

# **RELIGIOUSLY MOTIVATED DISCRIMINATION IN THE COMMERCIAL SPHERE: IS THE LAW GETTING IT RIGHT?**

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# I

## The Horns of a Dilemma

Put to a choice between the laws of man, or the laws of God, the faithful will obey God.<sup>1</sup> It is not always an easy choice however; early Christians lost their lives for refusing to burn incense to Caesar. Those of faith today face a similar choice, albeit the stakes are not nearly as high as they were in ancient Rome. Many religions teach that homosexual conduct is sinful, and that sin is something to be avoided. For a few business owners, such as hoteliers and cake makers, their services place them so proximate to the sin that they become complicit in it: for their own sake they refuse to serve homosexual customers. But this is discrimination, and it is against the law. To obey the law, or obey God – that is the dilemma: and both choices carry negative consequences.

The state's choice between permitting or preventing religiously motivated discrimination (“RMD”) presents a similar dilemma: the state must choose between the right to be free from discrimination on the grounds of sexual orientation,<sup>2</sup> or the right to religious freedom. If religionists<sup>3</sup> cannot discriminate, the apparatus of the state coerces believers into actions contrary to their faith.<sup>4</sup> If gay people suffer discrimination, they suffer an indignity that cuts straight to the heart of their identity. The laws of most liberal democracies prevent RMD. This dissertation will explore whether the law is normatively justified? I will conclude that it is not, and that further work is required if a fair solution is to be found.

### Defining the Topic

This dissertation is confined to RMD in the commercial context of goods and services. My discussion is primarily focused on RMD committed by small-scale, owner-operated businesses.

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<sup>1</sup> That is what is expected from a Christian. St Peter joined by the apostles is very clear in stating “we must obey God rather than men” (Acts 5:29).

<sup>2</sup> Some might also say equality, as it is phrased in Canada.

<sup>3</sup> This term is used throughout the dissertation to refer to a business owner with a religious conscience.

<sup>4</sup> If a business owner decides to discriminate, it can be a very costly affair. An Oregon bakery, in a similar situation to Ashers was fined \$135,000 for refusing to bake a cake for a gay wedding. “Oregon bakery that refused same-sex couple owes \$135,000 in damages” (4 July 2015) The Guardian <<http://www.theguardian.com/us-news/2015/jul/04/oregon-bakery-same-sex-marriage-lawsuit>>.

RMD by larger businesses raise questions of separate corporate identity that I cannot go into here.<sup>5</sup>

In exploring the law, I aim to understand how the law justifies favouring antidiscrimination principles over religious freedom. All cases of RMD will be discrimination in the legal sense – how courts come to that conclusion is a secondary concern. What I am concerned with is how the law weighs and interprets values such as religion in this commercial context – and these judicial heuristics and biases most often appear at the justification stage. Therefore, I will tend towards a more rigorous analysis of the justification stage of RMD cases.

I should further note that this dissertation will be framed against a Christian background. This is primarily because most of the cases of RMD have involved Christians. Also demographically, they are the most likely group to be involved in RMD in New Zealand.

### Chapter Summary

My arguments are set out over five chapters. In chapter II, I will consider the harms and benefits associated with both permitting and preventing RMD. In chapter III, I will review cases of RMD from the United Kingdom and Canada. I will also briefly note Australian and American cases. In chapter IV, I will prophesize what the New Zealand approach to RMD will be. In chapter V I will consider how the law disadvantages religious claims in an unjustified way. Finally, in chapter VI I will conclude with some factors that should orient further discussion.

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<sup>5</sup> Company law draws a distinction between the owner and the company (the principle in *Salomon v Salomon & Co Ltd* [1896] AC 22). When a company is small, it is generally unproblematic to identify the owner's religious freedom with the actions of the company. Larger corporations (which can be charged separately with discrimination) raise the issue of whether the corporate body itself can exercise religious freedom. See the United States Supreme Court case of *Burwell v Hobby Lobby* 573 US (13–354) 2014. See also the Australian case of *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75.

## II

# Normative Context

RMD poses a moral dilemma for the liberal state. Liberal democratic societies are committed to both freedom of religion and freedom from discrimination. These freedoms, along with other human rights are held up as entitlements that are fundamental to our society, “these are things it is morally bad for citizens to lack.”<sup>6</sup> When human rights conflict, the state must find a balance between the two.<sup>7</sup> We use the language of balance because we recognise that both rights are equally important.<sup>8</sup> The balanced option might be understood as the option that produces the greatest amount of ‘good’.

