general framework for equal treatment in employment and work place.<sup>6</sup> Article 2 distinguishes between direct and indirect discrimination. This has been transposed into English law by means of the Equality Act 2010 that prohibits discrimination based on religion or belief. The Act incorporates the Directive. The preamble states that the Directive applies to the employment practice and labour law and its impact is on the work environment where it sets out the duties and obligations of the employer towards the employee such as respect for their religious beliefs.<sup>7</sup> It renders unlawful the dismissal of an employee who practises a religion on the ground that he or she refuses to comply with an instruction from the employer

<sup>2</sup> Signed at Rome on 4 November 1950. All the Member States are signatories to the ECHR, but the European Union has not yet acceded as such; see Opinion 2/13, EU:C:2014:2454.

<sup>3</sup> The protocol was opened for signature on 4 November 2000. Of the EU Member States, it has to date been signed by Austria, Belgium, Croatia, Cyprus, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia and Spain. Only Croatia, Cyprus, Finland, Luxembourg, Malta, the Netherlands, Romania, Slovenia and Spain have so far ratified it.

<sup>4</sup> OJ 2010 C 83, p. 389.

<sup>5</sup> Article 21 of the Charter is entitled 'Non-discrimination'. Paragraph 1 states: 'Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.'

<sup>6</sup> (OJ 2000 L 303, p. 16).

<sup>7</sup> Recitals of the Directive 2000/78/EU state (9) Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential; (11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons; and (12) To this end, any direct or indirect discrimination based on religion or belief, disability, age or sexual orientation as regards the areas covered by this Directive should be prohibited throughout the [European Union].

(a private-sector undertaking) that she is not to wear a religious symbol when in contact with the customers of the business.

The Australian jurisdiction by comparison has a federal system where the states have their enact their legislation that prohibits discrimination in employment. The policy framework of overseeing legislation in this sector comes under the Australian Human Rights and Equal Opportunities Commission. The federal Fair Work Ombudsman also provides education and assistance for employees and employers on preventing discrimination in the workplace. Section 116 of the Commonwealth Constitution confers a guarantee of religious freedom and discrimination is prohibited in principle. However, every state jurisdiction prohibits religious discrimination except South Australia and New South Wales but these states have also adopted a precedent from the federal law to prevent victimisation in the workplace.

The research output shows that the wearing of religious symbolism can lead to discrimination but that it also breeds a victim complex and if there are no plausible reasons such as industry practice then it should be allowed in the workplace. The motivation of this study can be justified by the choice of 2 legal systems that compare the United Kingdom with that of Australia which are both based on common law. The difference needs to be highlighted that contrasts the equality legislation based on precedent which is found in English law and the Australian legal system that has incorporated the federal and the state law. This draws from the standards and, in particular, judicial, international and national resolutions and conceptualize them in the theoretical framework in order to differentiate between direct and indirect discrimination.

This paper examines the framework of English law that has adopted the EU Equality Directive into the Equality Act 2010 and evaluates the laws that protect religious symbolism of wearing the *hijab*, the head gear worn by Muslim women who profess a belief derived from Islamic custom.<sup>8</sup> Part A deals with the religious discrimination in the British labor system and the indirect discrimination in the work place. It considers the Equality Act and the interpretation of the Article 9 of the ECHR. There is also a distinction between the cases raised at the ECHR and the CJEU. Part B considers the Australian jurisdiction and the impact of the clauses of the Commonwealth Constitution and how they are implemented in the states which have their own statutes. The conclusions will analyse the common and divergent elements existing between the impact of the UK legal system and the Australian legal system on the use of the religious symbol in the form of the veil in the workplace.

## Part A. Religious discrimination in the British labor system

### *I. Indirect discrimination and religious freedom*

The legislative framework in English law distinguishes between both the direct and indirect discrimination.<sup>9</sup> There is a need to distinguish them in employment law and the protections available

<sup>8</sup> This has different types of veils but the more commonly known is the hijab, the headscarf that covers the hair; jilbab is an unfitted, long sleeved, ankle length gown; the niqab is a term for cloth which covers the body and entire face, leaving only the eyes visible; and the burka is an all enveloping robe which covers the entire body except for the eyes which are concealed under a net. Fadaw El Guindi, *s v hijab*. The Oxford Encyclopaedia of the Modern Islamic World (Oxford University Press 1995) 108-111.

<sup>9</sup> Article 2 of the EU Directive is entitled 'Concept of discrimination'. It states, in particular:

'1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons

to those with different religious beliefs. These principles have been derived from case law and by the reasoning of the judges in discrimination cases when they have come to court. These have impact on race discrimination but where the issue was the religious symbols worn by those who practice the faith of the claimants. The Courts have interpreted indirect discrimination in the religious context where there has been victimisation on account of nationality that also amounts to racial discrimination providing it satisfies certain characteristics.

In *Mandla v Dowell Lee*<sup>10</sup> there was an appeal to the House of Lords by a pupil belonging to the Sikh community who had asserted his right to wear a turban to school as part of his racial identity. The decision of their Lordships was based on the interpretation of the Race Relations Act 1976 section 1(1) (b) (i) and (ii) the issue was if the headmaster of a school in refusing to admit the boy unless he removed his turban in order to minimise religious distinctions was guilty of unlawful discrimination. The defence was that under section 3 the boy was a member of a 'racial group . . . who can comply' with the rule did not need to show the rule to be 'justifiable irrespective of [the boy's] ethnic . . . origins'.

Lord Fraser held that “*a distinct community had to have a long shared history, of which the group was conscious as distinguishing it from other groups, and the memory of which it kept alive, and second it had to have a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition, the following characteristics could also be relevant, namely (a) either a common geographical origin or descent from a small number of common ancestors, (b) a common language, which did not necessarily have to be peculiar to the group, (c) a common literature peculiar to the group, (d) a common religion different from that of neighbouring groups or from the general community surrounding it, and (e) the characteristic of being a minority or being an oppressed or a dominant group within a larger community*”.<sup>11</sup>

By applying those characteristics, the Sikhs were deemed as a racial group defined by reference to 'ethnic origins' even though they were not racially distinguishable from other people living in the Punjab. It was not material to the case that the racial and religious minority came under one definition of race because it was the overriding characteristic of the ethnic group. The definition of an ethnic group consisted of a cultural tradition and long shared history, and other characteristics could be relevant also such as religious affiliation. There is subsequent case law that sets out the principle of indirect discrimination.

In "*Jewish Free School Case*" - *R(E) v Governing Body of JFS and Another*<sup>12</sup> the issue was did it constitute direct racial discrimination under section 1(1)(a) of the Race Relations Act 1976 (RRA) to impose a criterion for admission to JFS (the Jewish free School as it used to be known) that the child applicant concerned be recognised as being Jewish by the Office of the Chief Rabbi of the United Congregation of the Commonwealth (OCR). If this applied then such a condition was unlawful by reason of section 17, of the RRA which outlawed discrimination in the arrangements made for selecting children for admission to schools and permits of no relevant exceptions.

The House of Lords ruled by 7-2 majority that there had been discrimination “on racial grounds” (defined by section 3 of the Act to include the ground of “ethnic origins”). Lord Phillips held that “the critical question is whether the requirements of Jewish identity as defined by the

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having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, ...

