

Religious Freedom and Section 116 of the Australian Constitution: Would a Banning of the Hijab or Burqa Be Constitutionally Valid?

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Introduction

In recent years, the issue of the extent to which an individual has or should have the right to religious freedom, and to manifest that freedom by wearing particular items of clothing, has become very contentious. Some nations have seen fit to ban the wearing of particular items of clothing thought to have religious significance, at least in some contexts. Courts from a range of jurisdictions have sought to grapple with these issues, involving a range of values and sometimes competing interests. As we will see, they have done so in different ways, and some of the results are, at first blush, somewhat surprising.

In this article, I will consider constitutional (and discrimination) issues that would arise if the Australian Parliament enacted legislation¹ prohibiting the wearing of particular items of clothing often thought to have religious significance, in particular the *hijab*, *burqa* or *niqab*.² While the ban could apply to other items of clothing or jewellery of religious significance other than Islam, given that most of the current debate concerns symbols of Islam, I will use this particular context as the focus of discussion. In so doing, I will draw upon the rich jurisprudence concerning these issues in other jurisdictions, where much more litigation has taken place regarding the question than Australia. The volume of litigation elsewhere means that consideration of the Australian position is enriched by considering some of the specific issues that have been considered by overseas courts, with the likelihood that at some stage similar issues will need to be considered by Australian courts. These overseas developments should inform our consideration of the interpretation of the Australian provisions, and assist in reaching an interpretation of the relevant provisions. As with all comparative analysis, it is necessary to bear in mind the different statutory, constitutional and convention context in which decisions are reached.

I will also consider briefly whether a different result would apply if the ban were passed at State level. This is not an abstract argument; a current Senator in the Australian Parliament, has personally called for a burqa ban, and private members' bills have been introduced in New South Wales and South Australia to introduce such a ban, at least in some circumstances.

In Part A, I set the statutory framework for the discussion that follows. In Part B, the meaning of the wearing of the hijab and burqa is considered. Part C considers how laws banning the wearing of religious dress or symbols have been considered in various courts. In Part D, I consider the validity of a Commonwealth law that banned the wearing of religious dress or symbols.

¹ Of course, this presupposes that the Commonwealth has a head of power to enact such a ban.

² The *hijab* is taken to refer to a head covering traditionally worn by Muslim women (the word can also be used to explain modest Muslim styles of dress in general), the *burqa* is a full dress covering a woman's body, including a veil over the woman's face (this veil is separately referred to as a *niqab*).

Part A: Statutory Context of Freedom of Religion

Section 116 of the Commonwealth *Constitution* forbids the Commonwealth Parliament from passing a law establishing a religion, imposing a religious observance, or prohibiting the free exercise of religion, and forbids a religious test from being required as a qualification for office in the Commonwealth.³ It is based on the American anti-establishment clause found in the First Amendment, and Article VI s3 regarding religious tests in order to take office. No law has ever been struck down as being offensive to the s116 prohibition. The prohibition applies (expressly) only to Commonwealth laws, not State laws.

The right to freedom of religion is recognised as fundamental in various international human rights documents. These include Article 9(1) of the European Convention on Human Rights, protecting the right to freedom of religion and to manifest that religion in worship or practice, subject to limited exceptions.⁴ It is clear that 'practice' here includes the wearing of distinctive clothing or headcovering.⁵ Very similar provisions appear in Article 18 of the *International Covenant on Civil and Political Rights*, and Article 18 of the *Universal Declaration of Human Rights*. It has been suggested that freedom of religion and conscience may be the oldest of the internationally recognised human rights.⁶ These rights protections have been borne out of a long history of violence and persecution in relation to religion, oppression of religious minorities, imposition of religion by states etc. As the United States Supreme Court noted

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favoured churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy.⁷

There was also the historical view that the monarch of the past, in whom lawmaking functions were reposed, was the representative of a higher religious authority. Links with theories of natural law may be acknowledged here. The separation of religion and state can

³ See also s14 of the *Human Rights Act 2004 (ACT)* and s3 of the *Charter of Rights and Responsibilities Act 2006 (Vic)*. Section 46 of the Tasmanian Constitution provides for free profession and practice of religion 'subject to public order and morality': *Constitution Act 1934 (Tas)*.

⁴ Article 9(2) provides for limits to the freedom if they are prescribed by law and necessary in a democratic society in the interests of public safety, protection of the public order, to protect health or morals, or to protect the rights and freedoms of others. Related rights include the right to respect for private and family life (Article 8), right to freedom of expression (Article 10), the right to freedom from discrimination on the basis of religion (Article 14), and the right to education (Article 2 of the First Protocol). The interpretation of these limits must be strict, and limits must be directly related and proportional to the specific need; they must not be applied in a discriminatory manner: Human Rights Commission *General Comment No 22: The Right to Freedom of Thought, Conscience and Religion* (Art 18)(Forty-Eighth Session, 1993). The European Court has found that restrictions on religious freedom call for 'very strict scrutiny' by the Court since the right is fundamental in nature: *Manoussakis v Greece*, App No 18748/91, 23 European Human Rights Reports 387, 407 (1997).

⁵ Human Rights Committee, *General Comment 22: The Right to Freedom of Thought, Conscience and Religion* (Art 18)(Forty-eighth Session, 1993).

⁶ W Cole Durham Jr 'Freedom of Religion: The United States Model' (1994) 42 *American Journal of Comparative Law* 617, 618; Abdullah Saeed and Hassan Saeed *Freedom of Religion, Apostasy and Islam* (2004) p10.

⁷ *Everson v Board of Education* 330 US 1 (1947).

be seen in great contrast to the historical position of the monarch as lawmaker and religious figure.⁸

Despite these provisions,⁹ some jurisdictions have recently moved to ban some forms of religious expression.¹⁰ As one example for discussion purposes, Law 2004-228, passed in France, prohibits in Article 1 in public elementary schools, colleges, junior high schools and high schools the wearing of signs and behaviours by which the pupils express openly a religious membership. On its face the Article does not single out a particular religion; however in practice it has been applied almost exclusively to require that the hijab and burqa not be worn at these venues.¹¹ In 2010, the French Government moved to extend the ban beyond educational settings.

Part B: Meaning of the Hijab and Burqa

The fundamental question arises as to whether a banning of either or both the hijab and burqa interferes with the person's right to freedom of religion, and their right to manifest that religion in practice. It is necessary to refer to religious documents as well as views as to the symbolism of such dress in order to answer this question.

An important source of information in answering this question are the relevant provisions of the Koran (Qur'an) itself. Typically, the following passage is quoted:

And say to the believing women that they should lower their gaze and guard, their modesty; that they should not display their beauty and ornaments except what (must ordinarily) appear thereof; that they should draw their veils over their bosoms and not display their beauty except to their husbands, their fathers, their husband's fathers, their sons, their brothers or their brother's sons, or their women.¹²

As with many issues in religion, the above passage has been interpreted in different ways. A specific challenge with Islam is that, as Baker notes, there is no central authority figure, such that followers adhere to different forms and interpretations of Islamic tenets.¹³ Opinions differ as what 'guarding their modesty' might mean; some interpret this strictly to require the full body garment (burqa) be worn; others see the headscarf as being sufficient; others argue

⁸ Great advocates for religious freedom in the past have included John Stuart Mill *On Liberty* (1859) p51-52 and John Locke *A Letter Concerning Toleration* (1689).

⁹ M Todd Parker argues that legal precedents allowing restrictions on religious dress and other practice are often not faithful to the requirements of the International Covenant and European Covenant on Human Rights: 'The Freedom to Manifest Religious Belief: An Analysis of the Necessity Clauses of the ICCPR and the ECHR' (2007) 17 *Duke Journal of Comparative and International Law* 91.

¹⁰ Links with post 9-11 hysteria have been noted here: 'women who are readily identified as Muslim because they wear a headscarf or veil report that they have often been the target of racist violence and discrimination and that this increased post 9-11 as their clothing is now read to signify religious fundamentalism, danger and terrorism': Margaret Thornton and Trish Luker 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71, 83.

¹¹ Mark Levine reports that in the first year following the passage of the French law, 47 Muslim girls had been expelled from French schools for wearing the hijab: 'The Modern Crusade: An Investigation of the International Conflict Between Church and State' (2009) 40 *California Western International Law Journal* 33, 42.

¹² *Qur'an* 24: 30-31, 24: 60, 33: 59 and 33: 53; Abdullah Yusuf Ali *The Qur'an Text, Translation and Commentary* (2001) p904-905.

¹³ Christina Baker 'French Headscarves and the U.S Constitution: Parents, Children and Free Exercise of Religion' (2008) 13 *Cardozo Journal of Law and Gender* 341, 359.

that the woman merely cannot wear clothing showing the outline of her bosom.¹⁴ Others say that the headscarf is a cultural tradition that has nothing to do with Islam, and the hijab referred to in the Qur'an is a curtain Muhammad used to separate his wives from male visitors, and is not a piece of clothing at all.¹⁵

There have been other suggestions as to the significance of the hijab or burqa that are based around culture rather than religion per se. Tiefenbrun summarises these as including:

- (a) It is a positive symbol designating the cultural and religious source of protection, respect and virtue;
- (b) It is a positive sign signifying Muslim identity, which might (arguably) be seen as opposition to Western civilisation;
- (c) It is a positive sign allowing Muslim women to freely participate in public life, preventing women from 'tempting men and corrupting morality';¹⁶
- (d) It is a negative symbol of Islam's power over women;¹⁷ for instance, Badinter claims the veil 'is the symbol of the oppression of a sex ... putting a veil on the head, this is an act of submission. It burdens a woman's whole life'.¹⁸

¹⁴ Mukul Saxena 'The French Headscarf Law and the Right to Manifest Religious Belief' (2007) 84 *University of Detroit Mercy Law Review* 765, 779-780; Susan Tiefenbrun 'The Semiotics of Women's Human Rights in Iran' (2008) 23 *Connecticut Journal of International Law* 1, 25; Jeremy Gunn 'Religious Freedom and Laicite: A Comparison of the United States and France' (2004) *Brigham Young University Law Review* 419, 471; Robert Kahn 'The Headscarf as Threat: A Comparison of German and US Legal Discourses' (2007) 40 *Vanderbilt Journal of Transnational Law* 417, 438.

¹⁵ T Jeremy Gunn 'Religious Freedom and Laicite: A Comparison of the United States and France' (2004) *Brigham Young University Law Review* 419, 471-472.

¹⁶ Aliah Abdo 'The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf' (2008) 5 *Hastings Race and Poverty Law Journal* 441, 441, 449: 'Hijab is not only meant to guard women from inappropriate leering male attention, but it is considered to be a liberating experience to be free from societal expectations and judgments over a women's body and other physical characteristics'; Mark Levine 'The Modern Crusade: An Investigation of the International Conflict Between Church and State' (2009) 40 *California Western International Law Journal* 33, 41. Writing of the Iranian position, Susan Tiefenbrun claims 'women in Iran today are no longer excluded from public life and politics, and their participation has in fact increased in some areas due to, and not in spite of, the compulsory wearing of the veil or hijab': 'The Semiotics of Women's Human Rights in Iran' (2008) 23 *Connecticut Journal of International Law* 1, 19.

¹⁷ Susan Tiefenbrun 'The Semiotics of Women's Human Rights in Iran' (2008) 23 *Connecticut Journal of International Law* 1, 22-23; Stefanie Walterick 'The Prohibition of Muslim Headscarves from French Public Schools and Controversies Surrounding the Hijab in the Western World' (2006) 20 *Temple International and Comparative Law Journal* 251, 255: 'to many people in France, the hijab is also a symbol of the oppression and subjugation of Muslim women'; *Commission de Reflexion sur l'Application du Principe de Laicite dans la Republique (Stasi Commission Report)* p46-48; Christopher Bebelieu 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' Democratic Jurisprudence' (2006) 12 *Columbia Journal of European Law* 573, 583: 'just like Islam itself, the practice of veiling can take on a range of styles and meanings ... (619) the message conveyed (by the wearing of the veil) depends on the carrier of the symbol as well as the audience of that symbol'; Adrien Wing and Monica Smith 'Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban' (2006) 39 *University of California Davis Law Review* 743, 746-747, 750-751. Chouki El Hamel argues the hijab ensures men will maintain their status as providers and guardians of women and ensures women remain isolated: 'Muslim Diaspora in Western Europe: The Islamic Headscarf, the Media and Muslims' Integration in France (2002) 6 *Citizenship Studies* 293, 302; Ghais Jasser 'The Twin Evils of the Veil' (1999) 5 *Social Identities* 31, 37: 'the veiled woman is reduced to impotence'.