In this chapter I will explore whether there is a right, or balanced option when faced with the issue of RMD. Understanding this normative context helps us to understand whether the law is fixing the balance appropriately.

### Permitting or Preventing RMD: Effects

#### 1. Dignitary Effects

Human dignity recognises the equal worth of human beings<sup>9</sup> – dignity is something we possess *qua* human beings.<sup>10</sup> There is disagreement over what dignity means;<sup>11</sup> but it is nevertheless a powerful notion within human rights discourse, especially in the context of discrimination.<sup>12</sup> The prevailing understanding sees human dignity as the “ability to achieve self-identification and self-fulfilment.”<sup>13</sup> It is a person’s capacity, in the words of Ronald Dworkin, to define one’s

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<sup>6</sup> Martha Nussbaum “The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis” (2000) 29 JLS 1005 at 1019. There is plenty of literature on why these rights are important, but I take them as a given and move on.

<sup>7</sup> Ronald Dworkin *Taking Rights Seriously* (2<sup>nd</sup> ed, Harvard University Press, Cambridge, 1978) at 199.

<sup>8</sup> Because rights are equal, there is no hierarchy of rights. See *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835 at 839.

<sup>9</sup> For a great genealogy of the concept, starting with Rousseau to the present day, see Charles Taylor “Politics of Recognition” in Amy Gutmann (ed) *Multiculturalism* (expanded ed, Princeton University Press, Princeton, 1994).

<sup>10</sup> Joel Harrison and Patrick Parkinson “Freedom Beyond the Commons: Managing the Tension Between Faith and Equality in a Multicultural Society” (2004) 40 MULR 413 at 424.

<sup>11</sup> *R v Kapp* [2008] SCC 41 at [22] noting that human dignity is “an abstract and subjective notion”.

<sup>12</sup> See Christopher McCrudden, “Multiculturalism, Freedom of Religion, Equality and the British Constitution: The *JFS* Case Considered” (2011) 9 *International Journal of Constitutional Law* 200.

<sup>13</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1999] 1 SA 6, [36] (Ackerman J) (Constitutional Court).

own meaning and value and “realize that value in his own life.”<sup>14</sup> Dignity marks the capacity to be human in your own authentic way<sup>15</sup> – accordingly, harms to dignity should be taken very seriously by the state.

If RMD is permitted, homosexual people suffer dignitary harm. In the Canadian case of *Eadie and Thomas v Riverbend Bed and Breakfast and others*, the Panel heard evidence of the effects of discrimination: “[the discrimination] felt like a “slap in the face”, that it made him feel like a second-class citizen again after he had rebuilt his confidence, and that he felt crushed.”<sup>16</sup> Being gay, and living that reality is an important part of a gay person’s identity; discrimination prevents them from being true to that identity.<sup>17</sup> Further still, the mere existence of discrimination in society has a “stigmatic effect, it leads to a sense of exclusion, thereby undermining dignity and self-respect.”<sup>18</sup> It makes homosexuals (as a group) feel like second-class citizens – that their conception of the good is not of equal worth.<sup>19</sup>

People are quick to recognise the dignitary harms that homosexual people suffer, but the dignity of religionists is often ignored.<sup>20</sup> Religion is as integral to the religionist’s identity as the lived public expression of homosexuality is to the gay person’s.<sup>21</sup> Christians place God at the center of their lives: “in Him we live, and move, and have our being.”<sup>22</sup> There is no part of life (private or public) that is separate from God.

The Christian must “Love the Lord your God and keep his requirements, his decrees, his laws and his commands always.”<sup>23</sup> Within this Christian understanding of the world, homosexual acts are “intrinsically disordered” to use the language of the Catholic Catechism.<sup>24</sup> Some

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<sup>14</sup> Ronald Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2006) at 72.

<sup>15</sup> Taylor, above n 9, at 30.

<sup>16</sup> *Eadie and Thomas v Riverbend Bed and Breakfast and others* (No 2) 2012 BCHRT 247 at [87]. See also Marvin Lim and Louise Melling “Inconvenience or Indignity? Religious Exemptions To Public Accommodations Laws” (2014) 22 JLP 705 at 706-707: gay person observed “[i]t is hurtful to see that we are less welcome than the family dog.”

<sup>17</sup> See *Bull v Hall* [2013] UKSC 73 at [52]-[53].

<sup>18</sup> Religious Claims vs. Non-discrimination Rights Another Plea for Difficulty at 52.