<sup>10</sup> [1983] 2AC 548

<sup>11</sup> p 1066

<sup>12</sup> [2010] 2 AC 728, SC

1976 Act met the characteristics define those who have them by reference to " colour, race, nationality, or ethnic or national origins ?"<sup>13</sup>

His Lordship stated ruled :

*" The difficulties in which the school ensnared itself illustrate the confusion created by the distinction, created by anti-discrimination legislation, between discriminating on the basis of religion (which is justifiable) and discriminating on the basis of ethnic origin or race (which is not). The school, in excluding the son, was enacting a policy which was based on religious precepts. But the impact it had on the son was because of his ethnicity. In situations such as there is no bright line between the one and the other. As Lord Kerr observes, the school's policy was unimpeachable and justifiable. That is not to the point. There was direct discrimination under the Act, and therefore no justification could be advanced. "The breach of the legislation arises because of the breadth of its reach" .<sup>14</sup>*

Lord Hope one of the dissenting judges held that the crucial question was not whether the person was a member of a separate ethnic group from those advantaged by the school's admissions policy, but whether he had been treated differently on grounds of ethnicity. His Lordship recognised the right of the Office of the Chief Rabbi (OCR) to define Jewish identity in the way it does as a matter of Jewish religious law but "to say [its] ground was a racial one is to confuse the effect of the treatment with the ground itself" .<sup>15</sup>

Both the above cases invite a more nuanced approach by the judges and it is not in the remit to change the law which is for the Parliament to enact. However, it is clear from the judgments that in employment law if there was a rule or dress code that targets a specific religious group, such as a ban on Sikhs wearing turbans then it would be direct discrimination. If a more neutral dress code is adopted which applies equally to all employees it may have an indirectly discriminatory effect on those who wish to wear religious clothing or symbols at work. For example, a general ban on wearing religious clothing will have a special impact on those whose religious beliefs require them to wear particular items. While direct discrimination can only be justified in very limited circumstances, employers can objectively justify indirect discrimination by showing they have a legitimate aim and have acted proportionately.

This has been clarified by the Equality Act 2010 that was a consolidated legislation that framed into a single statute the Race Relations Act 1976, Disability Discrimination Act 1997 and Employment Equality (Age) Regulations 2006 into one statute. This has in its provisions a set of protected characteristics that includes religious belief<sup>16</sup> and it outlaws both direct and indirect discrimination in the workplace.<sup>17</sup> Section 19 of the Equality Act states :

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

<sup>13</sup> Para 27

<sup>14</sup> Para 124

<sup>15</sup> Para 201

<sup>16</sup> Section 4 has established protected characteristics as follows: disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex; and sexual orientation.

<sup>17</sup> Equality Act 2010 prohibits discrimination on account of Religion or belief. Section 10 states:

- (1) Religion means any religion and a reference to religion includes a reference to a lack of religion.
- (2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.
- (3) In relation to the protected characteristic of religion or belief—
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;
  - (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.

- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and
  - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are age; disability; gender reassignment; marriage and civil partnership; race; religion or belief; sex; and sexual orientation.

The EU Equal Treatment Framework Directive 2000/78 that was transposed into English law to promulgate the Equality Act establishes a general framework for equal treatment in employment and prohibits both direct and indirect discrimination. Article 4 of the Directive entitled ‘Occupational requirements’ provides in Paragraph 1 :

*‘Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.’*

Paragraph 2 deals with differences of treatment based on a person’s religion or belief in the specific context of occupational activities within ‘public or private organisations the ethos of which is based on religion or belief’. This issue of religious discrimination emanating from English law has come before the European Court of Human Rights under Article 9 and the appeals from the national courts of the EU countries have been decided upon at the CJEU that have dealt with the Directive 2000/78. These rulings can be distinguished upon the reasoning of the courts.

## *II. Distinguishing the cases in the ECHR and the CJEU*

### *i) European Court of Human Rights (ECHR)*

It may be noticed that when it comes to the non-discriminatory exercise of freedom of religion by an employee working in the public sector the legal impact of the European Human Rights Court (ECtHR) is based on ECHR Article 9. The issue has been explored of the Hijab under this provision of a religious symbol worn by women of the Muslim faith. In *Leyla Şahin v. Turkey*<sup>18</sup> and *Dogru v. France*,<sup>19</sup> the hijab (headscarf covering the hair and neck while leaving the face uncovered) was ruled as an act that could be regarded as “motivated or inspired by a religion or religious belief”.

This principle of non interference has been held with reference to other religions also. In *Eweida and Others v. The United Kingdom*,<sup>20</sup> the conditions were established as to when such interferences were possible based on the ECHR. In this case, a woman employed by a private company who had to serve the customers in performing her tasks was prevented from wearing a cross. The Court found a violation of the applicant’s religious freedom under Article 9 of the ECHR. It was

<sup>18</sup> [GC], no. 44774/98, § 78, ECHR 2005-XI

<sup>19</sup> [GC] no. 27058/05, § 47, 4 December 2008

<sup>20</sup> [2013] ECHR 37

decisive in establishing the restrictions upon the private companies' to allow their employees religious freedom for the sake of their company's public profile.

In failing to protect Ms Eweida's desire to manifest her religion by wearing a visible cross at work, the UK breached her human rights. The ECHR held that a fair balance had not been struck between "Ms Eweida's desire to manifest her religious belief" by wearing a visible cross and "the employer's wish to project a certain corporate image".<sup>21</sup> This could apply also in the instance where Muslim women are actually prohibited from wearing a veil when such policies impose the exclusion of the headscarf as a matter of policy in the workplace. The application of the principle would require a balancing exercise in the public image of the employer and the aspirations of the employee to put on a religious head gear as a matter of religious belief.

## ii) Court of Justice of the European Union (CJEU)

While the CJEU's references to *Eweida* in its case law are in support of its ruling they do not reflect the basis upon which the judgment was made at the Strasbourg Court. On 14th March 2017, the CJEU issued two rulings which for the first time that clarified the concept of religious discrimination in the context of Council Directive 2000/78/EC, that established a general framework for equal treatment in employment and occupation.

In *Asma Bougnaoui v Micropole*<sup>22</sup> concerned a design engineer, Ms Bougnaoui, employed by a French private IT Consulting Company, Micropole. Following some complaints by Micropole's customers about Ms Bougnaoui's headscarf, she was asked to remove it on visits to customers and after she had refused, was eventually dismissed. It is not clear under the terms of the reference whether Micropole's objections were exclusively based on their customers' preferences or whether they also relied on a company neutrality policy. Prior to the specific complaints which triggered Ms Bougnaoui's dismissal, the issue of the headscarf had indeed already been raised and the very first instance, when Ms Bougnaoui met a Micropole representative at a student fair and discussed again at the time of her recruitment when she was informed that the wearing of a *hijab* would not be possible when dealing face-to-face with customers. Whether these repeated discussions about the headscarf reflected an established company neutrality policy or were hypothetical guidelines by Micropole management of customers' preferences was not obvious but the French Court de cassation is the correct forum to decide the issue, based on the CJEU findings on the facts.

In this case the Court found a direct discrimination on the ground of religion, since the employer's decision was not based on a general neutrality policy of the company. The customers' wish not "to have the services of that employer provided by a worker wearing an Islamic headscarf" could not be considered as a 'genuine and determining occupational requirement'.<sup>23</sup> The issue was, therefore, characterized as one of religious freedom (under article L. 1121-1 of the French Labour Code) and not as a discrimination question (under article L 1321-3 of the same code) such as under Article of the ECHR. Against this background, the *Bougnaoui* ruling upholds the protection against religious discrimination under the Directive to cover both religious beliefs and their manifestations. This interpretation reflects the concept of "guaranteeing equal opportunities for all and contributing strongly to the full participation of citizens" (as per Recital 9 of the Directive). It may not encourage the absolute acceptance in the work environment but attempts to eliminate the occasions for intolerance. The religious individuals are left with the option of choosing between

<sup>21</sup> Para 94

<sup>22</sup> [2017] Case C-188/15

<sup>23</sup> Para 41



their religious or work duties which may be a contravention of the ECHR that protects the Right to Religious Belief under the Article 9.