¹⁸ Elisabeth Badinter, Interview with L Joffin *The Nouvel Observateur* (1989) p7-11; Nilufer Gole 'The Voluntary Adoption of Islamic Stigma Symbols' (2003) 70 *Social Research* 809, 817-818; Azar Majedi denounces the veil as 'the ideological banner of Iran's sexual apartheid and misogynist values': *Women's Rights*

Some studies based on interviews with Muslim women suggest that while some Muslim women adopt the veil to comply with family values and expectations, it is becoming more common that women choose to wear the headscarf themselves, often without pressure and often against their parents' wishes. It is sometimes argued by Muslim women that the veiling forces males to deal with them on a mental level as equals, rather than sexual objects.¹⁹ Economics may even play a factor.²⁰ A multitude of reasons is plausible.²¹ Baroness Hale engages with the complex symbolism of the wearing of religious dress such as the hijab or burqa in her judgment in *R v Headteacher and Governors of Denbigh High School*.²² As Choudhury summarises it, 'Islamic scholars and feminists continue to debate whether hijab is compulsory and, if so, what practices of dress constitute valid observance.'²³

Given this range of views, it would be difficult for a court to determine emphatically that the wearing of the hijab or burqa either was, or was not, a manifestation of a religious practice. The courts have sometimes expressed their reluctance to judge the 'validity' of an asserted religious belief, acknowledging that religious belief is intensely personal:

Emphatically, it is not for the court to embark upon an inquiry into the asserted belief and judge its validity by some objective standard such as the source material upon which the claimant found his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual ... religious belief is intensely personal and can easily vary from one individual to another. Each individual is at liberty to hold his

vs Political Islam: A Series of Political Writings About the Devastating Effects of Political Islam on Women's Situation and the Struggle of Women Against It (2007); Steven Gey 'Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expression in Public Schools' (2006) 42 *Houston Law Review* 1, 62: 'In France, the government is seeking to create a limited area in which especially vulnerable students are free to consider all areas and possibilities, free from the constraints imposed by them by the religions and social mandates of their community and family'; cf Aliah Abdo who describes these views as a 'severely flawed and false reflection of Islamic principles': 'The Legal Status of Hijab in the United States: A Look at the Sociopolitical Influences on the Legal Right to Wear the Muslim Headscarf' (2008) *Hastings Race and Poverty Law Journal* 441, 441.

¹⁹ Adrien Wong and Monica Smith 'Critical Race Feminism Lifts the Veil?: Muslim Women, France and the Headscarf Ban' (2006) 39 *University of California Davis Law Review* 743, 761-763. Others note that in other cultures such as the Berber-speaking Tuareg of West Africa men veil, and masks are common in other cultures, which has not attracted the same controversy as that of a woman veiling: John Borneman 'Veiling and Women's Intelligibility' (2009) 30 *Cardozo Law Review* 2745, 2748-2749.

²⁰ Dina Alsowayel 'Commentary: The Elephant in the Room: A Commentary on Steven Gey's Analysis of the French Headscarf Ban' (2006) 42 *Houston Law Review* 103, 118.

²¹ Jeremy Gunn 'Commentary: French Secularism as Utopia and Myth' (2006) 42 *Houston Law Review* 81, 98; Yael Barbibay 'Citizenship Privilege or the Right to Religious Freedom: The Blackmailing of France's Islamic Women' (2010) 18 *Cardozo Journal of International and Comparative Law* 159, 201; Karima Bennoune 'Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression and Women's Equality Under International Law' (2007) 45 *Columbia Journal of Transnational Law* 367, 388; Christopher Belelieu 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' *Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment*' (2006) 12 *Columbia Journal of European Law* 573, 583.

²² [2006] UKHL 15, [94], quoting Yasmin Alibhai-Brown that 'what critics of Islam fail to understand is that when they see a young woman in a hijab she may have chosen the garment as a mark of her defiant political identity and also as a way of regaining control over her body'.

²³ Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199, 218.

own religious beliefs, however irrational or inconsistent they may seem to some, however surprising.²⁴

I will now consider the question of how bans or restrictions on religious dress have been answered in other jurisdictions.²⁵ Given that these issues, as with many other legal issues, are of universal rather than territorial concern, and given that the issues have been explored by courts in other jurisdictions at some length, it is sensible to consider how other courts have approached these issues. The High Court of Australia and courts in other nations have increasingly been willing to consider legal developments in overseas jurisdictions in developing Australian jurisprudence.²⁶ Recently the High Court has resorted more frequently

²⁴ *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246, [22-23](Lord Nicholls); *Employment Division, Department of Human Resources of Oregon et al v Smith et al* 494 US 872, 887 (1990); *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27 (para 52); *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, (para 35);; *Manoussakis v Greece* (1997) 23 European Human Rights Reports 387, 45; cf early cases, where the Court appeared judgmental of the religious views of others whose opinions the judges presumably did not share: *Krygger v Williams* (1912) 15 CLR 366, 370-372; *Mormon Church v United States* (1889) 136 US 1, 49.

²⁵ This raises a separate question as to the extent to which Australian law is, or should be, influenced by developments overseas. There is a rich jurisprudence on this question: see for example Hilary Charlesworth, Madeleine Chiam, Devika Hovell and George Williams *No Country is an Island: Australia and International Law* (2006); Kristen Walker 'International Law as a Tool of Constitutional Law Interpretation' (2002) 29 *Melbourne University Law Review* 85; Devika Hovell and George Williams 'A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa' (2005) 29 *Melbourne University Law Review* 95; Hilary Charlesworth 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20 *Adelaide Law Review* 57.

²⁶ Justice Kirby was a consistent advocate of the importance of international law; see for example *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513, 657-658 ('international law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia's Constitution, as the fundamental law of government in this country, accommodates itself to international law'), and in *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 418: 'where there is ambiguity, there is a strong presumption that the *Constitution* ... is not intended to violate fundamental human rights and human dignity'; *Al-Kateb v Godwin* (2004) 219 CLR 562, 616-624; Michael Kirby 'Domestic Implementation of International Human Rights Norms' (1999) 5 *Australian Journal of Human Rights* 109. In the landmark *Mabo* decision, Brennan J concluded that 'international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights': *Mabo v Queensland (No2)*(1992) 175 CLR 1, 42. Some judges have been less enthusiastic: for example, *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 384 (Gummow and Hayne JJ), *AMS v AIF* (1999) 199 CLR 160, 180 ('As to the *Constitution*, its provisions are not to be construed as subject to an implication said to be derived from international law': Gleeson CJ McHugh and Gummow JJ); Callinan J in *Western Australia v Ward* (2002) 191 ALR 1, 275 ('the provisions of the *Constitution* are not to be read in conformity with international law'); *Al-Kateb v Godwin* (2004) 219 CLR 562, 589 (McHugh J)('courts cannot read the *Constitution* by reference to the provisions of international law that have become accepted since the *Constitution* was enacted in 1900 ... The claim that the *Constitution* should be read consistently with the rules of international law has been decisively rejected by members of this Court on several occasions. As a matter of constitutional doctrine, it must be regarded as heretical'; *Roach v Electoral Commissioner* (2007) 233 CLR 162, 221 (Hayne J) and 225 (Heydon J)(denying that international instruments such as the *International Covenant on Civil and Political Rights* or *European Convention on Human Rights* could (should) have any influence on interpretation of the Australian *Constitution*. Those who take this view often do so on the basis that the founding fathers could not have been influenced by these documents which post-dated the drafting of the Australian *Constitution*; however such a view reifies the intent of the founding fathers at the expense of a living organism view of the *Constitution* which has gained orthodoxy in the High Court. There is also evidence of British judges interpreting the common law consistent with, for example, the European Convention on Human Rights even prior to the enactment of the *Human Rights Act*: *Attorney-General v Guardian Newspapers (No2)*[1990] 1 AC 109, 283-284; *R v Advertising Standards Authority Ltd; ex parte Vernons Organisations Ltd* [1993] 2 All ER 202; *Derbyshire County Council v Times Newspapers* [1992] QB 770, 811-812: see for discussion H Mountfield and M Beloff 'Unconventional Behaviour?: Judicial Uses of the European Convention in England and Wales'

to international materials, particularly in the rights context. For example, in *Roach v Electoral Commissioner*²⁷ a High Court majority²⁸ (over the express dissent by the minority²⁹) expressly referred to international jurisprudence from Canada and Europe on the right to vote to justify their conclusion. In *Betfair Pty Ltd v Western Australia*,³⁰ six members of the High Court made extensive reference to American jurisprudence in their consideration of s92 of the Australian *Constitution*. The current and a former Chief Justice of the High Court have expressed support for the use of international materials in deciding Australian cases.³¹

As always, relevant differences in the statutory wording must be considered, but overseas jurisdictions recognise the freedom of religion that underpins s116 of the Australian *Constitution* and their approach is submitted to be relevant in discussing the issues in Australia.

The Fate of Bans on Religious Dress in Other Jurisdictions

(a) Europe

With its melting pot of different cultures, religions and complex history, it is not surprising that these issues have received significant airing in Europe. In some parts of Europe veiling has not created difficulty.³² Major examples of controversy here have included the French banning of religious clothing in some contexts. In 2004, the Republic passed legislation stating that ‘in public elementary schools, junior high schools and high schools, students are

(1996) 5 *European Human Rights Law Review* 467; A Cunningham ‘The European Convention on Human Rights, Customary International Law and the Constitution’ (1994) 43 *International and Comparative Law Quarterly* 537; R Higgins ‘The Relationship Between International and Regional Human Rights Norms and Domestic Law’ (1992) 18 *Commonwealth Law Bulletin* 1268; New South Wales Chief Justice James Spigelman noted soon after the introduction of the *Human Rights Act* 1998 (UK) that the English common law was ‘developing in the shadow of the jurisdiction of the European Court’: ‘Rule of Law: Human Rights Protection’ (1999) 18 *Australian Bar Review* 29, 32. The United States Supreme Court has started to take into account international law in interpreting that country’s Constitution: *Atkins v Virginia* (2002) 536 US 304, 316; *Lawrence v Texas* (2003) 539 US 558, 576-577; *Grutter v Bollinger* (2003) 539 US 306, 344 (Ginsburg J).²⁷ (2007) 233 CLR 162.

²⁸ Gleeson CJ (177-179), Gummow Kirby and Crennan JJ (203-204).

²⁹ Hayne J (221) and Heydon J (225).

³⁰ (2008) 234 CLR 418, 459-464 (Gleeson CJ Gummow Kirby Hayne Crennan Kiefel JJ).

³¹ ‘It is .. important that we do not allow legal insularity to hamper our national engagement with international legal systems. We should derive from these systems such benefits as they may offer to the development of our own law and our more effective interaction with other countries’ (Chief Justice of Australia Robert French, *Oil and Water? – International Law and Domestic Law in Australia*, The Brennan Lecture, Bond University, 26 June 2009), Former Chief Justice of Australia Murray Gleeson *Global Influences on the Australian Judiciary*, Australian Bar Association Conference, Paris, 8 July 2002); see also Chief Justice of New South Wales James Spigelman *Corporate Governance and International Business Law: Book Launch*, 18 June 2009, and Justice Paul Finn *Internationalisation or Isolation: The Australian Cul de Sac? The Case of Contract Law*, Bond University 20th Anniversary Symposium, 26-27 June 2009.

³² In 2003, for instance, the German Federal Constitutional Court held that Muslims could wear their veils while teaching (rejecting the idea that public authorities could themselves decide to implement a ban, but not objecting to legislation to that effect); (subsequently eight Laender legislated to ban headscarves): *Kopftuch-Urteil* [Headscarf Decision], Entscheidungen des Bundesverfassungsgerichts (BVerf GE)(Federal Constitutional Court) 108, 282 24/9/03, 2 BvR 1436/02, NJW 2003, 3111 (F.R.G). The German Constitution does not expressly refer to principles of secularism. See for further discussion of the German jurisprudence Axel Frhr von Campenhausen ‘The German Headscarf Debate’ (2004) *Brigham Young University Law Review* 665.

prohibited from wearing symbols or clothing through which they conspicuously evince a religious affiliation'. The legislation was, on its face, applicable to all religions; however the intention apparently was, and the practice has been, that the legislation has overwhelmingly been applied in relation to the wearing of the hijab, and to a lesser extent, the burqa.³³

France has a long and complex history concerning the relation between church and state, and a formal separation which occurred in a 1905 Act arguably completed the separation that commenced in 1789, with the Revolution creating the secular nature of the State, and the 1905 Act confirming the state's non-ability to regulate ecclesiastical matters.³⁴ This principle of secularism, also known as *laïcité*, has come to be associated very strongly with French identity and notions of equality, such that differences based on culture, ethnicity or religion, or things that symbolise such differences, may be seen as problematic.

Questions have arisen as to the extent to which the wearing of religious dress such as the hijab or burqa infringes the French concept of *laïcité*. In a 1989 opinion, the Conseil d'Etat, one of the three High Courts of France (the others being the Cour de Cassation and Conseil Constitutionnel) found that *laïcité* and the wearing of religious dress could be compatible:

It results from the constitutional and legislative texts and from France's international engagements ... that the principle of *laïcité* in public education, which is one of the elements of *laïcité* of the state and of the neutrality of all of the public services, requires that education be dispensed with respect, on the one hand, for this neutrality by the programs and teachers, and on the other hand, for the students' liberty of conscience ... This freedom on the students' part includes the right to express and to manifest their religious beliefs inside educational establishments (as long as such expression is done) with respect for pluralism and for the freedom of others, and without detracting from the (school's) educational activities (and) the content of (its) program.³⁵

The Conseil concluded that wearing religious dress in a school 'is not in itself incompatible with the principle of *laïcité*', but that it could not constitute an act of pressure, provocation, proselytism or propaganda' impinging upon the freedom of others.³⁶

³³ Nusrat Choudhury notes that 45 of the 48 students expelled in the four months following the implementation of the ban were Muslim girls who refused to remove their headscarves when entering a public school: 'From the Stasi Commission to the European Court of Human Rights: L'Affaire Du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199, 201; Stefanie Walterick 'The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World' (2006) 20 *Temple International and Comparative Law Journal* 251, 251: 'the law was enacted with the specific intent to eliminate the Muslim hijab, or headscarf, from French public school classrooms'.