<sup>19</sup> Terry Armstrong and Clive Aspin “Human Rights and Sexual Minorities” in Margaret Bedgood and Kris Gledhill (ed) *Law into Action Economic, Social and Cultural Rights in Aotearoa New Zealand* (Thomson Reuters, Wellington, 2011) 314 at 328.

<sup>20</sup> Harrison and Parkinson, above n 10, at 426.

<sup>21</sup> Thomas C Berg “What Same-Sex-Marriage and Religious-Liberty Claims Have in Common” (2010) 5 NwJLSP 206 at 207.

<sup>22</sup> Acts 17:28.

<sup>23</sup> Deuteronomy 11:1.

<sup>24</sup> Libreria Editrice Vaticana, *Catechism of the Catholic Church* (United States Conference of Catholic



services and goods can be understood as contributing or enabling homosexual conduct<sup>25</sup> – wedding cakes and double-bedded hotel rooms are typical examples. Accordingly, the Christian cake maker might refuse to bake a wedding cake to avoid complicity in sin.<sup>26</sup> In discriminating, the religionist is refusing to be complicit in sin and adhering to Gods commands; if they are prevented from discriminating, then their dignity is harmed because they cannot live their life in accordance with their identity (their religion).

There is also an indirect impact to all religiously conservative people’s dignity. In the English case of *McFarlane v Relate Avon Ltd*, Lord Carey, former archbishop of Canterbury noted in his witness statement the feelings that antidiscrimination laws create within the Christian community:<sup>27</sup>

The description of religious faith in relation to sexual ethics as ‘discriminatory’ is crude; and illuminates a lack of sensitivity to religious belief... If Christian views on sexual ethics can be described as ‘discriminatory’, such views cannot be ‘worthy of respect in a democratic society’

These laws send the message that religion is undemocratic and unworthy of respect. Just as knowledge of discrimination impacts all those of homosexual orientation, the laws classification of RMD as discrimination impacts the dignity of all conservative religious people. It paints a negative image of their religious identity – the stigmatising effect is similar to that suffered by gay people.

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Bishops, 2nd ed, 2000) at [2357]. Note however that some Protestant denominations such as the Episcopal Church and the Presbyterian Church (U.S.A) see no issue with homosexual conduct. See David Masci and Michael Lipka “Where Christian churches, other religions stand on gay marriage” (6 July 2015) Pew Research Center <<http://www.pewresearch.org/fact-tank/2015/07/02/where-christian-churches-stand-on-gay-marriage/>>.

<sup>25</sup> Note that the Christian draws a distinction between homosexual conduct and homosexual orientation. Orientation cannot be helped, but conduct can be resisted. The position is summarised in the popular phrase “Love the sinner, hate the sin.” See Harrison and Parkinson, above n 10, at 418.

<sup>26</sup> Complicity extends the moral implications of actions onto other people that are proximate and causally relevant. See generally Rev Joseph Parkinson “Material Cooperation and Catholic Institutions: An inquiry into a traditional moral principle and its meaning for Catholic institutions today, with reference to Catholic hospitals in Australia” (PHD Dissertation, University of Notre Dame Australia, 2001).

<sup>27</sup> *McFarlane v Relate Avon Ltd* [2010] IRLR 872 at [16]. Laws LJ did respond to these concerns at [18]-[23], but that is beyond the point. What is important is how the overall dignity of the community is being affected, whether this effect is intended or not.

## 2. Economic Effects

Permitting RMD means that gay people will not be able to fully participate in the marketplace. They may be concerned that particular shops will turn them away. If they are turned away, then there is an inconvenience in finding alternative goods or services. It is also possible that they will be unable to find alternative substitutes of the same value or quality.

Prohibiting RMD severely impacts religiously conservative businesses. If religionists are to obey both the temporal and divine law, they are faced with either leaving their businesses altogether or operating their businesses in inefficient ways. The bed-and-breakfast owners in *Riverbend* abandoned their business as a result of the laws. The Riverbend bed-and-breakfast was their retirement project, a way to minister to people, to “share their beautiful home on the river with other.”<sup>28</sup> Unfortunately, the threat of future complaints, and a desire to obey the law led them to close it down.

If businesses stop offering the service that creates the moral dilemma it will affect the profitability of the business.<sup>29</sup> Jack Phillips, the baker involved in the American *Masterpiece* case, decided to stop making wedding cakes in the wake of the decision. This decision has resulted in approximately \$100,000 in lost revenue per year.<sup>30</sup> The other option is to withdraw service to the public, perhaps relying instead on private social networks.<sup>31</sup> But again, this option is not good for the economic viability of the enterprise.