The fact that Islam does not clearly mandate women to wear a *hijab* or that restrictions on religious symbols only affect the manifestation of religious beliefs (the *forum externum*) while allegedly leaving intact the beliefs themselves (the *forum internum*) is not relevant.<sup>24</sup> The CJEU thus affirms a broad concept of religion, in accordance with the interpretation of religious beliefs under the ECHR.<sup>25</sup> This is an elastic framework for the French courts which still at times tend to define religion in restrictive terms as in its *Baby Loup* case,<sup>26</sup> a plenary assembly decision of 25th March 2014, when the Court de Cassation in a private employment law case held that a private nursery had lawfully required one employee to remove her non-face covering Islamic *jilhab* at work, in accordance with the general religious neutrality requirements contained in the nursery's policy.<sup>27</sup> The Court did not consider it necessary to examine whether the restriction amounted to discrimination on the ground of religion, on the basis of being satisfied, that following the Procureur général's non-legally binding opinion, that the employee concerned was still free to hold her Muslim beliefs.<sup>28</sup>

In *Samira Achbita & Anor v G4S Secure Solutions*<sup>29</sup> the claimant a Muslim woman worked as a receptionist for a security company who was dismissed because she chose to wear the Islamic headscarf. Her claim for wrongful dismissal on the grounds of direct discrimination relating to her religion was based upon direct discrimination based on religion within the meaning of Article 2(2) (a) of Directive 2000/78/EC if that ban is founded on a general company rule prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general.

The preliminary remark on neutrality in *Achbita* on the enforcement of a neutrality policy by a private undertaking caused the CJEU to make a finding of no direct discrimination.<sup>30</sup> The company's "*internal rule at issue in the main proceedings refers to the wearing of visible signs of political, philosophical or religious beliefs and therefore covers any manifestation of such beliefs without distinction. The rule must, therefore, be regarded as treating all workers of the undertaking in the same way by requiring them, in a general and undifferentiated way, inter alia, to dress neutrally, which precludes the wearing of such signs.*"<sup>31</sup>

The CJEU applied its proportionality analysis by reflecting on the question whether or not "*it would have been possible for G4S, faced with such a refusal, to offer her a post not involving any visual contact with these customers, instead of dismissing her*".<sup>32</sup> The Court concluded that precluding wearing of an "*Islamic headscarf at work does not constitute direct discrimination based on religion within the meaning of Article 2(2)(a) of Directive 2000/78/EC if that ban is founded on a general company rule*

<sup>24</sup> It is a matter of contention as to whether or not the wearing of Islamic dress is a religious requirement, obligatory on Muslims and required by the Koran. This is debated amongst Islamic scholars and Muslims alike. Even where it can be agreed that there is some form of obligatory dress requirement, there is little consensus as to what form this should take. T Shadid W and Van Koningsveld, *Muslim Dress in Europe: Debates on the Headscarf*, *Journal of Islamic Studies*, 2005 16:1 pp35-61.

<sup>25</sup> Para 30

<sup>26</sup> Cass Ass Plén 25 June 2014, (2014) Rec D 1386.

<sup>27</sup> For reflections on the case in light of EU requirements, see Myriam Hunter-Henin, 'Living Together in an Age of Religious Diversity: Lessons from *Baby Loup* and *SAS*' (2015) *OJLR* 1, 11-13, 18. in which the author argues that it would lead to indirect discrimination against Muslim women on account of a general requirement of neutrality that is not proportionate because of its wide ambit –all staff, without any distinction, are affected by the prohibition which moreover applies across all of the nursery's activities and in all of the nursery's premises. it constitutes an indirect discrimination.

<sup>28</sup> See also, F Laronge, 'Affaire *Baby-Loup*: l'épuisement du droit dans sa recherche d'une vision apolitisée de la religion' (2014) *Droit social* 100

<sup>29</sup> [2016] EUECJ C-157/15

<sup>30</sup> Para 15

<sup>31</sup> Para 30

<sup>32</sup> Para 43

*prohibiting visible political, philosophical and religious symbols in the workplace and not on stereotypes or prejudice against one or more particular religions or against religious beliefs in general. That ban may, however, constitute indirect discrimination based on religion under Article 2(2)(b) of that directive".*<sup>33</sup>

The finding of indirect discrimination in this case and that of direct discrimination in *Micropole* has been analysed by Myriam Hunter-Henin who observes that the lessons from the recent rulings of the European Court of Justice on the Hijab on the question of religious discrimination in the workplace are contradictory. This is because " *Customer preferences might have no say under article 4(1) to justify a measure which amounts to direct discrimination but they may justify a measure which only indirectly discriminates against employees on the ground of their religion under article 2(2)(b), ... and all that is needed for employers to fall under the grace of article 2(2)(b) and escape condemnation under article 4(1) is a unilateral internal company rule requiring neutrality from all employees*". This will lead to "employers to soon introduce such regulations in mass and close the discrimination route to employees".<sup>34</sup>

Hunter-Henin states that "such inconsistency can hardly be resolved by an appeal to the particular deference owed to French and Belgium secularism". The significance attached to "contact with customers" in the G4S ruling portrays religion as a potential source of division and conflict. These untrusted " *accounts of religion certainly echo recent legal trends in France and Belgium which seek to neutralise visible signs of religion for the sake of social harmony under a new form of secularism entitled, 'New Laïcité', or in more pejorative words, a 'falsified laïcité' or 'distorted laïcité' in law, the concept of laïcité is still construed as a principle of State religious neutrality rather than a tool of religious neutralisation*".<sup>35</sup>

This implies that if the private citizens have been increasingly subjected to restrictions upon their rights to manifest their religion in the French and Belgian public spheres, these legal developments have " *not been based on the concept of laïcité. The special committee set up to consider the issue of the wearing of the full veil concluded that the concept of laïcité was not relevant to the issue and the government's text which led to the 2010 French legislative ban on the covering of the face in the public sphere did not rely on the notion. Similarly prior restrictions on religious manifestation in the workplace did not rely on laïcité, unless the work involved a mission of public service. Laïcité, had held the Court de cassation, could not serve as a legal basis for a restriction imposed in a purely private law employment context*".<sup>36</sup>

Hunter-Henin contends that having decided that the " *wearing of the hijab was a religious manifestation covered under the Directive, the CJEU then went on to rule that Ms Bouganoui's dismissal either amounts to direct discrimination under Article 2(2)(a) of the Directive (in the absence of a company neutrality policy) or to indirect discrimination under article 2(2)(b) of the Directive (should such neutrality policy prove to have been in place). The distinction makes sense. In the former instance, the dismissal directly relies on the employee's religion (to which the wearing of the hijab must be assimilated) whereas in the latter, the impact on the religious employee's rights results from a rule which, albeit neutral, 'puts religious employees (and especially Muslim female employees) at a particular disadvantage*". The judgment implies that a ban on the Islamic *hijab* in the workplace "will amount to unjustifiable direct discrimination".<sup>37</sup>

The implication is that in purely private law employment law contexts the religious individual rights traditionally have precedence. While deferring to national discretion in assessing the proportionality of indirect discriminatory measures, the CJEU indicates that restrictions upon employees' rights to manifest their beliefs in the workplace (whether in the public or private sector) ought to be justified if they rely on a neutrality company rule. The case law demonstrates that that

<sup>33</sup> Para 44

<sup>34</sup> Myriam Hunter-Henin, Lessons from the European Court's Hijab rulings, 6 April 2017, <https://www.ucl.ac.uk/european-institute/news/2017/apr/lessons-european-courts-hijab-rulings>

<sup>35</sup> Ibid

<sup>36</sup> Ibid

<sup>37</sup> Ibid

such interference with religious freedoms are not allowed to such an extent. In the *Baby Loup* case, the dismissal of an employee who had refused to remove her *jilbab* was held legitimate and proportionate but only because ostentatious religious symbols were construed as potentially harmful for children's freedom of conscience.

The English Employment Tribunals have followed the precedent of the CJEU by ruling that there is no religious discrimination in job interview questions about Muslim interviewee's dress causing a trip hazard. In *Begum v Pedagogy Auras UK Ltd t/a Barley Lane Montessori Day Nursery*<sup>38</sup> the Employment Appeal Tribunal (EAT) dismissed an appeal against an employment tribunal decision that there was no religious discrimination against a Muslim interviewee. She was asked by an interviewer about the potential for her unusually long religious dress to provide a trip hazard. Ms Begum wears a *jilbab*, a dress that covers her body from neck to ankle. While discussing the need to wear non-slip shoes, one of the interviewers had noticed that the *jilbab* was covering Ms Begum's shoes and touching the floor. The employment tribunal dismissed Ms Begum's subsequent religious discrimination claim. The appeal was dismissed because Ms Begum was never told she could not wear the *jilbab* that she was wearing at the interview, only that she should not wear clothes that might constitute a trip hazard. Ms Begum was permitted to wear a *jilbab*, even at full length, providing that it did not constitute a trip hazard.