³⁴ Dominique Custos 'Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004 (2006) 54 *American Journal of Comparative Law* 337, 345; Christina Baker 'French Headscarves and the U.S Constitution: Parents, Children and Free Exercise of Religion' (2008) 13 *Cardozo Journal of Law and Gender* 341, 343-344; T Jeremy Gunn 'Religion and Law in France: Secularism, Separation and State Intervention' (2009) 57 *Drake Law Review* 949; Elisa Beller 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society' (2004) 39 *Texas International Law Journal* 581.

³⁵ Conseil d'Etat, 27/11/1989.

³⁶ Jean Rivero 'Laïcité Scolaire et Signes d'Appartenance Religieuse (1990) 6 *Revue Française de Droit Administratif* 1, 6; Elisa Beller 'The Headscarf Affair: The Conseil d'Etat on the Role of Religion and Culture in French Society' (2004) 39 *Texas International Law Journal* 581, 611.

However, a very different approach was evident in a report by the Stasi Commission, set up to study the French concept of *laïcité*. In its 2003 report, the Commission concluded that a tension existed between *laïcité* and the wearing of religious dress or symbols, justifying a ban on wearing them in public institutions such as schools. As discussed earlier, this recommendation was legislated into existence in the following year. Part of the argument that the Commission provided to justify this recommendation was that the wearing of religious dress or symbols often represented an involuntary act:

Pressures exert themselves on young girls, forcing them to wear religious symbols. The familial and social environment sometimes imposes on them a choice that is not theirs. The Republic cannot remain deaf to the cries of distress from these young women.³⁷

However, critics of such findings counter that the reasons why an individual might wear religious dress or symbol are often complex and multiple. The Stasi Commission did not commission research to support its assertion that the wearing of religious dress was usually or often the product of pressure from others, and there is evidence to the contrary, as has been noted above.³⁸ Further, the ban implemented is far from complete; it only bans the wearing of such dress in a (public) school environment, but not in society more generally. If it really were about avoiding the oppression of people who might feel forced to wear religious dress or symbols, why is the ban confined to the wearing of such dress at (public) school? Why does it not apply to students in private schools? Or banned in any context?³⁹ Further, as Custos notes, the ban is confined to expressions of religious affiliations through the wearing of dress or symbols; in contrast, oral or written expressions of religious affiliation are not prohibited or confined, whether at school or elsewhere.⁴⁰ It may have the effect of alienating Muslim youth, denying young women an education and discouraging integration within French society.⁴¹

The French Government may have been emboldened in its decision to ban the wearing of religious dress in a school decision by some decisions interpreting the right to freedom of religion in this context. Somewhat surprisingly, several European Court of Human Rights

³⁷ Stasi Commission Report, 4.2.2.1; cf Dina Alsowayel 'Commentary: The Elephant in the Room: A Commentary on Steven Guy's Analysis of the French Headscarf Ban' (2006) 42 *Houston Law Review* 103, speaking of the French ban, 'A young French Muslim girl who was previously shrouded in the hijab removes it to go to school. By removing her cover, she is suddenly more receptive to other ideas regarding matters of faith and can now freely choose among them. This reasoning indicates a woeful lack of understanding about the hijab and Islam' (107).

³⁸ The Report has been trenchantly criticised: see Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199; Dominique Custos 'Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004' (2006) 54 *American Journal of Comparative Law* 337; T Jeremy Gunn 'Religious Freedom and Laïcité: A Comparison of the United States and France' (2004) *Brigham Young University Law Review* 419, 468-473; Mukul Saxena 'The French Headscarf Law and the Right to Manifest Religious Belief' (2007) 84 *University of Detroit Mercy Law Review* 765.

³⁹ The French Government moved to extend the ban in 2010 beyond the educational context.

⁴⁰ Dominique Custos 'Secularism in French Public Schools: Back to War? The French Statute of March 15, 2004' (2006) 54 *American Journal of Comparative Law* 337, 373.

⁴¹ Stefanie Walterick 'The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World' (2006) 20 *Temple International and Comparative Law Journal* 251, 252.

decisions have apparently condoned such restrictions on the right of an individual to manifest their religious views, despite the strong protection given to religion by the Convention.⁴² It is to these decisions that I now turn.

In *Dahlab v Switzerland*,⁴³ the court considered a Swiss law restricting the wearing of religious clothing, in this case applied against a teacher who wished to wear an Islamic headscarf. The court found that although there was an interference with the right to freedom of religion espoused in Article 9(1) of the Convention, it was justified within the 'margin of appreciation' granted to member states. Here allowing a teacher to wear the scarf would violate the notion of institutional neutrality associated with public schools. It was relevant that the teacher taught students aged 4-8, where their vulnerability was high. (However, the court acknowledged there was no evidence that the teacher had attempted to indoctrinate her students in any way). Further, the court concluded that the wearing of the Islamic scarf 'is hard to square with the principle of gender equality' and 'it appeared difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils'.⁴⁴

In *Sahin v Turkey*, the court considered a ban on the wearing of an Islamic headscarf at a Turkish University.⁴⁵ Sahin was excluded from the University because she refused to comply with the ban. Her arguments to the European Court of Human Rights were unsuccessful. By a majority of 16-1, the Grand Chamber dismissed her case. They held that although there was an interference with Sahin's right to freedom of religion, the ban fell within the Turkish Government's 'margin of appreciation', necessary to combat the headscarf's threat to secularism and gender equality, important values in the Turkish Republic.⁴⁶ The Court reiterated the value of secularism, to protect equality and liberty. The majority found the headscarf was 'difficult to reconcile with the message of tolerance, respect for others ... and

⁴² Article 9 of the European Convention on Human Rights provides that everyone has the right to freedom of thought, conscience and religion, including the freedom to manifest one's religion or belief in worship, teaching, practice and observance. This right is subject only to such limitations as are prescribed by law and necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or protection of the rights and freedoms of others.

⁴³ (2001) European Court of Human Rights 1.

⁴⁴ The findings have been criticised: see for example Ingvill Thorson Plesner 'Legal Limitations to Freedom of Religion or Belief in School Education' (2005) 19 *Emory International Law Review* 557, 572-573: 'it is hardly a sign of tolerance to not accept symbols that are carried by women of a particular religious tradition'.

⁴⁵ The Turkish Constitution contains a principle of 'laiklik', similar to French laicite, emphasising the secular nature of the state. However, in an earlier Turkish case in which the government dissolved a political party thought to have a religious agenda, the European Court accepted the validity of the government's action, on the basis that 'in a democratic society the State may limit the freedom to manifest a religion, for example by wearing an Islamic headscarf, if the exercise of that freedom clashes with the aim of protecting the rights and freedoms of others, public order and public safety ... (and) impose on its serving of future civil servants ... the duty to refrain from taking part in the Islamic fundamentalist movement, whose goal and plan of action is to being about the pre-eminence of religious rules': *Refah Partisi (The Welfare Party) v Turkey* App Nos 41340/98, 41343/98 and 41344/98, 37 European Human Rights Report 1 (2003); Kathryn Boustead 'The French Headscarf Law Before the European Court of Human Rights' (2007) 16 *Journal of Transnational Law and Policy* 167.

⁴⁶ The notion that Turkey is secular is contestable: Benjamin Bleiberg 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Sahin v Turkey*' (2006) 91 *Cornell Law Review* 129, 153.

non-discrimination'.⁴⁷ Referring to the *Dahlab* case, the majority noted that the court in that case had stressed the 'powerful external symbol' which the wearing of the headscarf represented, and questioned whether it might have a proselytising effect, given it was worn as a religious precept that was difficult to reconcile with equality.⁴⁸ The majority claimed that

In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf to be worn.⁴⁹

The dissentient, Judge Tulkens, noted there was no evidence of Sahin's reasons for wearing the headscarf, or that she was seeking to make any particular statement, or achieve any particular purpose, by wearing it. There was no evidence that Sahin's wearing of the scarf had, or would likely, cause disruption on the campus. As the Judge noted:

Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and 'extremists' who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant had fundamentalist views. She is a young adult woman and a university student and might reasonably be expected to have a heightened capacity to resist pressure, it being noted in this connection that the judgment fails to provide any concrete example of the type of pressure concerned. The applicant's personal interest in exercising the right to freedom of religion and to manifest her religion by an external symbol cannot be wholly absorbed by the public interest in fighting extremism.⁵⁰

The judge noted that Sahin in her evidence said she wore the headscarf of her own free will, giving the lie to the suggestion of the majority that allowing Sahin to wear it would be perpetuating inequality or intolerance. The judge asked what the connection was between the ban and sexual equality, accusing the majority judgment of paternalism.⁵¹ As has been noted, if the government really were serious about promoting equality, and really did believe that a ban was necessary to promote or preserve it, the ban actually implemented was grossly inadequate to the task – the ban should have been applied to all of Turkish society rather than in schools and government.⁵² Further, the effect of such laws may be, in effect, to deny

⁴⁷ Para 111.

⁴⁸ The ban was subsequently lifted in 2008: Frances Raday 'Traditionalist Religious and Cultural Challengers – International and Constitutional Human Rights Responses' (2008) 41 *Israel Law Review* 596, 613.

⁴⁹ Para 116.

⁵⁰ Para 10.

⁵¹ The judge said it was not for the court to make an appraisal of this type on a religion or religious practice. See for further discussion of the case Nusrat Choudhury 'From the Stasi Commission to the European Court of Human Rights: L'Affaire Du Foulard and the Challenge of Protecting the Rights of Muslim Girls' (2007) 16 *Columbia Journal of Gender and Law* 199; Jennifer Westerfield 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54 *American Journal of Comparative Law* 637; Natan Lerner 'How Wide the Margin of Appreciation? The Turkish Headscarf Case, the Strasbourg Court, and Secularist Tolerance' (2005) 13 *Willamette Journal of International Law and Dispute Resolution* 65; Cindy Skach (2006) 100 *American Journal of International Law* 186; Jennifer Westerfield 'Behind the Veil: An American Legal Perspective on the European Headscarf Debate' (2006) 54 *American Journal of Comparative Law* 637.

⁵² Benjamin Bleiberg 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Sahin v Turkey*' (2006) 91 *Cornell Law Review* 129, 162. Further critique

Islamic women the right to education, a result actually exacerbating inequality rather than addressing it. According to one estimate, the result of the *Sahin* case has been that thousands of Turkish Islamic women have dropped out of Turkish Universities.⁵³

At the national level, courts have considered similar issues, in the context of both convention rights and rights under more general discrimination/equality legislation. An example is *R v Headteacher and Governors of Denbigh High School*.⁵⁴ The case involved a school with a very diverse ethnic student body; approximately 79% of its students were Muslim. A majority of the school governors were Muslim, as was the head teacher. The school had a uniform policy drawn up in consultation with the school community, including Muslim representatives. It provided for three uniform options, one of which was undoubtedly acceptable to Muslim requirements. Students were allowed to wear a headscarf. The school argued its uniform policy was designed to promote harmony and avoid students segregating along race or religious lines. A student turned up for school in a jilbab, a long coat-like garment. The student complained it was only this garment that satisfied her Muslim beliefs. The student was advised to go home and change dress, because what she was wearing was not consistent with the school's uniform policy. The student brought legal action asserting that her right to free exercise of religion in Article 9 had been unjustifiably infringed.

In the House of Lords, her claim was unanimously rejected. A majority found that the student's religious freedoms had not been infringed;⁵⁵ two judges (Lord Nicholls and Baroness Hale) concluded her freedoms had been infringed, but that such infringement was justified on the basis of the school's desire for harmony and collegiality within the school.⁵⁶ Although the decision leaves many issues resolved, at least some of the opinions suggest that the margin of appreciation granted to bodies to infringe religious freedoms may be similar in scope to the position reached by the European Court.

A student complaint was upheld in *The Queen on the Application of Watkins-Singh and the Governing Body of Aberdare Girls' High School and Rhondda Cynon Taf Unitary Authority*.⁵⁷ In this case, argued on the basis of indirect discrimination on the ground of race rather than the European Convention on Human Rights, a student complained about a school decision to refuse her permission to wear the Kara, a plain steel bangle, which was very significant to the student as a Sikh. The student stated that she wore the Kara out of a sense of duty, as well as an expression of her race and culture. An expert testified as to the

of the decision appears in Christopher Bebelieu 'The Headscarf as a Symbolic Enemy of the European Court of Human Rights' *Democratic Jurisprudence: Viewing Islam Through a European Legal Prism in Light of the Sahin Judgment* (2006) 12 *Columbia Journal of European Law* 573.

⁵³ Benjamin Bleiberg 'Unveiling the Real Issue: Evaluating the European Court of Human Rights' Decision to Enforce the Turkish Headscarf Ban in *Sahin v Turkey*' (2006) 91 *Cornell Law Review* 129, 163.

⁵⁴ [2006] UKHL 15.

⁵⁵ This was largely on the basis that the complainant could choose to attend other schools which would accept her wearing the jilbab to school; the court concluded that the complainant had 'sought a confrontation' on the matter, and that Article 9 'does not require that one should be allowed to manifest one's religion at any time and place of one's own choosing. Common civility also has a place in the religious life' (Lord Hoffmann, [50]); to like effect Lord Bingham [25] and Lord Scott [87-89].

⁵⁶ See also *R and Headteachers of Y School and the Governors of Y School* [2006] EWHC 298.