### ‘Obvious’ and ‘Tragic’ Questions

We are faced with a choice between two options and we want to make the right choice. Martha Nussbaum notes two questions that we should ask when making a decision. There is the ‘obvious question’ which asks what are we ought to do?<sup>32</sup> This question might be difficult to answer, and the method of arriving at that answer might be contestable, but it must be answered

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<sup>28</sup> *Riverbend* at [20].

<sup>29</sup> In *Bull v Hall* at [39] it was suggested that the bed and breakfast owners could stop offering double-beds all together, thereby sidestepping any future religious conscience issues.

<sup>30</sup> Ken McIntyre “24 Questions for Jack Phillips, the Baker Who Gave Up Wedding Cakes for God” (19 August 2015) The Daily Signal <<http://dailysignal.com/2015/08/19/24-questions-for-jack-phillips-the-baker-who-gave-up-wedding-cakes-for-god/>>.

<sup>31</sup> The New Zealand Human Rights Act 1993 applies to those who hold themselves out to the public – if they do not, then the Act’s antidiscrimination provisions do not apply to them.

<sup>32</sup> Nussbaum, above n 6, at 1006.

because the state must act. There is another question, the ‘tragic question’ which asks whether any choice is morally acceptable? This question does not register the difficulty of a choice; rather it is aimed at understanding whether any answer to the obvious question involves a ‘serious moral wrongdoing.’<sup>33</sup>

### *1. The obvious question*

To answer the obvious question, it might be helpful to employ a cost-benefit analysis<sup>34</sup> which can help determine the option that “contains the largest net measure of good.”<sup>35</sup> It should be noted that this does not entail consequentialism or utilitarianism: weightings can be given to all manner of aspects within an option, for example, the act of breaching a human right in itself can be accorded a weight regardless of its consequences or utility value.<sup>36</sup>

If RMD is prevented, then gay people do not suffer discrimination or the stigmatizing effect that the existence of discrimination creates in society. Economically, gay people are guaranteed goods and services. These are surely great benefits. But these benefits must be weighed against the stigmatizing dignity effects that preventing RMD has on religionists. Economically, it forces religionists out of business. Aggregating the effects is not a precise science, but from the standpoint of equal respect for both groups, I contend that the dignity benefit is offset by the loss to religious dignity. Considering the economic effects, it seems that religionist’s suffer significantly worse compared to gay people. Gay people have equal access to goods and services, but this is offset by the withdrawal of religionist’s from the marketplace.

Permitting RMD is the inverse of the previous analysis. Gay and religious dignity again cancels out, but economically, religionists will be far better off.

### *2. The tragic question*

Considering the tragic question, it should be clear that both permitting and preventing RMD entails serious moral wrongdoing. As considered earlier, the state is committed to respecting

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<sup>33</sup> Nussbaum, above n6, at 1007.

<sup>34</sup> *Ibid*, at 1023. Nussbaum defines cost-benefit analysis “as a strategy for choice in which weightings are allocated to the available alternatives, arriving at some kind of aggregate figure for each major option.”

<sup>35</sup> *Ibid*, at 1032.

<sup>36</sup> *Ibid*, at 1029.

human dignity given its centrality to human identity, yet both options entail dignitary harms. Permitting RMD harms the dignity of gay people; preventing RMD harms the dignity of conservative religionists. Both options entail a regrettable wrong by the state, and in that respect, the tragic question is answered negatively: there is no option that is morally acceptable.<sup>37</sup>

### **No Obvious Winner**

The above analysis should reveal the difficulty in either permitting or preventing RMD; if the state accords equal respect to both groups, and takes the harms to each group seriously, then it will not be an easy choice. The inescapable tragedy that the choice raises (harming either gay or religious dignity) makes the choice particularly regrettable.

I should note however, that my analysis is not definitive. As Nussbaum notes, the real work of the cost-benefit analysis is in the weighting stage, and my weightings are contestable.<sup>38</sup> Perhaps I have overstated the dignitary harms to religious people, or I have not accorded enough weight to the economic benefits to gay people of preventing discrimination. I have also been deliberately narrow in considering only economic and dignitary effects. There might be broader societal effects that should be considered; for example, the expulsion of religion from the marketplace might be seen as a positive factor in favour of preventing RMD. Nevertheless, the preceding analysis should indicate that fixing the balance is not a simple choice; there are many factors to consider, and if there is a winner, it will only be by a slight margin in any case.