In *Farrah v Global Luggage Co Ltd* (employment tribunal)<sup>39</sup> a retailer with branches on Oxford Street and in Piccadilly forced a Muslim employee who came to work wearing a headscarf to resign because it wanted to retain its "trendy" image. Ms Farrah, who worked part time for a retailer that sells suitcases, is a Muslim, but does not normally wear religious dress. After she began wearing a *hijab* headscarf at work, she was moved from working at the Piccadilly store, which "caters for a higher class of customer", to the Oxford Street store, which was "less pleasant" for her (for example, she was required to clean shelves). Ms Farrah resigned after she was threatened with redundancy, despite a later increase in the workforce. She said she was given the option of resigning immediately with a good reference, or being dismissed "the formal way" and without a reference. Her religious discrimination claim was unsuccessful, with the tribunal noting that she should have brought an indirect, rather than direct, discrimination claim. However, the tribunal went on to uphold Ms Farrah's unfair dismissal claim, concluding that she was either actually or constructively dismissed after being given a clear indication that she had no future.

Whether the discrimination is characterized as direct or indirect, it may be justified by the employer. The justification test in case of direct discrimination is a stricter test the difference of treatment is based on one of the protected characteristics that may only be justified if it corresponds to a genuine and determining occupational requirement, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out (article 4(1) Directive). The justification of an indirectly discriminatory measure on the other hand is only subject to the requirements of legitimacy, proportionality and necessity under article 2(2)(b)(i).

Saïla Ouald-Chaib and Valeska David contrast the *Eweida* judgment with rulings under the CJEU and provide the "three important grounds that are contrary to the interpretation adopted in *Achbita*. These are: (1) the difference between a human right and a business interest; (2) the seriousness of the restriction for the applicant; and (3) the lack of evidence on the harm inflicted to the company. These can be examined under the following sub-headings:

- (1) Human right vs. business interest:** While the Court in *Eweida* accepted as legitimate the private companies' wish to project a certain corporate image, it made it clear that this does

<sup>38</sup> (2015) UKEAT/0309/13/RN

<sup>39</sup> ET/2200147/2012

*not stand on a same footing with the right to manifest one's religion. For the ECJ, an employer's wish to project an image of neutrality is covered by the freedom to conduct a business (Article 16 Charter). This reasoning doesn't have a place at the ECtHR. Freedom of religion, like the prohibition of discrimination, is a human right protected by the ECHR (Article 9); the private companies' interest to project an image is not. The Court thus concluded in Eweida that too much weight was accorded to this interest. (§ 94).*

- (2) **Proportionality requires weighting what is at stake for the applicant:** *Ascertaining this aspect in Eweida, the Strasbourg Court acknowledged "the value [of religious manifestation] to an individual who has made religion a central tenet of his or her life to be able to communicate that belief to others" (§ 94). Moreover, in its necessity test, the Court also considered the socio-economic harm faced by Ms. Eweida and by other applicant manifesting religion in a private workplace. That is, it weighed the possibility of changing job and the seriousness of losing one's job (§§ 83 and 109).*
- (3) **Need for evidence of the alleged threat:** *Of course, balancing presupposes a careful examination of what is at stake at the side of the employer too. That is why the ECtHR in Eweida went on to examine the damage experienced by the company. But the Court didn't find "any negative impact on British Airways' brand or image." There was "no evidence of any real encroachment on the interests of others" (§§ 94- 95).<sup>40</sup>*

The CJEU frames its proportionality inquiry in the following terms: "*it must be determined whether the prohibition is limited to what is strictly necessary.*" That is "*whether the prohibition [...] covers only G4S workers (Achbita) who interact with customers*" (§ 42)

Ouald-Chaib and David contend that the CJEU pre-empted the last question which overlooks "the initial crucial questions of proportionality that the ECtHR asked in *Eweida*:" These can be defined on grounds what was the risk " for the applicant and what weight does this have in the balancing? How did her religious manifestation threaten the company's interests and what evidence was provided to that effect?"<sup>41</sup> There are significant aspects of the *Eweida* case which may be contrasted that are firstly, the applicant declined British Airways' offer to transfer to a job that did not require "visual contact with customers" and secondly, "while this offer, according to the ECtHR, could have mitigated the interference, it did not make the restriction proportionate (§§ 94-95)" which establishes that, "hiding the employee" is not a solution under the ECHR. Finally, the Strasbourg Court had "rightly found a violation even though it had not been established that the company's uniform policy had put Christians generally at disadvantage (§§ 14-16)".

The CJEU "*blindly accept neutrality policies in private companies to be legitimate, it also considers neutrality policies which prohibit employees to manifest their religion to be part of the right to conduct a business. The ECJ is more critical in the case of Bougnaoui, where it does not accept that customers' wishes trump employees' right to manifest their religion. In the case of Achbita, however, such a critical stance is missing. At the same time, the critical approach in the former case is made insignificant. Indeed, ultimately, even though the ECJ does not accept in Bougnaoui that individual customers' wishes are used as a basis for dismissing employees, it does accept, in Achbita, that employers put a policy in place which doesn't allow manifestations of beliefs because of possible non neutral perceptions this might engender with customers*".<sup>42</sup>

<sup>40</sup> Ibid

<sup>41</sup> Ibid

<sup>42</sup> Saïla Ouald-Chaib and Valeska David, European Court of Justice keeps the door to religious discrimination in the private workplace opened. The European Court of Human Rights could close it. 27/3/17 <https://strasbourgobservers.com/2017/03/27/european-court-of-justice-keeps-the-door-to-religious-discrimination-in-the-private-workplace-opened-the-european-court-of-human-rights-could-close-it/>

This critique is premised upon "whether dismissing an employee for wearing a headscarf at the workplace is an appropriate and necessary means for pursuing a neutral image of the company towards customers". The ECJ determination in their view is that "it does. At least, as long it concerns employees with a customer contact job and as long as the policy is applied in a consistent manner".<sup>43</sup> The ECJ accepted the reasoning unchallenged that employees who are treated differently would not be discriminated against, as long as you 'give them' the 'opportunity' to have a back office job. It encourages employers to conceal diversity and to demote people who are visibly religious in the 'closet' of the company.<sup>44</sup>

### III. Essential basis of the Neutrality argument

The preliminary remark on neutrality in *Achbita* on the enforcement of a neutrality policy by a private undertaking caused the CJEU to make a finding of no direct discrimination. The religious freedom can be restricted for the sake of "private neutrality" as an acceptable proposition. In this case the wearing of the *hijab* was deemed as a problem because the employee was in constant contact with customers who might have objected to her wearing symbols of religious affiliation.

However, because this was established by a general company neutrality rule by G4S based on the customers' preferences and prejudices that were not accepted on the facts in the *Bougnououi* ruling. In this instance the employer, Micropole had been more receptive to religious employees than G4S and it was concerned about customers' objections but did not dismiss the employee until there were implications. In *Achbita* the CJEU suggested that the discrimination suffered by the G4S employee ought to be held to be justified because the employer had prevented from the start any possibility of a reconciliatory position. The judgment implies that a ban on the Islamic *hijab* in the workplace will amount to unjustifiable direct discrimination unless it relies on a company neutrality policy, in which case it will be characterized as justifiable indirect discrimination.