⁵⁷ [2008] EWHC 1865 (Admin).

importance of the bangle, reminding Sikhs of God's infinity and that followers were handcuffed to God. The school argued that its uniform policy prohibited the wearing of jewellery, and that it would be discriminatory to allow an exception to this particular student.

The Court found that the school had unlawfully discriminated against the student on the ground of race and religion. Due to its significance to the later discussion of the Australian position, the basis of this finding is worthy of extended consideration.

The relevant Acts under consideration in this case were the *Race Relations Act 1976* (UK) and *Equality Act 2006* (UK). Section 1 of the Race Relations Act, as amended, set out the key definition of racial discrimination in terms of direct⁵⁸ and indirect discrimination.⁵⁹ Section 45(3) of the latter Act also deals with indirect discrimination, defined to include applying a provision or practice equally to those not of the complainant's religion or belief, such as to place those of the complainant's religion or belief at a disadvantage compared to some or all others (where there is no material difference in relevant circumstances), placing the complainant at a disadvantage compared with those not of their religion or belief, where there is no material difference in circumstances, and where the person committing the alleged discrimination cannot justify their actions by reference to matters other than the complainant's religion or belief

In this case, the court found that the Sikhs comprised both a racial group⁶⁰ and a religion. The relevant practice was the school's uniform policy and how it was implemented, specifically a ban on any jewellery apart from a pair of stud earrings, unless it was a compulsory requirement of the student's religion or culture. Comparing how the practice affected the complainant with those whose religious or racial beliefs were not compromised by the practice. In this context, the policy caused a particular disadvantage or detriment to the complainant, given the exceptional importance she (genuinely) placed on the wearing of the Kara. The school could not justify its policy. The court found that comparisons with

⁵⁸ Section 1(1)(a) includes within the definition of discrimination treating someone less favourably than another on racial grounds.

⁵⁹ Section 1(1)(b) includes within the definition of discrimination applying a requirement or condition to those not of the same racial group (group defined by reference to colour, race, nationality or ethnic or national origin s3(1)) as the other, but where the proportion of the persons of the same racial group as the complainant who can comply with the requirement is considerably less than the proportion of those not of that racial group who can comply, and which is not shown to be justifiable irrespective of the colour, race, nationality or ethnic or national origins of the person to whom it is applied, and as a result the complainant suffers detriment. It also includes cases where a person applies to the complainant a provision, criterion or practice which is applicable equally to persons not of that race, ethnic or national origin, but which puts those of the race, ethnic or national origin of the complainant at a particular disadvantage when compared with others, and which is not a proportional means of achieving a legitimate aim (s1(1A), in the contexts referred to in (1B)). Section 1(1A) was introduced in order to give effect to the European Directive, Council Directive 2000/43/EC (29 June 2000) implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

⁶⁰ This concept was discussed in detail in *Mandla v Dowell Lee* [1983] 2 AC 548 where Lord Fraser discussed essential requirements of a racial or ethnic group to include (1) a long shared history of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. Other relevant factors included a common geographical origin, or descent from a small number of common ancestors, a common language, a common literature peculiar to the group, a common religion differing from neighbouring groups, and being a minority or an oppressed group within a larger community (developed from *King-Ansell v Police* [1979] 2 NZLR)

cases in which bans on dress such as the niqab and jibab were not valid, because these forms of dress were much more visible, such that arguments about uniformity, coherence, communal spirit and whether students ‘stood out’ from others were not valid in the current context. As a result, the court concluded the defendants had indirectly discriminated against the complainant on the ground of race contrary to the RRA, and on the ground of religion under the *Equality Act 2006* (UK).

The United Kingdom Supreme Court considered these issues recently in *R v Governing Body of JFS and the Admissions Appeal Panel of JFS*.⁶¹ There a school policy gave preference in admission to those whose status as Jews was recognised by the Office of the Chief Rabbi (OCR). M was refused admission because he was not recognised as such by the OCR. His father was recognised as such but his mother was not. She was born in Italy and she had undergone a Jewish conversion process, but it was not recognised as effective by the OCR. As a result of this non-recognition, M was not recognised by the school as being Jewish. M argued that his exclusion from the school on this basis contravened s1 of the *Race Relations Act 1976* (UK). The section prohibited both direct discrimination⁶² and indirect discrimination.⁶³ A majority of the Court found the actions of the school to be discriminatory contrary to the *Race Relations Act 1976* (UK). The majority was satisfied that the discrimination here was due to the person’s racial or ethnic origins, such that it contravened the Act;⁶⁴ for the majority it was artificial to distinguish here between ethnic status (to which the RRA applied) and religious status (to which the RRA did not apply). Some majority judgments considered the extent to which the motive or intention behind the behaviour argued to be discriminatory was relevant in considering whether there had been a breach of the Act. Members of the majority believed that such a factor was not relevant in assessing the validity of the challenged behaviour against the RRA.⁶⁵ One of these judges, Lord Mance, considered the *International Convention on the Elimination of all Kinds of Racial Discrimination* to fortify this conclusion, referring to the Article 1(1) definition of racial discrimination as including race, national or ethnic origin discrimination committed with the purpose or effect of impairing the exercise of human rights.⁶⁶ Directive 2000/43 EC, upon which the relevant definition of indirect discrimination in the (amended) RRA was based, was intended to give effect to this Convention. The inclusion of the words ‘or effect’ assisted in Lord Mance’s conclusion that motivation was not relevant.

⁶¹ [2009] UKSC 15.

⁶² Defined as discrimination against a person on racial grounds (race, nationality, ethnic or national origins. The Act bans such behaviour absolutely, with no justification permitted.

⁶³ Defined as

⁶⁴ Lord Phillips [51], Lady Hale [71], Lord Mance [92], Lord Kerr [123], Lord Clarke [129]; the dissenters found that the applicant had been discriminated against on religious rather than ethnic grounds, such that there was no breach of the RRA: Lord Hope [204], Lord Rodger [228], Lord Brown [242] and Lord Walker [249].

⁶⁵ Lord Phillips [20], Lady Hale [57], and Lord Mance [81]. Other judges were more equivocal - Lord Kerr [113] stated that a benign motive was not a defence, though he conceded at 114 that some cases had found that consideration of the reasons for the less favourable treatment may be appropriate, distinguishing this from the ground/s of the discrimination, and Lord Clarke, who at [132] stated that the stand of mind of the school authorities was irrelevant in assessing validity under the RRA, but then argued at [145] that in some cases it may be relevant at a preliminary stage (as did Lord Walker [192]).

⁶⁶ Para 81.

As a result, there is some clear overlap between the provisions of the European Convention on Human Rights through the *Human Rights Act 1998* (UK), and legislation such as the *Race Relations Act 1976* (UK) and *Equality Act 2006* (UK). Further muddying the waters is that some of the provisions of the domestic legislation are as a result of European Commission directives.⁶⁷ Article 9(2) of the Convention provides that the right to freedom of religion is not absolute and is subject to limits provided by (domestic) law; however it requires that these limits be necessary in a democratic society in the interests of public safety, public order, health, morals and the rights of others. Extensive exceptions to racial discrimination laws appear in the *Race Relations Act 1976* (UK)⁶⁸ and *Equality Act 2006* (UK). Whether these extensive exceptions meet the ‘margin of appreciation’ allowed by the Convention in this area is a contentious matter.

While both the ECHR and discrimination legislation allow discrimination to be justified, it has been claimed that, contrary to the impression gained by comparing the results in *Denbigh* and *Watkins-Singh*, as a general rule courts applying discrimination law principles have been very willing to accept justifications for what would otherwise be indirect discrimination, whereas in the human rights context, the justification requirement has been imposed more strictly.⁶⁹ In support of such a claim, the extent of exceptions in the *Race Relations Act 1976* (UK) to the general principles of non-discrimination has been commented upon above, in contrast to the apparently limited scope of departures from the principle of freedom of religion and exercise thereof contemplated in the Convention and *Human Rights Act 1998* (UK). In some of the cases, at first confined to employment but subsequently applied in the education context, a view has been taken that a practice may not be discriminatory if the complainant has the opportunity to work (or study) elsewhere.⁷⁰ This theory is highly questionable in the writer’s view based on consideration of the text of both the legislation and convention.⁷¹

⁶⁷ For example, s1(1A) of the *Race Relations Act 1976* (UK) is based on European Directive 2000/43/EC.

⁶⁸ Most importantly, s4A and s5 allow for exceptions to the non-discrimination requirements of the Act where it is justified by genuine occupational requirements (as does cl 7 of the *Employment Equality (Religion or Belief) Regulations 2003* (SI 2003/1660); see also s19C, s19D, s19F, s25 and s35-39 of the Act.

⁶⁹ Ann Blair ‘Case Commentary: *R (SB) v Headteacher and Governors of Denbigh High School – Human Rights and Religious Dress in Schools*’ (2005) 17(3) *Child and Family Law Quarterly* 8-9. (Note to reviewer – I considered making further investigation on this point but I don’t know that it is necessary for the purposes of my article which is to focus on the Australian jurisdiction with appropriate guidance from UK/EU – I am willing to do more on this if the reviewer believes it to be necessary). The point has been made at a higher level of abstraction by the House of Lords, where it was pointed out that the standard of review of legislation pursuant to the Convention was more rigorous than that applied when general principles of judicial review are applicable: *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, paras 25-28 (Lord Steyn); see also *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138.

⁷⁰ *Ahmad v United Kingdom* (1981) 4 EHRR 126; *Stedman v United Kingdom* (Application No 29107/95)(1997) 23 EHRR CD 168. This also formed the basis of the decision of several of the judges in *Denbigh*.

⁷¹ In *Denbigh*, both Baroness Hale and Lord Nicholls were of the view that there had been an interference with the complainant’s religious freedom, so given that there were clearly other schools at which the complainant could have enrolled, it seems that these judges do not require the non-existence of alternative places of employment or education etc as a condition of finding an interference with the religion right, as the other judges in *Denbigh* do. The House of Lords in *Williamson v Secretary of State for Education and Employment* [2005] UKHL 15, para 39 questioned whether alternative means of accommodating the exercise of religious beliefs was necessary, as has the Court of Appeal: *Copsey v WWB Devon Clays Ltd* [2005] EWCA Civ 932, paras 31-39; Mummery LJ in *Denbigh* [2005] EWCA Civ 199, para 84. It might be argued that the question of the

The concept of ‘proportionality’ appears in both the *Race Relations Act 1976* (UK)⁷² and *Equality Act 2010* (UK)⁷³ in the context that discrimination that is otherwise unacceptable may be justified if it is a proportional means of achieving a legitimate end; this concept is foreign to the ECHR, which provides for strictly limited departures from the rights recognised in Article 9. Further, both the *Race Relations Act 1976* (UK) and *Equality Act 2010* (UK) require that the disadvantage suffered by the complainant be ‘particular’, a concept again foreign to Article 9.⁷⁴ Another difference is that the discrimination legislation embraces the distinction between direct and indirect discrimination, allowing justification for the latter only; this distinction does not appear in the ECHR.

Some (other) important differences should be borne in mind in the current context. While Islam is clearly a religion, such that its followers would have a right to bring a complaint under the *Equality Act 2006* (UK) and *Equality Act 2010* (UK), it would be more difficult to bring a complaint under the *Race Relations Act*, given its definition of discrimination relates to concepts such as ‘race’ and ‘ethnic or national origin’. Given the standard definition of these concepts in *Mandla*,⁷⁵ and the fact that Islam can be described as a ‘heterogenous faith’ without some of the elements of the *Mandla* definition, unless the definition were adapted it is arguable whether a follower of the Islamic faith could meet this threshold requirement.⁷⁶ The extension in s1(1A), arguably slightly broader than *Mandla*, may not assist in the current context. If the discrimination were in the context of employment, regulations adopted in 2003 may be of assistance in this case given they focus on discrimination on the ground of ‘religion or belief’.⁷⁷

opportunity of the complainant to work (or study) elsewhere is relevant to the question of the extent of particular disadvantage they would suffer from the discrimination, in that if there were easily available alternative options, the discrimination’s impact might be lessened. However, in terms of the definition of discrimination in the *Race Relations Act*, s1(1) requires only detriment to the complainant (without specifying how much), while s1(1A) requires ‘particular disadvantage’ (as does cl 4 of the *Employment Equality (Religion or Belief) Regulations 2003* (SI 2003/1660)). The *Equality Act* refers to ‘disadvantage’ without quantifying the extent.

⁷² S1(1A).

⁷³ S19; as does s45 of the *Equality Act 2006* (UK).

⁷⁴ S1(1A) and s19 respectively.

⁷⁵ I must concede here that some have noted the slightly different meaning of the words in s1(1A) of the *Race Relations Act 1976* (UK) (‘race or ethnic or national origins’), compared with the wording in s1 (racial grounds, racial group). Some have acknowledged that the provisions in s1(1A) connote a broader concept than the *Mandla* definition of race to which reference is made later in the paper: *R v Governing Body of JHS and Anor* [2009] UKSC 15, Lord Phillips [33], Lord Mance [94]. This difference may not be material in the context of discussing the Islamic faith.

⁷⁶ The possibility exists, as Ann Blair notes, that a measure affecting Muslims could be challenged if it disproportionately affected people of Asian origin, given high Muslim populations in Indonesia and Malaysia: ‘Case Commentary – *R (SB) v Headteacher and Governors of Denbigh High School – Human Rights and Religious Dress in Schools*’ (2005) 17(3) *Child and Family Law Quarterly* 7. Anne Hewitt agrees that a Muslim would in most cases not be able to meet the definition of ‘race’ or ‘ethnic group’: ‘Muslims do not satisfy the test as a racial group because they are drawn from too diverse a range of backgrounds’: ‘It’s Not Because You Wear Hijab, It’s Because You’re Muslim – Inconsistencies in South Australia’s Discrimination Laws’ (2007) 7(1) *Queensland University of Technology Law Journal* 57, 67.