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<sup>37</sup> The obvious question asks what one should do, in other words, which option is better than the other. The better option does not necessarily entail that it is the moral option. The moral option is one that does not infringe a person's core entitlement i.e. human dignity. Note that Nussbaum might not view human dignity in a broad sense as raising a tragic choice automatically – but I argue that if we are willing to accord dignitary worth to homosexual expression (in the public sphere of goods and services), then religion likewise should equally have such recognition. See Nussbaum, above n 6, at 1034.

<sup>38</sup> Ibid, at 1032.

# III

## Religiously Motivated Discrimination outside New Zealand

In this chapter, I will review cases of RMD from the United Kingdom and Canada. I will also note American and Australian cases in passing.<sup>39</sup> In reviewing the case law, I am particularly concerned with how courts balance the competing interests of freedom from discrimination and equality, versus religious freedom. Therefore, where I am able, I will glance over the *prima facie* discrimination elements of these cases – considerations of balancing and justification will be my primary focus.

### The United Kingdom

#### *1. Overview of the Law*

England is a signatory to several international human rights treaties;<sup>40</sup> the most important treaty is the European Convention for the Protection of Human Rights and Fundamental Freedoms which guarantees everyone the right to freedom of thought, conscience and religion,<sup>41</sup> and the right to be free from discrimination.<sup>42</sup> Article 14 of the Convention does not protect sexual orientation specifically, but it has consistently been read into the “other status” category.<sup>43</sup> These rights are given domestic recognition in the Human Rights Act 1998, which requires English courts to adopt Convention rights consistent interpretations.<sup>44</sup>

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<sup>39</sup> Due to the word limit, I cannot undertake a full examination of these cases. I do not believe however than these cases considerably add to general approaches that can be deduced from Canadian and English law.

<sup>40</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 20 May 1976).

<sup>41</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms 213 UNTS 221 (opened for signature 4 November 1950, entered into force 3 September 1953) Article 9.

<sup>42</sup> Article 14.

<sup>43</sup> *Salgueiro da Silva Mouta v Portugal* (1999) No 33290/96 ECHR, at [28] “sexual orientation, [is] a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive...”.

<sup>44</sup> Human Rights Act 1998, s 3. Courts may also declare incompatibility between rights and legislation under s 4.

These rights constrain public power,<sup>45</sup> but the right to freedom from discrimination extends into the private sphere through the Equality Act 2010. The Act specifically protects sexual orientation<sup>46</sup> in the provision of services.<sup>47</sup> The Act also draws a distinction between direct and indirect discrimination.<sup>48</sup>

It is helpful here to review the theory of direct and indirect discrimination because it is a critical distinction within discrimination law generally. Direct discrimination is when a person or group is treated differently on a prohibited ground.<sup>49</sup> Indirect discrimination is when a policy is facially neutral, but effectively treats an individual or group differently on a prohibited ground.<sup>50</sup> For example, a policy of ‘no blacks allowed’ is direct discrimination on grounds of race. A policy of ‘only blond haired people’, while not directly discriminating on race, will have a disproportionately negative *effect* on Asian and Black people; thereby indirectly discriminating on race.

As I will consider, most cases of RMD in England will be classified as direct discrimination. This is not good for religionists because, while indirect discrimination can be justified, there is no defence to direct discrimination at English law.<sup>51</sup> In saying that, the chance of successful justification of RMD that is indirect is very slim.

## 2. *Bull v Hall*

The Supreme Court decision in *Bull v Hall* is the leading authority on RMD in England.<sup>52</sup> The dispute concerned the refusal of a double-bedded hotel room by Mr and Mrs Bull (the hotel owners) to a same-sex couple Mr Preddy and Mr Hall who were joined in civil union.<sup>53</sup> The Bulls operated a policy that only married couples were allowed to rent double-bedded rooms –

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<sup>45</sup> Human Rights Act 1998, s 6.

<sup>46</sup> Equality Act 2010, s 12.

<sup>47</sup> Equality Act 2010, s 29.

<sup>48</sup> Sections 13 (direct discrimination) and 19 (indirect discrimination).

<sup>49</sup> Selene Mize “Indirect Discrimination Reconsidered” (2007) 1 NZLR 27 at 27.

<sup>50</sup> *Ibid*, at 28.

<sup>51</sup> *R (E) v Governing Body of JFS* [2009] UKSC 15 at [57]. “Direct and indirect discrimination are mutually exclusive: you cannot have both at once. The main difference between them is that direct discrimination cannot be justified, whereas indirect discrimination can be justified if it is a proportionate means of achieving a legitimate aim.”