At the ECtHR the neutrality argument is not accepted as a basis to reject the applicants' affiliation towards a religion by manifestation of their dress. The acceptance of restrictions to religious symbols in the name of neutrality has a narrow interpretation and such restrictions concern public institutions, mostly in the educational field, and these are subject to a principle of neutrality with human rights. Therefore, in the context of the Strasbourg Court the organisation has to be in the public domain in order to attain the protection but it would not be possible for a private undertaking to avail itself by adopting a neutral policy in order to avoid liability.

This has been debated at the ECtHR in *Lachiri v Belgium*<sup>45</sup> where the issue was that the court usher informed the applicant to remove her *hijab* before entering the courtroom which was in accordance with Article 759 of the Belgian Judicial Code that required everyone to remove their headgear before entering the courtroom. The applicant refused and was not allowed to attend the hearing. The applicant unsuccessfully challenged the decision and the issue before the Court was whether exclusion of the applicant from the courtroom on the sole ground that she refused to remove her *hijab* constituted a restriction of her right to manifest her religion was a breach of the Article 9 rights. The applicant, in order to support her claim that she could not be subjected to a duty of discretion in the expression of her religious beliefs, argued not only that she was a mere citizen but also that courtrooms are public spaces open to all.

<sup>43</sup> Ibid

<sup>44</sup> Eva Brems, Analysis: European Court of Justice Allows Bans on Religious Dress in the Workplace at <https://blog-iacl-aidc.org/test-3/2018/5/26/analysis-european-court-of-justice-allows-bans-on-religious-dress-in-the-workplace>

<sup>45</sup> Application no 3413/09: (2018)

The ECtHR accepted that the refusal to admit the applicant to the courtroom on account of her refusal to remove the *hijab* constituted a restriction on the exercise of her right to manifest her religion. The Court concluded that the legitimate aim pursued had been the “protection of public order” and the necessity of the restriction in a democratic society was first of all that the “Islamic headscarf was headgear and not, as in the case of *S.A.S. v. France* a garment which entirely concealed the face with the possible exception of the eyes.”<sup>46</sup>

The Court ruled that Mrs Lachiri’s conduct when entering the courtroom had not been disrespectful and had not constituted nor potentially was a threat to the proper conduct of the hearing. Therefore, the need for the restriction in issue had not been established and that the infringement of her right to freedom to manifest her religion was not justified in a democratic society under Article 9 (2). The Court, however, stated that since in *Lachiri*, the prohibition was only aimed at the protection of public order, it will not examine whether it could have been justified by the objective of “maintaining the neutrality of the public arena.”<sup>47</sup> The principle of “neutrality” can be defined here as the obligation of the state and its institutions, like courts, to be religiously neutral. This requires the civil servants, such as judges, who represent the institutions, themselves to be neutral. This duty concerns primarily the *action* of civil servants: they are required first and foremost to *act* neutrally, meaning that they cannot favour some citizens over others for religious reasons nor promote a certain faith while performing their duties.<sup>48</sup> This was affirmation that whilst a court could be part of the “public arena”, it was not a “public place” comparable to a public street or square and “a court is indeed a “public” institution in which respect for neutrality towards beliefs could prevail over the free exercise of the right to manifest one’s religion, like public educational establishments”.<sup>49</sup>

In some states like France, however, go further than this: they impose on their civil servants an obligation to be neutral in their appearance, and not merely in their action, thus precluding them from wearing any sign that would reveal to the public that they believe in a certain faith.<sup>50</sup> The Court has accepted that such a restriction to the right to manifest one’s religion – usually justified by reference to the concept of *laïcité*, which implies an extensive conception of state neutrality – is compatible with the Convention, at least for what regards social worker employed in the psychiatric wing of a public hospital.<sup>51</sup> In terms of judges, the duty of neutrality is especially strict because of the special sensitivity of their vocation and they cannot undermine “the public’s confidence in the ability of the judiciary to render justice independently and impartially. Accordingly, a good case can be made that an extensive duty of religious neutrality, as including an obligation to be neutral in their appearance, is justified with respect to judges. It can be surmised that the Court would consider such a measure as being in accordance with the Convention”.<sup>52</sup>

J. Ringelheim observes that the “*private person who enters a courtroom to assist a hearing or participate in it as a witness or a civil party does not exercise any official function. Nor do they hold*

<sup>46</sup> [GC] (no. 43835/11, §§ 124-36, ECHR 2014 (extracts) [GC]

<sup>47</sup> Para 46

<sup>48</sup> The Human Rights Centre in Ghent argued in its third party intervention that based on past precedent a restriction to the wearing of a religious sign based on Article 759 cannot be considered to be “prescribed by law” within the meaning of Article 9(2) ECHR. On the limitations of the neutrality argument and of other grounds to restrict the manifestation of religion, see also, Third Party Intervention by Human Rights Centre of Ghent University in *Lachiri v. Belgium*, Application No. 3413/09, Available at <http://www.hrc.ugent.be/third-party-interventions-before-ecthr/>

<sup>49</sup> Para 45, See *Sahin v Turkey* no. 44774/98, § 78, ECHR 2005-XI

<sup>50</sup> On the distinction between “neutrality of action” and “neutrality of appearance”, see S. Van Drooghenbroeck, “Les transformations du concept de neutralité de l’Etat. Quelques réflexions provocatrices,” in *Le droit belge face à la diversité culturelle* (Bruylant, 2011) 75.

<sup>51</sup> *Ebrahimian v. France* App No 64846/11 (2015)

<sup>52</sup> On the concept of religious neutrality in the Court’s case law, see Julie Ringelheim, “State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach,” *Oxford Journal of Law and Religion* (2017) 6(1) doi 10.1093/ojlr/Rww060.

*any deciding power. It is thus hard to see how the fact that their clothing reveals that they have certain religious beliefs could generate, among some persons, the fear that their case would not be judged impartially. The idea that the mere presence of a person in the premises of a court is a sufficient reason to forbid them from wearing a religious symbol in order to safeguard the court's neutrality disregards the very rationale of the neutrality principle, that is, to guarantee that all individuals are treated objectively and impartially by the judiciary".<sup>53</sup>*

In employment law the issues that will need to be addressed when balancing the right to wear religious symbols is the integration of the employee with other members of staff and the customer service that may be required. This will be the factor that determines the neutrality standard applied by the employer is reasonable and does not impose any obligations that are harsher than the ordinary standard. The approach taken by the CJEU focuses on the direct and indirect discrimination of the employee whereas the ECtHR considers the breach of Article 9 freedom of conscience, religion and thought. It is apparent from the case law that the manifestation of religious symbols is given a greater latitude in the human rights context than when it is pleaded as the breach of the EU law that has been incorporated in English law to protect the rights of the employee within the equality framework.

## **Part B. Religious discrimination in the Australian labor system**

### *I. Direct discrimination in the work environment*

In Australia, national and state laws cover equal employment opportunity and anti-discrimination provisions in the workplace. The laws to create a workplace free from discrimination and victimisation are composed of the federal legislation as promulgated by the Commonwealth and the state legislation enacted by the state Parliaments. Section 116 of the Australian Constitution confers a guarantee of religious freedom in the following terms:

*"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth".<sup>54</sup>*

In *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*,<sup>55</sup> the Commonwealth considered that the Jehovah's Witnesses were promulgating doctrines such as an objection to voting on religious grounds that were prejudicial to the defence of the Commonwealth and the efficient prosecution of the war. It took action against the Adelaide Company under the National Security (Subversive Associations) Regulations, which had been made pursuant to the National Security Act 1939 (Cth). Even though the case concerned the dissolution of an incorporated religious body, the fact that only one judge found the Regulations to be contrary to s 116 (free exercise clause) did not mean it could not protect incorporated and unincorporated religious associations in principle.

<sup>53</sup> Julie Ringelheim, *Lachiri v. Belgium: Headscarf ban imposed on a civil party in a courtroom in violation of religious freedom*, 23/11/18 <https://strasbourgobservers.com/2018/11/23/lachiri-v-belgium-headscarf-ban-imposed-on-a-civil-party-in-a-courtroom-in-violation-of-religious-freedom/>

<sup>54</sup> This Constitutional provision reflects Article 18 of the International Convention of Civil and Political Rights 1966 Article 18. It also has parallels with the Free Exercise Clause of the First Amendment 1791 of the US Constitution.