⁷⁷ *Employment Equality (Religion or Belief) Regulations 2003* (SI 2003/1660); in one example a predominantly school was held to be justified in requiring that a Muslim teacher remove her veil while teaching given that it was deemed essential to teaching that the students be able to see the face of their teacher; as a result a claim of indirect discrimination was rejected; similarly there was no direct discrimination because any teacher who

Another key difference between the discrimination and human rights approaches is that while the application of the European Convention in the United Kingdom is limited to public authorities,⁷⁸ the provisions of the *Race Relations Act 1976 (UK)*⁷⁹ and *Equality Act 2006 (UK)* are not so limited. *North America*

The Supreme Court has alluded at some length to the history creating the context in which religious freedoms were protected by the First Amendment:

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government-favoured churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy ... The practices of the old world were transplanted to and began to thrive in the soil of the new America. The very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorised these individuals and companies to erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.⁸⁰

In its interpretation of the free exercise of religion and anti-establishment provisions of the First Amendment, the Supreme Court has moved from a requirement that a law affecting religious practice be justified by a ‘compelling governmental interest’⁸¹ to a more modest requirement that the law not be directed at specific religious practices, or ban the performance of acts solely because of their religious motivation.⁸² This more recent approach validates laws which incidentally affect a religious practice, but which are of general

wanted to cover their face would be treated in the same manner as the applicant: *Azmi v Kirklees Metropolitan Council*, 6 October 2006, unreported Employment Tribunal decision.

⁷⁸ *Human Rights Act 1998 (UK)* s6.

⁷⁹ This Act has a broad context, applicable to employment, employment agencies, education providers, partnerships, unions, to planning authorities, public authorities, and in relation to the provision of goods, facilities, services and premises, whether privately or publicly provided.

⁸⁰ *Everson v Board of Education* (1947) 330 US 1, 8-9; Justice Jackson noted the purpose of the First Amendment religious freedom was ‘broader than separating church and state ... It was to create a complete and permanent separation of the spheres of religious activity and civil authority’ (29) ... for Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general (34).

⁸¹ *Sherbert v Verner* 374 US 398 (1963). In *Wisconsin v Yoder* 406 US 205 (1972) Chief Justice Burger wrote for the court that ‘only those interests of the highest order and those not otherwise served can overbalance legitimate aims to the free exercise of religion’ (215). The Court has not been impressed with laws that single out particular religions for special treatment: *Church of Lukumi Babalu Aye v City of Hialeah* 508 US 520 (1993).

⁸² So, for instance, a law prohibiting public school teachers from wearing religious emblems or insignia in the workplace was invalid, because the law singled out clothing with religious connotations as opposed to jewellery or clothing more generally: *Nichol v ARIN* 268 F. Supp 2d 536 (2003).

application and otherwise constitutionally valid.⁸³ The United States Supreme Court considered a religious ban in *Goldberg v Weinberger, Secretary of Defense*.⁸⁴ At issue here was an air force regulation prohibiting employees from wearing headgear while indoors, as part of the uniform policy. An employee who was serving as a psychologist on an air force base was an Orthodox Jew and ordained rabbi, and wore a skullcap (yarmulke) while on duty indoors, and under his service cap whilst outdoors. He was informed by his commander that he was in breach of the air force uniform regulation, and that if he persisted, he could be the subject of a court martial. The employee claimed that the regulation was an infringement of his First Amendment right to free exercise of religion.

A majority of the Supreme Court (Burger CJ, White, Powell, Stevens and Rehnquist, Brennan Blackmun O'Connor and Marshall JJ dissenting) upheld the validity of the regulation. The majority suggested that the court should be more deferential in the context of military provisions than in respect of provisions with civilian application. The majority claimed that great deference should be given to the professional judgment of military authorities concerning the relative importance of a particular military interest. The military had a legitimate interest in ensuring 'instinctive obedience, unity, commitment and esprit de corps'.⁸⁵ The regulation was not aimed at a particular religion.⁸⁶ The dissentients said the regulation set up an absolute bar to fulfilment of a religious duty;⁸⁷ dismissing the contention that the wearing of the skullcap would affect discipline within the forces as 'surpass(ing) belief'.⁸⁸ It would not affect the government's military mission in the slightest.

Courts in the United States have been prepared to uphold legislation prohibiting public school teachers from wearing religious clothing in the classroom.⁸⁹ In this context, courts have had to grapple with possible inconsistencies that could arise between the anti-establishment aspect of the First Amendment in relation to religion, and its free exercise.⁹⁰ So a decision to suspend a Sikh teacher for wearing white dress and a turban to school was upheld;⁹¹ as was a decision to dismiss a Muslim teacher for wearing a headscarf in the classroom.⁹²

⁸³ *Employment Division, Department of Human Resources of Oregon et al v Smith et al* 494 US 872 (1990); see also the Religious Freedom Restoration Act 42 USCA 2000bb-1 (1993) in response to the Smith decision, and the Supreme Court's rejoinder in *City of Boerne v Flores* 521 US 527 (1997); Vincent Bonventre 'A Second-Class Constitutional Right? Free Exercise and the Current State of Religious Freedom in the United States' (2007) 70 *Albany Law Review* 1399; Steven Green 'Religious Liberty as a Positive and Negative Right' (2007) 70 *Albany Law Review* 1453.

⁸⁴ 475 US 503 (1986).

⁸⁵ 507.

⁸⁶ 512.

⁸⁷ 513 (Brennan and Marshall JJ).

⁸⁸ 516 (Brennan and Marshall JJ).

⁸⁹ This legislation exists in Oregon, Pennsylvania and Nebraska. Apparently these kinds of laws, now mostly repealed, were originally designed to prevent Catholic nuns and priests from teaching in public schools, reflecting anti-Catholic sentiment, although they were typically facially neutral in terms of religion: Stefanie Walterick 'The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World' (2006) 20 *Temple International and Comparative Law Journal* 251, 264.

⁹⁰ Wojciech Sadurski 'Neutrality of Law Towards Religion' (1990) 12 *Sydney Law Review* 420, 427-447.

⁹¹ *Cooper v Eugene School District* 723 P. 2d 298 (Or. 1986).

⁹² *United States v Board of Education for the School District of Philadelphia* 911 F. 2d 882, 893-894 (3d Cir, 1990); however see *Nichol v ARIN Intermediate Unit* 28, 268 F. Supp 2d 536 (W.D Pa 2003), where an educational provider's dress code banning teachers from wearing Christian crosses or Stars of David was

Some of these cases have been argued on the basis of alleged discrimination on the basis of religion contrary to Title VII of the Civil Rights Act 1964.⁹³ For instance, in *Webb v City of Philadelphia*, the United States District Court found that the defendant was justified in insisting the plaintiff not wear hijab to work; this was due to the need for uniformity, cohesiveness, co-operation and esprits de corps among police. Disallowing the hijab here ensured religious neutrality among police and avoided divisiveness.⁹⁴

The most directly relevant case for present purposes in Canada is *Multani v Commission Scolaire Marguerite-Bourgeoys*.⁹⁵ G was a student of the Sikh faith enrolled in a Canadian school. He believed that his religion required him to wear a kirpan at all times. This is a religious object resembling a dagger and required to be made of metal. The school's governing board claimed that wearing of the kirpan violated the school's code of conduct, which prohibited the carrying of weapons. It cited concerns with safety. It was suggested that G could wear a kirpan, as long as it was made of a non-metallic substance. G refused this; he subsequently brought legal action alleging a breach of the freedom of religion provisions of the *Canadian Charter of Rights and Freedoms*.⁹⁶

All members of the Supreme Court of Canada overturned a finding that the interference with religious freedom was justified by s1 of the Charter.

The court was satisfied there was no doubt that the wearing of the kirpan had religious significance to G, and that it was a genuinely held belief. G also believed that the wearing of a kirpan made of wood or plastic would not meet his religious obligations. The risk of G using his kirpan as a weapon was extremely low, and there had been no history of any violent incidents involving kirpans in Canadian schools. While the kirpan could in theory be used as a weapon, it was above all a religious symbol; the word deriving from 'kirpa', meaning mercy, kindness and honour. Although the school's concern with safety was laudable, they were required to provide a reasonable level of safety, not guarantee absolute safety. A ban on metallic kirpans was not a proportional response to the public interest in providing a safe environment in schools given the lack of any history of violence involving them, particularly when Canada had strongly embraced multicultural values.⁹⁷

deemed to violate the free exercise clause). The United States Supreme Court has not yet decided whether the teacher dress statutes in these states is consistent with the First Amendment: see for further discussion Stefanie Walterick 'The Prohibition of Muslim Headscarves From French Public Schools and Controversies Surrounding the Hijab in the Western World' (2006) 20 *Temple International and Comparative Law Journal* 251, 264-267.

⁹³ 42 USC 2000e-16 (2007).

⁹⁴ *Webb v City of Philadelphia* 2007 WL 1866763, 1 (E.D Pa, June 27, 2007).

⁹⁵ [2006] 1 S.C.R 256.

⁹⁶ S2(a) of the *Charter*, as well as s3 of the Quebec *Charter of Human Rights and Freedoms*. In both cases, as is the case with most human rights provisions, the rights expressed are not absolute – in the case of Canada, the allowance is for 'reasonable limits as prescribed by law as can be demonstrably justified in a free and democratic society' (s1 of the *Charter*). Examples where limits on religious freedom were justified include *Ross v New Brunswick School District No 15* [1996] 1 S.C.R 825 and *B (R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 S.C.R. 315; cf *Amselem v Syndicat Northcrest* [2004] 2 S.C.R 551.

⁹⁷ This value was also recognised in an Australian religious discrimination case: *Catch the Fire Ministries v Islamic Council of Victoria* (2006) 15 VR 207, 241 (Nettle JA).

Summarising the overseas jurisprudence, although human rights legislation in the nations surveyed provide, as does the Australian Constitution, for religious freedom, the freedom is not absolute. The Courts have shown substantial deference to the decision of legislators that curbs on religious expression are necessary to further interests such as equality, assimilation, esprits de corps, women's rights and public safety. However, in some cases courts have upheld religious freedoms as against attempts by parliaments to take away such rights, particularly where the legislation or measure is seen as disproportionate to a legitimate objective, and where alternative means, less invasive of the right of religious liberty, are available to secure the legitimate objective. Some of these cases have been argued on the basis of discrimination principles, and key differences between the ECHR rights and rights under discrimination law have been noted. This is considered highly relevant to the position of Australia, to which our attention will now turn, given the existence of both a right to religion in the Constitution, and specific discrimination provisions.

Australia

Rights associated with religion are referred to both in the *Constitution*, and in discrimination legislation.⁹⁸ I intend to focus primarily on the constitutional provisions at this stage given that my main question in this paper is the extent to which the Commonwealth could legislate to ban Islamic clothing and the Commonwealth would enjoy at least a presumption that State discrimination laws would not apply to it.⁹⁹ The *Racial Discrimination Act 1975* (Cth) does apply to the Commonwealth,¹⁰⁰ and s9 prima facie prohibits distinctions based on race, colour, descent or national or ethnic origin which impairs the exercise of human rights, and s10 provides for equality before the law, denying the validity of laws which mean that a person of a particular race, nationality or ethnic origin doesn't enjoy rights enjoyed by others or another race. However, there is debate as to the extent to which these provisions could apply to discrimination based on religion rather than race, and there is the possibility that the Commonwealth could amend the provisions of the Act since there is nothing enshrining its contents. Arguments about discrimination legislation may become more important if the validity of a State law banning religious dress were considered, a matter considered briefly below.

⁹⁸ For example, in some states the legislation makes discrimination based on religion or religious belief unlawful: *Anti-Discrimination Act 1991* (Qld) s7(i); *Anti-Discrimination Act 1998* (Tas) s16(o); *Equal Opportunity Act 1995* (Vic) ss6(j); *Equal Opportunity Act 1994* (WA) Pt IV; *Discrimination Act 1994* (ACT) ss7(h); *Anti-Discrimination Act 1992* (NT) ss19(1)(m). Of indirect relevance are provisions outlawing discrimination on the basis of race: *Racial Discrimination Act 1975* (Cth) ss9; *Anti-Discrimination Act 1977* (NSW) Pt 2; *Anti-Discrimination Act 1991* (Qld) s7(g); *Equal Opportunity Act 1984* (SA) Pt 4; *Anti-Discrimination Act 1998* (Tas) ss16(a), *Equal Opportunity Act 1995* (Vic) s6(i); *Equal Opportunity Act 1994* (WA) Pt III; *Discrimination Act 1994* (ACT) s7(h); *Anti-Discrimination Act 1992* (NT) s19(1)(a). See for further discussion of these statutes Garth Blake 'God, Caesar and Human Rights: Freedom of Religion in Australia in the 21st Century' (2009) 31 *Australian Bar Review* 279; Reid Mortensen 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208; religious vilification is also proscribed in some jurisdictions: Patrick Parkinson 'Religious Vilification, Anti-Discrimination Laws and Religious Minorities in Australia: The Freedom to be Different' (2007) 81 *Australian Law Journal* 954.