<sup>52</sup> *Bull v Hall* [2013] UKSC 73.

<sup>53</sup> At [4].

this was accepted as a direct manifestation of their Christian belief.<sup>54</sup> The same-sex couple stated that they were joined in civil union (at the time, the only legal recognition of homosexual union in England), but the Bulls did not accept that this was a marriage and they were turned away.<sup>55</sup> This was held to be direct discrimination on the grounds of sexual orientation, the Bulls failing in their appeal.<sup>56</sup>

#### i) Direct or Indirect Discrimination?

*Bull* was decided under the current Equality Act's predecessor,<sup>57</sup> but the Court noted that "the principles, concepts and provisions with which we are concerned have remained much the same."<sup>58</sup> Therefore, *Bull* is still good law and it suggests that most RMD in the accommodation context will be direct (to which there is no defence).

Lady Hale began by stating the English law on discrimination which is summarised in the following extract:<sup>59</sup>

"I take there to be direct discrimination when the category of those receiving a certain advantage and the category of those suffering a correlative disadvantage coincide exactly with the respective categories of persons distinguished only by applying a prohibited classification."

Because the Bulls' policy applied to all couples, an 'exact correspondence' could not be drawn between the protected characteristic of sexual orientation, and the categories of those advantaged and disadvantaged by the policy. Stated another way, because the category of people denied a double-bedded room included both homosexual and heterosexual couples, there could not be an exact correspondence with sexual orientation; hence it could not be direct discrimination.

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<sup>54</sup> At [13] "The hotel's policy was a manifestation of the owners' religious beliefs within the meaning of article 9 [of the Convention]."

<sup>55</sup> At [10]. When Mr Preddy mentioned they were in a civil union, Mr Quinn who helped operate the Hotel explained: "... we were Christians and did not believe in civil partnerships and that marriage is between a man and a woman and therefore could not honour their booking".

<sup>56</sup> At [55].

<sup>57</sup> The Equality Act (Sexual Orientation) Regulations 2007. Direct discrimination was covered under s 3(1), and indirect discrimination under s 3(3).

<sup>58</sup> At [3].

<sup>59</sup> *Bressol v Gouvernement de la Communaute Française* (Case C-73/08) [2010] 3 CMLR 559, at [56]; cited in *Bull v Hall* at [19].

The Court then reframed the issue: they perceived the civil partnership as the equivalent of marriage.<sup>60</sup> Because the focus was limited to married couples only, it could be shown that there was an exact correspondence between the disadvantage (being refused a double-bedded room) and the prohibited classification (civil union which was understood as indistinguishable from sexual orientation).<sup>61</sup>

Note however that this reasoning was supported 3:2. The minority did not place as much emphasis on the civil partnership which led to their conclusion of indirect discrimination.<sup>62</sup> Lord Hughes believed the flaw in the majority reasoning lay in its concentration “on the characteristics of these claimants rather than on the defendants’ reasons for treating them as they did.”<sup>63</sup> The Bulls’ discriminated against all unmarried couples – civil partnered gay couples were but one subset of that group; “one cannot say that their less favourable treatment is on different grounds for each subset.”<sup>64</sup> Because the Bulls’ policy operated to the disadvantage of all unmarried people, gay or not, then the requirements for direct discrimination (exact correspondence) could not be made out.

Respectfully, the minority reasoning is clearer, but the majority reasoning states the law. A policy of ‘only married couples’ will be direct discrimination on the grounds of sexual orientation if it excludes gay civil unions. However, this might not be an important point now that gay people can marry in England.<sup>65</sup> Of course, discriminating against married gay couples will be direct discrimination as well.<sup>66</sup> Potentially, a gay couple that is legally unrecognised<sup>67</sup> might be excluded under a ‘married couples only’ policy without directly or indirectly discriminating,<sup>68</sup> but that would depend on the facts.

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<sup>60</sup> *Bull v Hall* at [27].

<sup>61</sup> At [30].

<sup>62</sup> Lord Neuberger (dissenting) at [75] “I am unable to join Lady Hale in accepting the respondents’ argument that a different conclusion is warranted simply because Mr Preddy and Mr Hall had entered into a civil partnership.”

<sup>63</sup> At [89].

<sup>64</sup> At [91].

<sup>65</sup> Marriage (Same Sex Couples) Act 2013.

<sup>66</sup> The Bulls were not really concerned that the civil union was not a marriage; they were concerned about whether the Christian criterion of marriage (man and woman) was satisfied. *Bull* at [25].