<sup>55</sup> (1943) 67 CLR 116.

Chief Justice John Latham held:

"...it should not be forgotten that such a provision as s. 116 [of the Constitution] is not required for the protection of the religion of a majority. The religion of the majority of people can look after itself. Section 116 is required to protect the religion (or absence of religion) of minorities, and, in particular, of unpopular minorities".<sup>56</sup>

Williams, J stated that this free exercise clause could apply to individuals as well as corporations.<sup>57</sup> The common denominator in the legal framework of workplace discrimination is the focus on the relevant characteristic in the religious belief and/or religious activity and the similarity between the legislative provisions in the areas in which they prohibit discrimination based on the relevant characteristic.<sup>58</sup> In each jurisdiction with a prohibition on religious discrimination, the prohibition extends to employment, education, access to goods services and facilities and accommodation.<sup>59</sup>

The Commonwealth enacted the *Human Rights and Equal Opportunities Commission Act 1986* (Cth) (HREOC Act) which provides that religion be dealt within the framework, firstly, the Commission is given power to investigate and attempt to conciliate allegations that an act or practice of the Commonwealth is inconsistent with human rights, which includes the right to hold and manifest religious beliefs. (HREOC Act s 11(1)(f) and s 3(1)), Secondly, the Commission can investigate and conciliate complaints of discrimination in employment or occupation on a number of specific grounds, including religion. (HREOC Act s 31(b)). The decisions of the HREOC cannot be challenged by means of judicial review.

Every state jurisdiction except South Australia and New South Wales<sup>60</sup> prohibits religious discrimination. In most jurisdictions, the prohibition is created by incorporation of religion into a general list of characteristics on which it is prohibited to discriminate.<sup>61</sup> In Victoria, where 'religious belief or activity' is included in a list of 16 such characteristics.<sup>62</sup> 'Religious belief or activity' is defined as:

- a) holding or not holding a lawful religious belief or view;
- b) engaging in, not engaging in or refusing to engage in a lawful religious activity.<sup>63</sup> The Equal Opportunities Act 2010 sets out the criteria for the determination whether discrimination has taken place. These are size, nature and circumstances of the business; resources; business and operational priorities; and practicality and cost of measures.<sup>64</sup>

<sup>56</sup> Para 143-44

<sup>57</sup> Para 155, Rich J, agreeing with Williams J), 154 (Starke J), 167 (Williams J).

<sup>58</sup> The connection between the free exercise of religion and individual rights has been increasingly recognised in academic literature. See, Professor Nicholas Aroney "Freedom of Religion as an Associational Right" (2014) 33/1 *University of Queensland Law Journal* 153-186.

<sup>59</sup> In *Miller v Wertheim*, (2002) FCAFC the Full Federal Court dismissed a claim of discrimination under the Racial Discrimination Act 1975 in relation to a speech made by the respondent (himself Jewish) which had criticised members of the Orthodox Jewish community for allegedly divisive activities. The Full Court stated that it could be 'readily accepted that Jewish people in Australia can comprise a group of people with an "ethnic origin"' (At 14) for the purposes of the RDA, and cited with approval *King-Ansell v Police* (1979) 2 NZLR 53. This case had accepted the reasoning of Lord Fraser that Sikhs could constitute an 'ethnic group' and were therefore entitled to the protection of the *Race Relations Act 1976* (UK). This case has been applied in Australia in the context of determining whether Jewish people are protected by the *Racial Discrimination Act 1975*.

<sup>60</sup> In New South Wales discrimination based on 'ethno-religious or national origin' is prohibited: *Anti-discrimination Act 1977* (NSW) s 4 and s 7. This ground has been specifically considered in relation to a complaint made by a Muslim person in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131. where he stated that he has been discriminated against because he was denied halal food in prison. The NSW Administrative Decisions Tribunal found that being a Muslim was not sufficient to constitute 'ethno-religious origin', and that there must be a close tie between faith, race nationality or ethnic origin for the prohibition to operate:

<sup>61</sup> See *Anti-discrimination Act 1991* (Qld) s 7(1)(i); *Anti-discrimination Act 1998* (Tas) ss 16(o) and (p), *Equal Opportunity Act 1995* (Vic) s 6(j); *Racial and Religious Tolerance Act 2001* (Vic) s 3; and *Anti-discrimination Act 1992* (NT) s 19(1)(m).

<sup>62</sup> *Equal Opportunity Act 1995* (Vic) s 6.

<sup>63</sup> *Equal Opportunity Act 1995* (Vic) s 4.

<sup>64</sup> In New South Wales discrimination based on 'ethno-religious or national origin' is prohibited: *Anti-discrimination Act 1977*



The other states have elected a different legislative format to achieve the same purpose and have addressed discrimination on the basis of religious belief in separate sections (rather than listing it among the prohibited grounds of discrimination).<sup>65</sup> The Australian Capital Territory *Discrimination Act 1991* (ACT) provides:

It is unlawful for an employer to discriminate against an employee on the ground of religious conviction by refusing the employee permission to carry out a religious practice during working hours, being a practice:

- (a) of a kind recognised as necessary or desirable by people of the same religious conviction as that of the employee; and
- (b) the performance of which during working hours is reasonable having regard to the circumstances of the employment; and
- (c) that does not subject the employer to unreasonable detriment.<sup>66</sup>

In Western Australia the *Equal Opportunity Act 1984* (WA) provides:

- (1) For the purposes of this Act, a person (in this subsection referred to as the ‘discriminator’) discriminates against another person (in this subsection referred to as the ‘aggrieved person’) on the ground of religious or political conviction if, on the ground of:
  - (a) the religious or political conviction of the aggrieved person;
  - (b) a characteristic that appertains generally to persons of the religious or political conviction of the aggrieved person; or
  - (c) a characteristic that is generally imputed to persons of the religious or political conviction of the aggrieved person,

The discrimination takes place when the aggrieved person is treated less favourably than in the same circumstances or in circumstances that are not materially different. The discriminator treats or would treat a person of a different religious or political persuasion.<sup>67</sup> The similarity between these approaches is a focus on the relevant characteristic which is religious belief and/or religious activity. There is a further unanimity between the legislative provisions is their scope in the areas in which they prohibit discrimination based on the relevant characteristic. In each jurisdiction with a prohibition on religious discrimination, the ban extends to employment, education, access to goods services and facilities and accommodation.<sup>68</sup>

The discrimination based on religious has been included in a list of relevant characteristics (such as in Victoria), or by provisions dealing specifically with discrimination based on religion (such as the Australian Capital Territory and Western Australia). The legislation in South Australia

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(NSW) s 4 and s 7. This ground has been specifically considered in relation to a complaint made by a Muslim person in *Khan v Commissioner, Department of Corrective Services* [2002] NSWADT 131. where he stated that he has been discriminated against because he was denied halal food in prison. The NSW Administrative Decisions Tribunal found that being a Muslim was not sufficient to constitute ‘ethno-religious origin’, and that there must be a close tie between faith, race nationality or ethnic origin for the prohibition to operate:

<sup>65</sup> *Discrimination Act 1991* (ACT) ss 7(1)(h), 8(1), 11; and *Equal Opportunity Act 1984* (WA) ss 53-65.

<sup>66</sup> *Discrimination Act 1991* (ACT) s 11.

<sup>67</sup> *Equal Opportunity Act 1984* (WA) s 53.

<sup>68</sup> See *Anti-discrimination Act 1991* (Qld); *Anti-discrimination Act 1998* (Tas) s 22; *Equal Opportunity Act 1995* (Vic) ss 13, 14, 37, 42, 49-52, *Anti-discrimination Act 1992* (NT) ss 29, 31, 41 and 38; *Discrimination Act 1991* (ACT) ss 10, 11, 18, 20 and 21; and *Equal Opportunity Act 1984* (WA) ss 54-65.

lacked a prohibition that would have concentrated on religious belief and practice and applied in the areas of employment, education, access to goods services and facilities and accommodation.