⁹⁹ *Jacobson v Rogers* (1995) 182 CLR 572.

¹⁰⁰ S6.

The relevant section in the Australian *Constitution* is s116, prohibiting the Commonwealth from passing any law establishing a religion and a law for prohibiting the free exercise of any religion.¹⁰¹ Very few cases alleging a breach of s116 have been brought, and in no case has a law been struck down as being offensive to s116. The section is in a part of the Constitution entitled 'States', although the section does not expressly refer to State laws.¹⁰² This is because in its original form, it was a law directed at states, prohibiting them from passing laws prohibiting the free exercise of any religion. However, after various re-drafts, where reference to Commonwealth was added (partly, it is said, due to an 'incredible'¹⁰³ legal analysis of an American case by Higgins), and extra sub-provisions to the section added, the reference to State law was eventually dropped, and the section we now know as s116 was agreed.

The leading case is *Adelaide Company of Jehovah's Witnesses Incorporated v Commonwealth*.¹⁰⁴ There the Federal Government seized property owned by the plaintiffs pursuant to powers contained in the National Security (Subversive Associations) Regulations. The plaintiffs were a group declared by the Governor General to be prejudicial to the war effort. It was said that followers of the Jehovah's Witness faith believed the British Empire (including the Australian Government) to be organs of Satan; they declined to take an oath of allegiance to the King and that God's law prevailed over laws passed by Parliament. The Adelaide Company challenged the proceedings on the basis that the regulations were not supported by the defence power, and they were inconsistent with s116, in particular the free exercise of religion aspect.

The Court decided the matter on the defence power argument and invalidated the law; the judges considered (in dicta) the reach of s116. In the leading judgment, Latham CJ pointed out that s116 protected the 'exercise' of religion; this included acts done in pursuance of religious beliefs as part of religion.¹⁰⁵ He noted the strong similarity between s116 and the relevant provisions of the United States *Constitution* to which reference was made above, concluding there was 'full legal justification for adopting in Australia an interpretation of s116 which had, before the enactment of the Commonwealth Constitution, already been given to similar words in the United States'.¹⁰⁶ He concluded, in terms with which the others

¹⁰¹ The section also prevents the Commonwealth from passing a law imposing any religious observance, or imposing a religious test as a qualification for office or public trust under the Commonwealth, but these aspects of s116 have never been litigated. Some tension between clauses in s116 are possible, in particular the anti-establishment and free exercise aspects: Wojciech Sadurski 'Neutrality of Law Towards Religion' (1990) 12 *Sydney Law Review* 420, 427; Joshua Puls 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 139, 159-160.

¹⁰² La Nauze puts this down to the drafting committee's 'exhaustion': *The Making of the Australian Constitution* (1972) 228-229.

¹⁰³ Clifford Pannam 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41, 51-56.

¹⁰⁴ (1943) 67 CLR 116.

¹⁰⁵ 124.

¹⁰⁶ 131; Starke J also observed that the Australian provision was substantially the same as the United States provision, and referred to the American case law (155); speaking of the similarity, Pannam spoke of the 'fairly blatant piece of transcription' involved in the drafting of s116: Clifford Pannam 'Travelling Section 116 with a United States Road Map' (1963) 4 *Melbourne University Law Review* 41, 41. On the other hand, in at least two respects the interpretation of the two provisions has diverged: in relation to government funding for certain

agreed,¹⁰⁷ that the religious freedom protected by s116 was not absolute, and would be subject, at least, to the validity of laws passed designed to ensure the maintenance of civil government.¹⁰⁸ He inferred a balancing exercise was necessary in relation to laws challenged under the provision, where the end sought to be achieved by the law invasive of religious freedom would be weighed against the extent to which religious freedom had been infringed; in other words, whether the infringement was ‘undue’.¹⁰⁹

In its most recent detailed pronouncement on s116, members of the High Court have concluded that in order for a law to be offensive to the section, it must have THE purpose of achieving an object which s116 forbids. Presumably, a law without this purpose, but which may have this effect, would not be offensive to s116, according to this view.¹¹⁰ This view, which is presumably¹¹¹ based on the word ‘for’ in the section,¹¹² has the effect of limiting the impact of the section and its ability to protect religious freedoms.¹¹³

denominational schools, this was invalidated as a breach of the First Amendment anti-establishment clause in *Everson v Board of Education* 330 US 1, 15 (1947)(although see now *Zelman v Simmons-Harris* 536 US 639 (2002)) but upheld by the High Court of Australia despite a s116 challenge in *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559; further the United States Supreme Court has interpreted the anti-establishment clause broadly to invalidate laws which advance or benefit religion (eg *McCreary County v ACLU* 545 US 844 (2005)) while the High Court of Australia has interpreted it strictly to forbid only the actual establishment of a religion (*Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559); see for further discussion Wojciech Sadurski ‘Neutrality of Law Towards Religion’ (1990) 12 *Sydney Law Review* 420. The question of the extent to which the American provision was similar to, and thus should guide interpretation of, the Australian provision divided the High Court of Australia in *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, with a majority emphasising the literal differences (laws ‘for’ in s116, compared with laws ‘respecting’ in the First Amendment: Barwick CJ 579, Gibbs J 598, Wilson J 653; cf Murphy J 622 (dissenting).

¹⁰⁷ Rich J (149)

¹⁰⁸ 126; similarly Rich J (149) and Starke J (155), who referred to laws ‘reasonably necessary for the protection of the community and in the interests of social order’ being valid, despite interference with religious freedoms; McTiernan J referred to laws so the ‘Commonwealth could defend itself against invasion’ (157); and Williams J spoke of laws necessary to ensure the nation was safe and its existence preserved (160). Although these comments were made in dicta, they are narrower than the margin of appreciation exception that the European Court has applied in its decisions in relation to laws that restrict religious freedoms, but which arguably do so for justified reasons. It may be that if the High Court were again asked to consider a law in terms of s116, it would cast the ‘margin of appreciation’ more broadly than the dicta comments in *Jehovah’s Witness* suggest.¹⁰⁹ 128.

¹¹⁰ Gaudron J claimed in *Kruger v Commonwealth* (1997) 190 CLR 1, 132 that purpose was the ‘criterion and sole criterion’ selected by s116 for invalidity. Toohey J was slightly more equivocal in *Kruger v Commonwealth* (1997) 190 CLR 1, 86, concluding that the purpose should be taken into account, and referring to whether ‘a purpose’ was to prohibit the free exercise of religion, rather than this being the predominant or only purpose, to be invalid under s116; see also Latham CJ in *Adelaide Company of Jehovah’s Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 132 who argued that purpose was a factor to be taken into account (132). On other hand, in *Attorney-General (Vic) ex rel Black v Commonwealth* (1981) 146 CLR 559, two of the judges also suggested that the effect of the law may be relevant in assessing validity under s116 – Gibbs J ‘purpose or effect’ (604) and Mason J ‘purpose or result’ (615); see also comments considering the ‘effect’ of legislation in relation to s116 in *Minister for Immigration and Ethnic Affairs v Lebanese Moslem Association and Others* (1987) 17 FCR 373, 374 (Fox J) and 388 (Jackson J), and *Halliday v Commonwealth of Australia* [2000] FCA 950, [21](Sundberg J). For criticism of the High Court’s approach here see Stephen McLeish ‘Making Sense of Religion and the Constitution: A Fresh Start for Section 116’ (1992) 18 *Monash University Law Review* 207, 233.

¹¹¹ No reason is given by Brennan CJ in *Kruger v Commonwealth* (1997) 190 CLR 1; the assertion that ‘to attract invalidity under s116, a law must have the purpose of achieving an object which s116 forbids’ appears without reference to prior authority or further elaboration of rationale.

Given the relative dearth of authority concerning s116 in Australia, fundamental issues such as the purpose of the section have remained relatively unresolved. It is possible to read the section, for example, as a strong assertion (re-assertion) of the separation of church from state, in the light of past experiences, particularly in other jurisdictions, where some governments acted to impose particular religious views and/or suppress minority religious views. Murphy J (dissenting) alluded to this history briefly in *Black*.¹¹⁴

An example of this view is contained in a letter from Thomas Jefferson to a group of Danbury Baptists:

Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of government reach actions only, and not opinions – I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof’, thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.¹¹⁵

¹¹² Toohey J justified it on this basis in *Kruger* (86), citing the judgment of Barwick CJ in *Black* for the proposition, as did Gaudron J (132-133); Gummow J took the same view, citing the judgment of Gibbs J in *Black* (160). It was not necessary for Dawson and McHugh JJ to consider this issue, because of their view that s116 did not apply to laws passed pursuant to s122. However, the view that the word ‘for’ means that the law has a particular purpose has been challenged, with Dixon J in *Lamshed v Lake* (1958) 99 CLR 132, 141 concluding that ‘for’ (in the context of s122) meant ‘with respect to’; see also Murphy J in *Attorney-General (Vic) ex rel Black* (1981) 146 CLR 559, 622.

¹¹³ There are links here with the American jurisprudence, most notably *Employment Division, Department of Human Resources of Oregon et al v Smith et al* 494 US 872 (1990), where the United States Supreme Court moved from a requirement that a law affecting religious practice be justified by a compelling governmental interest to a more modest requirement that the law not be directed at specific religious practices, validating laws that may incidentally affect religious freedoms in pursuance of another objective.

¹¹⁴ The purpose of the United States establishment clause was clearly to prevent the recognition of and assistance to religion which plagued European countries over many centuries. The religious wars of ancient times were repeated after the Middle Ages and into modern times. In the United Kingdom the struggle between the contending Catholic and Protestant factions, with the emergence of Presbyterians, Methodists, Quakers, Lollards and many other religious groups, was a bitter illustration of the attempts of religious factions to get the assistance of the state in propagating their views and if possible suppressing their rivals’: (1981) 146 CLR 559, 625. The colonies that would unite to become Australia did not experience this kind of angst based on religious differences and there was not the experience of a government-imposed religion or (formal) sanctions against minority religions, although Stephen J in *Black* comments that the creation of a state church nearly occurred in the years prior to federation (608). Mason J in the same case states that s116 reflected the ‘expression of a profound sentiment favouring religious equality in the Australian colonies’ (615). Pannam reflects on the fact that there has been little evidence of official religious intolerance or discrimination in Australia, and that s116 differs from its American counterpart in that it does not reflect a long struggle for religious freedom: Clifford Pannam ‘Travelling Section 116 With a US Road Map’ (1963) 4 *Melbourne University Law Review* 41, 50.

¹¹⁵ This passage was referred to with approval in the United States Supreme Court decision *Everson v Board of Education* (1947) 330 US 1; see also Chief Justice Burger in *Walz v New York Tax Commission* (1970) 397 US 664, 669: ‘we will not tolerate either governmentally established religion or governmental interference with religion’. In *Church of the New Faith v Commissioner of Payroll Tax (Vic)* (1983) 154 CLR 120, 130 Mason ACJ and Brennan J claimed that ‘freedom of religion, the paradigm freedom of conscience, is of the essence of a free society’.

It is also possible to read the section more modestly, as simply a clarification that, in respect of laws with respect to religion or religious observance, these are intended to be matters regulated by state governments rather than the new federal government.¹¹⁶

Would a Commonwealth or State Law Banning the Hijab or Burqa Be Constitutionally Valid?

(a) Commonwealth Law

Assuming that the Commonwealth did attempt to legislate a ban on religious dress including the hijab or burqa, at least in some contexts, would a constitutional challenge be successful? I am assuming for the purposes of this exercise that the Commonwealth law is otherwise valid, in particular that it is supported by a head of power.¹¹⁷

It is argued that such a law would infringe the free exercise of religion, and so prima facie be invalid pursuant to s116. This would be the first time a law had been struck down under the section. While there are different views of the meaning of wearing particular clothing such as the burqa, at least some link between its wearing and religion has been established. A law banning its wearing would appear prima facie to be an infringement of the free exercise of religion.

In terms of the Australian jurisprudence concerning interpretation of the section, frankly there is limited assistance available given the dearth of cases. As with its rights jurisprudence more generally, the High Court has tended to read express provisions in the Constitution conferring religious freedoms quite conservatively. In *Kruger* and *Black*, members of the Court claimed that in order to be invalid under s116, the law would have to have THE purpose of prohibiting the free exercise of religion. If this narrow interpretation were continued, it would be possible for the Commonwealth to argue that the purpose of the law is quite benign – as has happened in the cases cited earlier, for instance, that the law is necessary to promote civil ‘unity’ or to prevent the subjugation of women that some might argue is symbolised by the burqa, as has occurred in the European cases,¹¹⁸ and some of the American cases.¹¹⁹ If

¹¹⁶ This was apparently the view of at least Higgins in the Convention Debates: ‘the powers that the states individually have of making such laws as they like with regard to religion shall remain undisturbed and unbroken, and to make it clear that in framing this *Constitution*, there is no intention whatever to give to the Federal Parliament the power to interfere in these matters ... I simply want to leave things as they are. I do not want to interfere with any right the state has’: *Convention Debates*, vol 5, Melbourne 1898, 1769). However, originally the section applied to state laws, and the section appears in a part of the *Constitution* entitled ‘The States’. See also *Attorney-General (Vict) ex rel Black v Commonwealth* (1981) 146 CLR 559, 609: ‘(s116) cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state, from which may be distilled the detailed consequences of such separation ... by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation’ (Stephen J), and *Kruger v Commonwealth* (1997) 190 CLR 1, 125: ‘(s116) must be construed as no more than a limitation on Commonwealth legislative power’ (Gaudron J).