<sup>67</sup> Neither married or in a civil union. Courting might be the best word.

<sup>68</sup> Because gay people can now get married, such a policy might not indirectly discriminate against gay couples. Yet again, this is a fact depended finding.



## ii) Justification

The Court considered in the alternative whether the Bulls policy was justified under indirect discrimination. The first consideration was whether the Bulls' could justify their belief on a "matter other than sexual orientation."<sup>69</sup> The Court was prepared to accept that a "...deeply held belief that sexual intercourse outside marriage is sinful" could be grounds other than sexual orientation. However, and relying on the reasoning on direct discrimination, the Court was not willing to accept that a belief about the sinfulness of sexual intercourse within a civil union could be anything other than sexual orientation.<sup>70</sup> Therefore, the Bulls' did not even get past the first hurdle.

Even if they could, the Court found many obstacles in the way of justification. Firstly, there was a concern that justification in this case "would be to create a class of people who were exempt from the discrimination legislation."<sup>71</sup> Secondly, justification in this case would be contrary to the purpose of the Regulations, which existed to "secure that people of homosexual orientation were treated equally with people of heterosexual orientation by those in the business of supplying goods, facilities and services."<sup>72</sup> This was further reinforced by the fact that Parliament provided a carefully worded exemption for religious organisations that deliberately omitted protections for private religious objectors.<sup>73</sup> Therefore, it could not be Parliament's intention that a justification be provided in this case.<sup>74</sup> When considering the Bulls half of the balancing equation, Lady Hale curtly stated "of course, [the Bulls] are free to manifest their religion in many other ways;"<sup>75</sup> no other harm assessment was undertaken.

Even though the Court was split concerning the classification of discrimination, the Court was unanimous that if this was indirect discrimination, it could not be justified.<sup>76</sup>

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<sup>69</sup> *Bull* at [35] considering the wording of s 3(3)(d) of the Equality Act (Sexual Orientation) Regulations 2007 . Note however this formulation is not in the justification under the Equality Act 2010.

<sup>70</sup> At [35].

<sup>71</sup> At [37].

<sup>72</sup> At [38].

<sup>73</sup> At [38].

<sup>74</sup> At [38] "This strongly suggests that the purpose of the Regulations was to go no further than this in catering for religious objections."

<sup>75</sup> At [39].

<sup>76</sup> At [55].

### iii) Rights Compatibility

The final point raised in *Bull* was whether the Regulations were a justified limitation on the Bulls' right to freedom of religion under the Convention.<sup>77</sup> Lady Hale theorised that if the finding of direct discrimination was not compatible, the Court might hold that this was indirect discrimination, or ignore the Regulations.<sup>78</sup> The Court did not have to decide that point because they found that the Regulations were compatible.

The Court's analysis began with the limitation in Article 9(2), which subjects religious manifestation only to "such limitations as are prescribed by law and are necessary in a democratic society... for the protection of the rights and freedoms of others". The Regulations were proscribed by law, and their purpose was to protect homosexual people from discrimination; accordingly, this was a legitimate limitation prescribed by law.<sup>79</sup>

The final question was whether it was "necessary in a democratic society," equivalently whether there was a "reasonable relationship of proportionality between the means employed and the aim sought to be achieved."<sup>80</sup> The Bulls' argued for a 'reasonable accommodation' between the two groups' interests<sup>81</sup> (I will expand on this concept in the review of Canadian law); but this argument did not sway the Court.<sup>82</sup>

The legitimate aim was the protection of the rights and freedoms of Mr Freddy and Mr Hall. Whether that could have been done at less cost to the religious rights of Mr and Mrs Bull by offering them a twin bedded room [a reasonable accommodation] simply does not arise in this case. But I would find it very hard to accept that it could.

Lady Hale stated that the same reasons for denying justification under indirect discrimination were also relevant here.<sup>83</sup> After outlining the importance of sexual orientation,<sup>84</sup> she concluded that the Regulations were a justified limitation of the right to religious freedom noting: "...we

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<sup>77</sup> At [41].

<sup>78</sup> Both methods would achieve a rights consistent reading required under s 3(1) of the Human Rights Act 1998.

<sup>79</sup> At [44].

<sup>80</sup> At [45], quoting *Francesco Sessa v Italy*, App No 28790/08, Judgment of 3 April 2012, at [38].

<sup>81</sup> At [45].

<sup>82</sup> At [51].

<sup>83</sup> At [51].