The *Equal Opportunity Act 1984* (South Australia) did not contain a prohibition on discrimination based on religious belief or practice. Nor is such a provision included in the current bill. However, some provisions relating to religion do exist. There was for religious groups an alternative source of protection may be available under the *Equal Opportunity Act 1984* (SA) provisions prohibiting discrimination based on race.<sup>69</sup> Race was defined in that Act as follows: 'race' of a person means the nationality, country of origin, colour or ancestry of the person or of any other person with whom he or she resides or associates.<sup>70</sup>

Anne Hewitt in a critique of the lack of clarity in the South Australian legal definition of race has given example of the difficulty of tying it with religion.<sup>71</sup> This is because the South Australian case law "does not assist with interpreting the meaning of 'race' in the *Equal Opportunity Act 1984* (SA). The majority of the available decisions focus on discrimination against aboriginal people, and include no analysis of whether aboriginals are a 'race' – this is assumed".<sup>72</sup> There is one South Australian decision concerning racial discrimination against a non-aboriginal person in *Richard Kahn v State of South Australia*<sup>73</sup> in which a man of Pakistani origin argued that he had been discriminated against when his application for an Aboriginal Education Worker Traineeship was rejected. While the Tribunal appears to have accepted that this was, indeed, discrimination on the basis of his Pakistani ancestry, the discrimination was not unlawful because the traineeships were a scheme for the benefit of persons of Aboriginal or Torres Strait Islander descent.

The Equal Opportunity (Miscellaneous) Amendment Act 2009 provides new grounds that includes 'people who wear dress or adornments symbolic of their religion'. The amendments in this statute include discrimination on grounds of race that include those come the province of religion. They impact in two areas which in work and education. Chapter 30, Section 1 effects those which are applicants and employees; Chapter 31, Section 2 effects the agents and employees; and Chapter 32, Section 1 impacts on contract workers.

The Australian study by a government appointed Expert Panel on Religious Freedom has stated the "cases illustrate how the existing anti-discrimination laws work to negotiate the intersection between the right to manifest religious belief, and the right to non-discrimination. The anchor points for the exception are the religious purpose of a body, and either or both of conformity to doctrines, tenets or beliefs of a religion, and avoiding injury to religious susceptibilities of adherents of a religion. These are matters that are objectively determined. However, even this approach fails to allow sufficiently for the particular circumstances of a case. For example, it fails to evaluate how central or important the belief is to the religion, how and to what extent any proposed action would infringe it, and how much harm might be done by defeating a discrimination claim in the particular facts of a case".<sup>74</sup>

There have been two anti-discrimination law reform inquiries that have recommended abandoning the use of exceptions, including those that presumptively favour religious conduct over non-discrimination. Both inquiries suggested relying instead on a general 'rights limitation' provi-

<sup>69</sup> Prohibition of discrimination on the ground of race, *Equal Opportunity Act 1984* (SA) pt 4.

<sup>70</sup> *Equal Opportunity Act 1984* (SA) s 5. On the basis Lord Fraser held in *Mandla v Dowell Lee* 2 AC 548 that Sikhs could constitute an 'ethnic group' and were therefore entitled to the protection of the *Race Relations Act 1976* (UK). This case has served as a precedent in Australia in the context of determining whether Jewish people are protected by the *Racial Discrimination Act 1975* (Cth) See note 53

<sup>71</sup> Anne Hewitt, "It's not because you wear a hijab, it's because you're Muslim: Inconsistencies in South Australia's discrimination laws" [2007] QUTLawJl 4; (2007) 7(1) Queensland University of Technology Law and Justice Journal 57

<sup>72</sup> *Abdulla v Berkeley on Hindley Street P/L* (2005) SA EOTL

<sup>73</sup> (2005) EOC 93-098

<sup>74</sup> Submission by the Discrimination Law Experts to The Expert Panel on Religious Freedom Inquiry: Religious Freedom Review, Department of Prime Minister and Cabinet, 14 February 2018. p 10

sion, under which the intersection of religion freedom and non-discrimination would be assessed on a case-by-case basis.<sup>75</sup> However, the Australian legal system may soon adopt a federal Act in 2019 that prohibits religious discrimination at federal level. This is because the Commonwealth government has accepted 15 of the twenty recommendations proposed by the Ruddock Review.<sup>76</sup> This will amend of the RDA which in section 9 prohibits discrimination on the basis of a person's "race, colour, descent or national or ethnic origin". Ethnic origin has been interpreted by the courts to cover both Sikhs and Jews. (See *Jones v Scully*) By contrast, Muslims and Christians are not covered by the Racial Discrimination Act, as they do not constitute a single ethnic group.

The amendment of the *Racial Discrimination Act 1975* (Cth) or the enactment of a Religious Discrimination Act (Bill) to make discrimination on the basis of 'religious belief or activity' unlawful.<sup>77</sup> Given the Ruddock Review's recognition of the powerful message that legislation gives to a society the mere suggestion that protection of religion be tacked on to the *Racial Discrimination Act 1975* (Cth) rather enacted in a standalone act is peculiar. As previously discussed, the Ruddock Review also recommended amendments to present exemptions contained in the *Sex Discrimination Act 1984* (Cth) to reduce their scope and accessibility.<sup>78</sup> However, the bill has come for criticism because there is no provision that allows the manifestation of religious symbols as a human right in the work environment.<sup>79</sup>

## II. Indirect discrimination in the workplace

The emergent themes in anti discrimination framework in the employment practice in Australia that it is accepted that it is integral to the diversity policy within the, organisational structures and routines, and the public domain or customer dealings.<sup>80</sup> This evaluation needs an empirical analysis in order to arrive at conclusions as to what leads to indirect discrimination. It therefore, requires a social legal input with studies aimed at the experience of the Muslim women who have displayed their customary head gear in the form of the *hijab*.

The prevalent view in Australia has been that while direct discrimination has subsided the indirect discrimination has continued in the workplace.<sup>81</sup> This confirms the need to focus on indirect and "subtle forms of discrimination", particular, there is a need to take into consideration the "multiple influences of gender, ethnicity, religion and pre-migration work on the perceptions and

<sup>75</sup> ACT Law Reform Advisory Council, Review of the Discrimination Act 1991 (ACT) Final Report, LRAC 3 FR, 2015; and Commonwealth Attorney-General's Department, Human Rights and Anti-Discrimination Bill 2012 Explanatory Notes, 2012. 18 ACT Law Reform Advisory Council, above n 17, 99-102; Commonwealth Attorney-General's Department, above n 17, 33-3517 .

<sup>76</sup> Philip Ruddock (Chair), "Report of the Expert Panel Religious Freedom Review" (18 May 2018) Appendix A: Submissions and consultations 109. 112 <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/religious-freedom-review-expert-panel-report-2018.pdf> (Ruddock Review)

<sup>77</sup> Ruddock Review Recommendation 15

<sup>78</sup> Ruddock Review Recommendations 5 to 8

<sup>79</sup> The language of exemptions is a historical consequence of the piecemeal approach to the protection of human rights adopted in Australia that places religion at a disadvantage. Rather than portraying religions freedom as a valuable human right worthy of protection, it creates the false impression that religious freedom is an unusual permission to engage in unlawful behavior. It is unfortunate that the Ruddock Review did not instead adopt positive language recognising a religious school's right to select students and staff who are mission fit. The Chimera of Freedom of Religion in Australia: Reaction to the Ruddock Review. The Conversation. (Univ of Western Australia) <https://www.e-ir.info/2019/01/21/the-chimera-of-freedom-of-religion-in-australia-reactions-to-the-ruddock-review/>

<sup>80</sup> As Carolyn Evans has shown freedom of religion as protected under international human rights law has both an individual and a collective aspect, and the right to manifest religious freedom collectively necessarily implies that it has an organisational dimension. Carolyn Evans, Legal Protection of Religious Freedom in Australia (Federation Press, 2012) 35.