¹¹⁷ I do not propose to discuss the possible heads of power to support such legislation in any depth; however s51(29) and (6) are possible sources. More detailed consideration of this issue is considered beyond the scope of the article, which is focussed on the constitutionality of a ban in terms of s116.

¹¹⁸ Eg *Dahlab v Switzerland* (2001) European Court of Human Rights 1; *Sahin v Turkey* (Application No 44774/98), 10/11/2005.

¹¹⁹ Eg *Employment Division, Department of Human Resources of Oregon et al v Smith et al* 494 US 872 (1990); *Goldberg v Weinberger, Secretary of Defense* 475 US 503 (1986).

this argument were accepted, the law may be valid; its purpose might be held to be legitimate, and the effect on religious expression it might have would not, according to this view, be sufficient to invalidate the law.

Along similar lines, it is generally contended that human rights are not absolute, and the courts often engage in a balancing exercise, comparing the infringement of human rights the legislation might create with legitimate objectives to which it might be aimed. Latham CJ made this comment expressly in relation to religious freedom in the *Jehovah's Witness* case. In that case, the court said that religious freedoms would have to give way to laws deemed necessary to preserve the maintenance of a civil government. The cases referred to above from Europe and North America also reflect a balancing exercise, considering the supposed need for laws that might incidentally affect human rights, their proportionality to any claimed legitimate ends, the availability of less invasive measures to achieve the legitimate objective etc.

Considering the Australian precedents, it is considered that a law banning the wearing of the burqa would be difficult to justify on the kinds of grounds spoken of in the *Jehovah's Witness* case. It is difficult to see how a ban on religious dress would be necessary to preserve a civil government, which were the words chosen in that case (in dicta). Certainly, when the matter is eventually considered again, the High Court may adopt different words in expressing a test for when laws which infringe religious freedom may nevertheless be valid.

It is submitted that on the current state of the High Court jurisprudence on s116, a law banning religious dress such as a burqa would not be unconstitutional. This is because although such a provision would not be justified on the grounds stated in *Jehovah's Witness* ie necessary for the maintenance of a civil government, it would not meet the current test for invalidity set out in *Kruger* ie that only a law with the express purpose of infringing the rights mentioned in s116 is invalid due to that section. The Federal Government could state that its express purpose in enacting the law was to promote civil harmony or assimilation and, according to the High Court decision in *Kruger*, this would be a decisive factor in declaring the law to be valid. It is possible the Court could draw on the European and American precedents in support of this position, to find that the law was justified in terms of preserving equality and liberty among citizens, and avoiding supposes subjugation of women. However, as has been indicated, the research is difficult to reconcile with a bald assertion that the wearing of religious dress such as the burqa is necessarily a sign of subjugation of women or gender or religious inequality.

The author would prefer that the High Court took a broader view to the question of the rights protected by s116 of the Constitution than previous cases have provided. Specifically, it is suggested that the test in *Kruger* for invalidity pursuant to the section, that the law be passed with the purpose of restricting religious freedom, is too narrow. As interpreted by the High Court, this section has very little operation, in that the Commonwealth, by carefully drafting its legislation, can ensure that its law avoids invalidity under s116, even when the law clearly has the effect of restricting the rights implied in s116. This is of course not the only context in which the High Court has read 'rights' contained in the *Constitution* narrowly, with the

result that they have little if any scope and can be subverted by intelligent drafting. The High Court's jurisprudence on s80 of the Constitution is submitted to be another example of this approach, though it is beyond the scope of this article to explore that matter further, and there is a substantial body of literature already.¹²⁰ Rights provisions must not be read pedantically or narrowly, or in such a way as to make them easy for the parliamentary drafter to subvert. Nor should the courts blindly accept claims by parliament that limits on religious freedoms are justified on 'equality', 'assimilation', 'esprit de corps' or 'women's rights' grounds as has occurred in Europe and elsewhere, without a thorough investigation of the evidence.

As will be recalled, this issue divided the United Kingdom Supreme Court recently in *R v Governing Body of JFS*.¹²¹ There, in the context of considering a complaint under the *Race Relations Act 1976* (UK) (rather than religious freedom per se), several judges indicated either unreservedly,¹²² or with some reservations,¹²³ that the motive of the decision maker was not relevant in considering whether their behaviour constituted discrimination under that legislation. Further, as Lord Mance indicated in that case, the *International Convention on Elimination on all Kinds of Racial Discrimination* prohibits discrimination on the ground of race/national or ethnic origin if it has the purpose or effect of impairing the exercise of human rights. Whilst it is appreciated that this provision is not automatically relevant in the context of discussing protection of a right in a Constitution (or Convention) rather than discrimination legislation, there seems to be little logic in applying different principles in the discrimination context than to discrimination in the context of a constitutional freedom, where the text does not require it. Anti-discrimination rights are remedial in nature, and no pedantic or narrow view should be taken of them.

The approach of the Canadian court in *Multani* is also preferred here, asking whether the religious ban is proportional¹²⁴ to a legitimate objective, and taking into account the multicultural nature of modern society, as well as values of tolerance. In the author's view, such an approach would better balance the right to religious freedom with other fundamental rights in society, and ensure that the section would have some substantive effect, rather than the intent of the section being easily subverted, which the current interpretation allows. Such an approach would not be foreign to Australia; it would be similar in approach to the High Court's interpretation of the implied freedom of political communication, which also reflects

¹²⁰ Amelia Simpson and Mary Wood 'A Puny Thing Indeed – *Cheng v The Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Federal Law Review* 95; James Stellios 'The Constitutional Jury – A Bulwark of Liberty?' (2005) 27 *Sydney Law Review* 113; James Stellios 'The High Court's Recent Encounters With Section 80 Jury Trials' (2005) 29 *Criminal Law Journal* 139.

¹²¹ [2009] UKSC 15.

¹²² Lord Phillips [20], Lady Hale [57], and Lord Mance [81].

¹²³ Lord Kerr concluded that a benign motive would not save otherwise discriminatory behaviour, but that mental processes leading to the decision may be considered [120]; Lord Clarke found that state of mind was irrelevant [132] but conceded that sometimes at a preliminary stage questions of motive might be relevant [145], as did Lord Walker [192]

¹²⁴ This concept is also embraced in the context of United Kingdom discrimination legislation: *Race Relations Act 1976* s1, *Equality Act 2010* s19, and *Equality Act 2006* s45.

an approach balancing fundamental human rights with legitimate reasons that parliament may have for curtailing such rights in some cases.¹²⁵

Such a ban may well infringe the *Racial Discrimination Act 1975* (Cth), about which more will be said below in the context of a State ban on the burqa. However, it is of course open to the Federal Parliament to amend or repeal the *Racial Discrimination Act 1975* (Cth) as they see fit.

(b) *State Law*

In considering whether a State law banning the burqa would be valid, one first acknowledges that the religious freedom contained in s116 is expressly confined to laws passed by the Commonwealth. As a result, it would be difficult to argue against the law on the basis of that section.

An argument may be made against such State laws by having regard to discrimination laws. Here the focus will be on federal discrimination laws. Although each state has its own discrimination laws, it would be a simple matter for a state to amend or repeal such laws. A later law inconsistent with an earlier law is implicitly deemed to amend or repeal the earlier law, even in the absence of express words. Further, each State Parliament has generally plenary law making powers¹²⁶ to pass laws for the peace, welfare and good government of the State. These words have been declared not to be words of limitation in terms of their law making power.¹²⁷ As such, it is not proposed to discuss in detail the extent to which individual states' laws currently protect rights against discrimination, given their precarious nature.

A stronger argument would be that the State law was inconsistent with the *Racial Discrimination Act 1975* (Cth), and invalid for that reason.¹²⁸ Section 9(1) of the Act makes it unlawful for a person to do an act involving a distinction or restriction based on race, colour, descent or national or ethnic origin¹²⁹ which has the purpose or effect of nullifying or impairing the enjoyment or exercise, on an equal footing, of any human right or fundamental

¹²⁵ *Coleman v Power* (2004) 220 CLR 1.

¹²⁶ A slight qualification is appropriate in relation to those jurisdictions with Charters, Victoria and the Australian Capital Territory. However, their significance should not be overstated, since they adopt the 'declaration of incompatibility' model rather than power to declare invalid model.

¹²⁷ *Union Steamship v King* (1988) 166 CLR 1.

¹²⁸ Section 109 of the Commonwealth *Constitution* (conflict between a valid Commonwealth law and valid State law is resolved in favour of the former). Of course, it may also be inconsistent with State discrimination laws, but these are not doubly entrenched, and thus could be easily amended or repealed by a State Parliament.

Discussion of these laws appears in Margaret Thornton and Trish Luker 'The Spectral Ground: Religious Belief Discrimination' (2009) 9 *Macquarie Law Journal* 71; Reid Mortensen 'Rendering to God and Caesar: Religion in Australian Discrimination Law' (1995) 18 *University of Queensland Law Journal* 208; Rachel Bloul 'Anti Discrimination Laws, Islamophobia and Ethnicization of Muslim Identities in Europe and Australia' (2008) 28(1) *Journal of Muslim Minority Affairs* 7; Anne Hewitt 'It's Not Because You Wear Hijab, It's Because You're Muslim' – Inconsistencies in South Australia's Discrimination Laws' (2007) 7(1) *QUT Law and Justice Journal* 57. Given the ease with which a State discrimination law could be amended, I have decided not to discuss in detail the individual differences between them in terms of racial/ethnic/religious discrimination, but to focus on the federal discrimination legislation.

¹²⁹ This is of course similar to the wording of the *Race Relations Act 1976* (UK) s1(1A), implementing the European Directive 2000/43/EC.

freedom.¹³⁰ Section 9(1A) applies where a person applies a requirement to another person that is not ‘reasonable’ having regard to the circumstances of the case, if the other person does not comply with it. The requirement must have the purpose or effect of impairing the equal enjoyment of a human right by those of the same colour, descent, national or ethnic origin as the complainant. Section 10 relevantly states that if by reason of a State law persons of a particular race, colour, national or ethnic origin (‘first race’) do not enjoy a right enjoyed by persons of another race, colour or national or ethnic origin (‘second race’), then those of the first mentioned race enjoy the right to the same extent as those of the second race. In other words, the discrimination is overturned.¹³¹

While the *Racial Discrimination Act 1975* (Cth) does not, on its terms, outlaw religious discrimination, religious discrimination may in effect be prohibited given the above references in s10 to ‘ethnic origin’. It has been held that the Sikh people are an ‘ethnic group’ for the purposes of the legislation considered there.¹³² Australian and United Kingdom precedents have confirmed that Jewish people can comprise an ethnic group for the purposes of the *Racial Discrimination Act 1975* (Cth)¹³³ and *Race Relations Act 1976* (UK).¹³⁴ It remains an open question in Australia whether followers of the Islamic faith constitute an ‘ethnic group’ within the meaning of the *Racial Discrimination Act 1975* (Cth).¹³⁵

¹³⁰ The reference here to ‘purpose or effect’ picks up the wording of the *International Convention on the Elimination of all Kinds of Racial Discrimination*, and is broader than the High Court of Australia’s current reading of s116 of the *Constitution*, which requires a purpose of interfering with religious freedom.

¹³¹ There are key differences between the Australian discrimination provision and similar provisions in the United Kingdom. The Australian legislation does not require that the complainant suffer a ‘particular disadvantage’ as does the *Race Relations Act 1976* (UK) s1(1A) and *Equality Act 2010* (UK) s19, the Australian legislation does not allow discrimination to occur if it is a proportional means of achieving a legitimate end (as appears in s1(1A) of the *Race Relations Act 1976* (UK)) and s19 of the *Equality Act 2010* (UK), and the Australian Act does not distinguish between direct and indirect discrimination, as does the United Kingdom legislation. On the other hand, the scope of the Acts, being applied to race, colour, nationality, and ethnic or national origins, is similar.

¹³² *Mandla v Dowell Lee* [1983] 2 AC 548: the court identified the following characteristics as essential to establish an ethnic group – (a) shared history of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive; and (b) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. Other relevant factors include a common geographical origin or descent from a small number of common ancestors, a common language, common literature, common religion different from neighbouring groups or the general community, and being a minority or an oppressed or dominant group within a larger community (562). The *Harvard Encyclopaedia of American Ethnic Groups* (1980) refers to an ethnic group as comprising (a) a distinctive vocabulary, (b) shared history, (c) unique theological belief, (d) definite in-group boundaries, and (e) a strong sense of peoplehood.

¹³³ *Miller v Wertheim* [2002] FCAFC 156, [14]; see also *Jones v Scully* (2002) 120 FCR 243, 271-273; *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, [22]. In the *Jones* case, the court noted that Jews saw themselves as a distinct community bound by common customs and beliefs, with a common language and sharing common characteristics [112].

¹³⁴ *R v Governing Body of JFS* [2009] UKSC 15 (I have acknowledged above the key differences between the Australian and United Kingdom discrimination legislation regimes).