<sup>81</sup> E. A Deitch,., A.Barsky, , R. M Butz,., S., Chan, A. P., Brief, & , J. Bradley, Subtle yet significant: The existence and impact of everyday racial discrimination in the workplace. Human Relations, 56 (11) (2003): 1299–1324.

actual process of migrants' transition".<sup>82</sup> There is a presumption in the system that western norms are superior and serve to establish the secular values in the work environment.

The contemporary research conducted by Syed and Pio evaluates three levels of analysis within the emergent themes that subsumed: the macro-societal level, (social stereotypes, social support and the legal framework); the meso- organisational level, (diversity policies along with organisational structures and routines); and the micro-individual level (ethnic and religious bargains in the workplace). The study begins with the hypothesis that "*while most organisations have been found to be compliant with anti-discrimination legislation, with a tendency to discourage individual or isolated cases of direct discrimination, subtle forms of indirect discrimination were evident in the experience of those impacted. However, organisations can choose to take cognisance of such overtones through policies for diversity management*".<sup>83</sup>

Syed and Pio argue that the "perceptions of subtle discrimination" in other national and industrial contexts could be based on the lack of understanding "for the notion of cultural differences fading over time with reference to Australian born Muslim women who may face double jeopardy (ethnicity/religion and gender) and first generation Muslim migrant women who face triple jeopardy (ethnicity/religion, gender, migration)"; which may also extend to the "experiences and attitudes of Muslim women, such as those who have recently arrived and those of earlier periods"; and this can be presumed because the "earlier studies were too undifferentiated in terms of their treatment of migrant workers from different countries".<sup>84</sup>

It becomes apparent that while "strict dress codes or uniform are not enforceable in most Australian organisations, there is an unspoken code for personal presentation" which may impact adversely on women from minorities.<sup>85</sup> There are a number of key variables that have been identified and the potential implications for workplace diversity management. The exclusive focus on organisations by holding them solely accountable for diversity policies may be intensely inadequate as diversity management is impacted by both macro-societal and micro-individual issues. The workplace experiences of migrant women "are simultaneously shaped by occupational structure, legal frameworks of equal opportunity, and social networks of support. At each level, particular challenges towards diversity are evident".<sup>86</sup>

There are multilevel issues and challenges for Muslim migrant women in relation to their employment in Australian organisations. The issue has become for the employers of managing diversity in the organisation and set it within the division of labour in the structure of the business. The research shows that the "management of diversity will continue to be a major task for organisations that seek productivity and financial profits from a diverse workforce...and [therefore] foster conditions that promote structural and informal inclusiveness at all levels." It is, however, acknowledged that the conventional framing of the diversity management discourse is based on a preferencing of individual differences over social group differences with an explicit reference to a "business case for diversity".<sup>87</sup> The data indicate the complex nature of "interrelated multilevel challenges in the la-

<sup>82</sup> E.Ogbonna, , & L. C Harris,. The dynamics of employee relationships in an ethnically diverse workforce. *Human Relations*, 59(3) (2006): 379–407.

<sup>83</sup> Jawad Syed and Edwina Poe, Veiled diversity ? Workplace experience of Muslim in Australia. *Asia Pacific Journal of Management* 27(1) (2009):115-137

<sup>84</sup> Ibid

<sup>85</sup> N Kamenou, & A Fearfull,.. Ethnic minority women: A lost voice in HRM. *Human Resource Management Journal*, 16(2) (2006) 154–172.

<sup>86</sup> M., Stockdale, & F. Cao, Looking back and heading forward: Major themes of the psychology and management of workplace diversity. In M. Stockdale & F. Crosby (Eds.). *The psychology and management of workplace diversity*:(2004) 298–316. Oxford: Blackwell Publishers.

<sup>87</sup> S Nicholas,., A Sammartino, J., O'Flynn, A.Ricciotti, , K.Lau, , & N Fisher,. The business case for diversity management. Research Report produced by The Department of Immigration and Multicultural and Indigenous Affairs in cooperation with the Australian Centre for International Business, Melbourne.(2001.)

bour market which requires a much deeper understanding of migrant women's ethnic and religious customs, and the need to go beyond a simplified official 'success story' narrative of skilled migration in Australia".<sup>88</sup>

This empirical analysis based upon the experiences of the work environment is defined by a combination of issues and challenges within the framework of macro-societal, meso-organisational and micro- individual levels. These are productive means of evaluating the cultural differences between the prevailing organisational approaches towards diversity management, and the issues of multiple and intersecting ethnic and religious factors. They establish the policy framework of the Commonwealth government's priority in dealing with the "economic or business benefits of diversity, focused on migrant workers' skills and qualifications" rather than accommodating their specific needs such as religious manifestation expressed in their external appearance.

## Conclusion

There are common and divergent elements existing between the treatment provided by the UK legal system and the Australian legal framework on the use of the veil in the workplace and these depend on the incorporation on the multinational laws that have been adopted in the national law. In the English law the race relations legislation was the springboard for cases that came before the court and which distinguished between the direct and indirect discrimination. The racial discrimination can be extended to religious discrimination when minorities have a characteristic that needs protection in the law. This is basis upon which the Equality Act was framed which transposed European Equality Directive into domestic legislation and set out religion as one of the nine protected characteristics. The ECHR has also been adopted into the UK framework and it protects the religious beliefs under the Article 9 of the Convention. This has been applied in cases of discrimination in the wearing of religious symbols and there is strict duty imposed on the employer to respect the right of the employee to wear the veil in the workplace. The provision does not recognise the concept of direct or indirect discrimination by the employer and instead there is proportionality in balancing the right against the duties on the employer.

In Australia there are multi national rights that have been adopted but, by contrast, there is a constitutional provision in the form of Section 116 Free Exercise Clause that is based on the same principle as the First Amendment in the US Bill of Rights. This prescribes every religion equal protection while not upholding any particular belief as legally superior in treatment of its adherents. The Section can invalidate any law that is enacted but it has not been invoked to void state legislation. There is also the existence of the Racial Discrimination Act 1975 (Cth) which is significant because while the Commonwealth can enact discriminatory legislation provided that a statutory power exists, the states would find it onerous given possible inconsistency between such legislation and the RDA.

Section 9 of the RDA, prima facie, prohibits distinctions based on race, colour, descent or national or ethnic origin which impair the exercise of human rights and section 10 provides for equality before the law, denying the validity of laws which mean that a person with these characteristics does not enjoy the same rights as of another race. However, there is debate as to the extent to which these provisions could apply to discrimination based on religion, rather than on race, and the Commonwealth has not yet amended the provisions of the Act to enshrine religious belief in its contents.

<sup>88</sup> C. Ho, , & C. Alcorso., Migrants and employment: Challenging the success story. *Journal of Sociology*, 40(3)( 2004) 237–259.

The English law provides a more elastic determination of the 'neutrality' of the employer in terminating the employment based on indirect discrimination. The employer has to consider the specific task in the occupational environment where the religious symbol is worn and also has to balance factors such as not losing customers or grounds of health and safety. In Australia reform has been piecemeal and laws purports to be neutral as between the employer and the aggrieved party. The objective of the Commonwealth government has been to create the space for business activity in the workplace and has been less inclined towards promulgating legislation that protects religious beliefs in the workplace. It has left it to the state legislatures to enact their own laws that infringe the religious beliefs and this includes the wearing of veils in the workplace and, consequently, there is less case than in the English courts.

The common law systems in both England and Australia are a mirror in terms of the application of anti discrimination laws after international laws have been endorsed in their equality framework. It is important that the legislation does not create a victim complex in cases of religious symbolic discrimination. If those who chose to make cultural statements by projecting their apparel then they be discriminating themselves and conservatism must not be confused with piety. It is necessary for the courts to interpret the law that is objective in all circumstances in instances where facts meet the norms of conduct as in the work place.