¹³⁵ The Explanatory Memorandum to the *Racial Hatred Act 1995* (Cth) states an intention that the concept ‘ethnic origin’ be applied to those of the Muslim faith: *Explanatory Memorandum, Racial Hatred Bill 1994* (Cth), 2-3; however some United Kingdom decisions suggest Muslim people are not of ‘ethnic origin’ because although they profess a common belief system, followers were divided across many nations, colours and languages: *Tariq v Young* (Unreported, Employment Appeals Tribunal 24773/88), *Nyazi v Rymans Limited* (Unreported, Employment Appeals Tribunal 6/88). The New South Wales Anti-Discrimination Tribunal found

Assistance may be derived as to the meaning of ‘ethnic group’ from the case *Mandla v Dowell-Lee*.¹³⁶ There the court identified the following characteristics as essential to establish an ethnic group – (a) shared history of which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive; and (b) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. Other relevant factors include a common geographical origin or descent from a small number of common ancestors, a common language, common literature, common religion different from neighbouring groups or the general community, and being a minority or an oppressed or dominant group within a larger community.¹³⁷

In *King-Ansell v Police*, a New Zealand court found a group to be identifiable by its ethnic origin if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from common racial stock. The group would have a distinct social identity based not only on group cohesion and solidarity, but also beliefs as to their historical antecedents.¹³⁸

One may also derive assistance as to the meaning of ‘ethnicity’ from non-legal sources. For example, Romanucci-Ross, DeVos and Tsuda define it as a ‘self-perceived inclusion of those who hold in common a set of traditions not shared by others with whom they are in contact, typically including ‘folk’ religious beliefs and practices, language, a sense of historical continuity, and common ancestry or place of origin’.¹³⁹

Applying these principles, it would be difficult to conclude that followers of Islam were not an ethnic group within the meaning of the *Racial Discrimination Act 1975* (Cth). The above sources emphasise a common sense of beliefs, values and customs, clearly evident in followers of Islam with the five pillars¹⁴⁰ and various other accepted practices. Clear links

that a Muslim follower did not have an ‘ethno-religious’ origin within that State’s discrimination laws (*Khan v Commissioner, Department of Ethnic Services* [2002] NSWADT 131, [21], but see *State of Queensland v Mahomed* (2007) EOC 93-452 (Supreme Court of Queensland). Rachel Bloul criticises the distinctive treatment of Muslims here compared with, for example, Jews and Sikhs, as ‘ridiculously unjust but perfectly legal’: ‘Anti-Discrimination Laws, Islamophobia and Ethnicization of Muslim Identities in Europe and Australia’ (2008) 28(1) *Journal of Muslim Minority Affairs* 7, 7.

¹³⁶ [1983] 2 AC 548, 569.

¹³⁷ 562.

¹³⁸ [1979] 2 NZLR 531, 543.

¹³⁹ Lola Romanucci-Ross, George De Vos, and Takeyuki Tsuda *Ethnic Identity* (2006) 4th ed, p4-8; Fredrick Barth in *Ethnic Groups and Boundaries* (1969) states that ethnicity involves a ‘unison of socially ascribed designation and group self-identification’; Nagel talks of an overwhelming sense of ‘we’ in an ethnic group: Joane Nagel *American Indian Ethnic Renewal* p7.

¹⁴⁰ These are belief in God and that Muhammad is the messenger of God, prayer – Muslims must pray five times a day, fasting in the month of Ramadan, giving zakat or a percentage of one’s yearly accumulated wealth to the poor and needy, and pilgrimage to Mecca: Jamila Hussein ‘Islam: Its Law and Society’ (2003) 2nd ed, p14-15; David Ingersoll, Richard Matthews, and Andrew Davison *The Philosophical Roots of Modern Ideology* (2001) 3rd edition, 254. Although there are different interpretations of Islamic principles, ‘there are several basic beliefs and values that hold the different Muslim interpretations of Islam together’ (257).

between religion-based bonds and ethnicity have been acknowledged in the literature above. It has been noted by Islamic scholars that Judaism and Islam are alike in many ways in terms of being monotheistic religions,¹⁴¹ as well as ritual and practice regarding food, attitude to statues and religious images.¹⁴² Given this fact, and the fact that precedent in both Australia and the United Kingdom confirms that Jews form an ethnic group, it would be hard to argue that Muslims are not, so as to exclude them from the protection of the *Racial Discrimination Act 1975* (Cth). Such legislation, being remedial in nature, should not be narrowly or pedantically applied. To do so would not be consistent with the purpose of the Act.¹⁴³ In other words, there is no reason to exclude Muslims from the protections given by the *Racial Discrimination Act 1975* (Cth) for discrimination against an ethnic group.

If it were decided that Muslim followers were an ‘ethnic group’ for the purposes of the *Racial Discrimination Act 1975* (Cth), it appears that s10 of that Act would in effect prohibit a State law that banned symbols of a particular ‘ethnic group’, but not symbols of a different ethnic group. For instance, a law banning the burqa, but not the Star of David, could be challenged under s10.¹⁴⁴ This is consistent with the position in other nations; it explains why, at least on their face, the laws said to be aimed at banning the burqa tend to be cast in religious-neutral tones, apparently applying to all religious symbols, as in the case of the French ban, for instance.¹⁴⁵ Apparently then, a State law could ban the wearing of religious symbols/dress, as long as it did not discriminate against a particular ethnic group etc. This identifies a weakness in relying on discrimination legislation rather than the Australian Constitution or ECHR to protect religious liberty; the discrimination legislation would apparently allow substantial interference with religious liberty, as long as it was not directed at specific religions or groups.

Returning to the Australian constitutionally context, it would be a difficult argument to make, but it might be suggested that the religious freedom inherent in s116 should be extended to invalidate State laws prohibiting the free exercise of religion etc. It is appreciated that on its face, s116 applies only to Commonwealth laws, so it is concededly a difficult argument to run.¹⁴⁶

¹⁴¹ It is conceded that Christianity is also monotheistic, yet a Christian would not be considered to belong to a particular ethnic group by virtue of that fact.

¹⁴² Jamila Hussein *Islam: Its Law and Society* (2003) 2nd ed, p14.

¹⁴³ Of course, where there is ambiguity, a court should lean to an interpretation of legislation that is consistent with its purpose or object: s15AB *Acts Interpretation Act 1901* (Cth); at common law the mischief rule of statutory interpretation.

¹⁴⁴ However, a law banning the burqa but not a cross would apparently be valid, since adherents of the Christian faith are unlikely to constitute a particular race, ethnic group or nationality. The law would thus not be offensive to s10.

¹⁴⁵ It is, of course, one thing to consider what the law on its face says; it is another to consider how it has been applied. As discussed above, although the French ban was on its face neutral as applying to all religious symbols, in practice it has overwhelmingly been applied against those wearing Islamic dress.

¹⁴⁶ It is also true that in *Grace Bible Church Inc v Reedman*, the Supreme Court of South Australia (1984) 54 ALR 571 decided that the s116 right did not apply to state laws. Of course, that decision, steeped in Diceyan theory of Parliamentary supremacy, is not binding on the High Court of Australia, and the ongoing applicability of Diceyan Parliamentary supremacy is itself a matter of conjecture: see recently *R (Jackson) v Attorney-General* [2006] 1 AC 262, per Lord Steyn (302) and Lord Hope (303-304); Lord Mance ‘Britain’s Emerging Constitution’ (2008) *Oxford University Comparative Law Forum* 1.

However, there is some support for a broader reading of the s116 provision. It can be argued that the section was, as originally drafted, directed to State laws, and it appears in a Chapter of the *Constitution* entitled 'States'. One could read s116 as a broad aspirational section designed to secure separation between church and state, rather than narrowly to simply ensure that religion remained a state matter.¹⁴⁷ As has been alluded to above, the fact that s116 was included, and was in the end directed to Commonwealth laws, may reflect a misreading of an American precedent by one of the founding fathers. This could justify looking beyond the literal wording of the section, and seek to give effect to it as a statement of the kind of society which the founding fathers wished to see, including a strict separation of church and state.

The High Court has noted that the Australian section was largely derived from the American equivalent.¹⁴⁸ In relation to the American equivalent, Jefferson spoke of the 'wall of separation' intended to be achieved by the provision.¹⁴⁹ If this is accepted, there is no reason in logic or principle why the 'wall of separation' should exist at one level of government, but not another. Certainly in the United States, the Supreme Court has extended the religious freedom protection expressed in the First Amendment (which states that *Congress* may not pass a law establishing a religion or prohibiting its free exercise) to the States, contrary to the actual wording in the First Amendment.¹⁵⁰ Similarly to the Australian provision, the actual clause expressing the religious protection refers only to federal laws rather than state laws. The United States Supreme Court has not applied every part of the Bill of Rights to State laws; its guiding principle has been that it will apply to the States parts of the Bill of Rights reflecting 'fundamental principles of liberty and justice', or rights 'basis to our jurisprudence'.¹⁵¹ It might analogously be argued in the Australian context that religious freedom is such a fundamental principle, that it should similarly be extended to protection from State laws, as well as Federal laws.

There is some analogy to cases where the High Court was prepared to 'draw down' the principle of separation of powers enshrined in the Commonwealth *Constitution* to State courts,¹⁵² although the principle finds no basis in State constitutions, pursuant to which State

¹⁴⁷ Recently, Gonzalo Villalta Puig and Steven Tudor have argued that section 116 should be seen as a guarantee of an individual civil right rather than merely a regulator of Commonwealth power: 'To the Advancement of Thy Glory?: A Constitutional and Policy Critique of Parliamentary Prayers' (2009) 20 *Public Law Review* 56, 66.

¹⁴⁸ Latham CJ in *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, 131.

¹⁴⁹ Letter to Danbury Baptists, referred to above.

¹⁵⁰ *Everson v Board of Education* (1947) 330 US 1; *Cantwell v Connecticut* (1940) 310 US 296. Admittedly, this is in the context of the Fourteenth Amendment expressing equal protection, and early American authority denied that the First Amendment, including the religious freedom protection, applied to the States: *Barron v Baltimore* 32 US (7 Pet) 243 (1833). It is true that the Fourteenth Amendment equal protection clause is not found expressly in the Australian Constitution; however some members of the High Court have agreed with a principle of equality before the law: *Leeth v Commonwealth* (1992) 174 CLR 455, 485 (Deane and Toohey JJ), and Gaudron J (502). It may be argued that the concepts are similar.

¹⁵¹ *Duncan v Louisiana* 391US 145 (1968).

¹⁵² *Kable v Director of Public Prosecutions* (NSW)(1996) 189 CLR 51.

courts are established. While State constitutions embody no formal separation of powers,¹⁵³ the High Court in effect said that this principle was applicable to State courts because of the integrated structure and nature of our court system, and that ‘different grades of justice’ within the Australian court system were not acceptable. Analogously, it might be argued that if the *Constitution* expressly forbids the Commonwealth from imposing on the free exercise of religion, States should similarly be forbidden. This is not considered to be contrary to the intention of the founding fathers,¹⁵⁴ given the various drafts of what would become s116, and the original intent to have it apply to state laws; it would also reflect the broad principle of freedom of religion, and the wall of separation between church and state. Freedom of religion has been recognised as one of the oldest of the human rights, and is enshrined in international human rights documents, as explained above. Australian law should give the right the prominence it deserves. There is no reason, other than adherence to the literal words of the *Constitution*, to allow State Parliaments to pass laws establishing a religion, imposing religious observances, making religious requirements in order to hold office, or for imposing on the free exercise of religion.¹⁵⁵ It would make no sense to allow the States to do so, and would run counter to basic freedom of religion and conscience, pivotal in democracies such as Australia, and recognised in international human rights instruments.

Conclusion

If the Commonwealth Government passed a law (otherwise constitutional) banning the wearing of religious dress or symbols, the High Court should read the principle of religious freedom in s116 broadly. It should not validate a law just because the Commonwealth argues the law was passed for other (legitimate) purposes; in some cases, it is submitted courts in other jurisdictions have been too willing to accept at face value government arguments that bans on religious dress or symbols were necessary in pursuit of legitimate objectives of equality and neutrality, or that effects on religious freedoms were incidental (and so not considered to be objectionable). While the precise meaning of the wearing of items such as the hijab or burqa is open to interpretation, on at least some interpretations such wearing is supported by the Qur’an; it is highly contentious to extrapolate from the wearing of such items of clothing that oppression, subjugation or ‘extremism’ is being reflected.

There is also the possibility that such a ban would infringe the *Racial Discrimination Act* 1975 (Cth); in relation to a Commonwealth law, this is not particularly contentious, since the Commonwealth can amend its own legislation; in relation to a State law which purported to implement a ban, the court would have to consider directly whether Islam followers are an

¹⁵³ *Builders’ Labourers’ Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

¹⁵⁴ Some might argue that if this reasoning were adopted, bizarre results would follow. For instance, given s90 prohibits customs and excise duties to the States, would the argument run then that equally, such duties are forbidden to the Commonwealth, by virtue of the equality doctrine. However, the analogy is false – it was clearly intended by the founding fathers that at the commencement of federation, the Commonwealth would have the power to levy customs and excise duties. The position is far more equivocal in relation to religious freedoms and s116.

¹⁵⁵ Of course, with the rider that no human rights are absolute, and some infringement of human rights is acceptable if there are legitimate objectives and the infringement is proportional to those ends.

‘ethnic group’ within the meaning of the Act; further a general State Government ban that applied indifferently to all religious dress and symbols (at least facially), would likely be valid, despite the curtailment of the freedom of religion that this would represent. For these reasons, the author has considered briefly the suggestion that the religious freedom clearly contemplated for Australia in the words of s116 could be applied against state laws infringing the freedom, despite the literal wording of the section. This would be a radical step for the High Court to take but it would give the spirit of religious freedom contemplated by the section greater scope.

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