<sup>84</sup> At [52]-[53].

should be slow to accept that prohibiting hotel keepers from discriminating against homosexuals is a disproportionate limitation on their right to manifest their religion.”<sup>85</sup>

### 3. *Black v Wilkinson*

The facts in *Wilkinson* are similar to *Bull*. Again a religiously-minded bed-and-breakfast proprietor refused accommodation to a gay couple.<sup>86</sup> The Court of Appeal was bound by *Predy*<sup>87</sup> to find direct discrimination, but they went on to consider justification under indirect discrimination in the alternative. The Court’s rigorous treatment of justification makes *Wilkinson* a valuable case.

The Court had to decide whether Mrs Wilkinson (the bed and breakfast owner) justified her actions under the Equality Act (Sexual Orientation) Regulations 2007.<sup>88</sup> She had to establish that her policy was a “proportionate means of achieving a legitimate aim”.<sup>89</sup> The policy in question was one of restricting rooms to married couples. Mrs Wilkinson attempted to justify her policy in reference to her right to manifest her religion under article 9 of the Convention. In relying on her right to manifest religion under the Convention, the Court would have to find that, on the facts of Mrs Wilkinson’s case “the absence of an exception for bed and breakfast accommodation would violate the Convention rights of someone running such a business.”<sup>90</sup> But any finding of justification would have to be consistent with the statutory scheme.<sup>91</sup>

Mrs Wilkinson ultimately failed to establish a justification. It was accepted that the policy was a manifestation of religion which was a legitimate aim.<sup>92</sup> However, the balance favoured the claimants for two primary reasons. Firstly, the Court accorded “considerable weight to the balance struck by the Regulations themselves.”<sup>93</sup> The issue of RMD had arisen in the consultation process in writing the Regulations, and Parliament deliberately omitted to provide a specific exemption for religionists in the course of goods and service provision. The second

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<sup>85</sup> At [53].

<sup>86</sup> *Black v Wilkinson* [2013] EWCA Civ 820 at [6].

<sup>87</sup> *Predy v Bull* [2012] EWCA Civ 83.

<sup>88</sup> Which have been replaced by the Equality Act 2010. But see Lady Hale’s statement in *Bull* at [3] “All of this legislation has since been replaced (for a case such as this) by the Equality Act 2010, but the principles, concepts and provisions with which we are concerned have remained much the same.”

<sup>89</sup> *Wilkinson* at [24].

<sup>90</sup> At [64].

<sup>91</sup> At [65].

<sup>92</sup> At [53].

<sup>93</sup> At [53].

factor came down to the asymmetrical imposition of harms. Sexual orientation was viewed as a very important characteristic requiring protection.<sup>94</sup> On the other side, the injury to Mrs Wilkinson was not well articulated. The Court accepted that the law might force Mrs Wilkinson to withdraw from offering double-bedded rooms which would be commercially damaging, but the Court was not willing to take this point further without full argument.<sup>95</sup> McCombe LJ's dictum suggested that the right to manifestation of religion (and any injury to that interest) would not be as weighty in the commercial context which further harmed Mrs Wilkinson's chance of justification.<sup>96</sup>

#### 4. *Lee v Ashers Baking Company*

*Gareth Lee v Ashers Baking Co Ltd* is the most recent case of RMD to arise in the United Kingdom.<sup>97</sup> It received plenty of media attention, but legally speaking it harbours no surprises – the bakery lost. It follows in the spirit of *Bull* and *Wilkinson*. *Ashers* is useful however because it is RMD in the context of goods provision.<sup>98</sup>

In *Ashers* Mr Lee ordered a cake which was to feature the slogan “Support Gay Marriage”.<sup>99</sup> Ashers Bakery refused the order because the owners believed in the sinfulness of marriage, and that “the business must be run by God’s wishes.”<sup>100</sup> This was held to be discrimination on the grounds of political opinion<sup>101</sup> and sexual orientation.<sup>102</sup>

In considering the grounds for discrimination, Ashers attempted to argue a form of status/conduct distinction: they claimed to be objecting to the pro-homosexual message on the

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<sup>94</sup> *Wilkinson* at [67].

<sup>95</sup> At [57]. “The appellate system is not an inquisitorial one and the court does not in general give directions of its own for evidence. It cannot build bricks without straw. The appellant must provide the straw.”

<sup>96</sup> At [76], per McCombe LJ “the balance lies in allowing the Defendant to hold her religious views and to manifest them, but requiring her, if she chooses to run a commercial venture to operate it in a manner which does not discriminate against homosexuals... where businesses are open to the public on a commercial basis they have to accept the public as it is constituted...”

<sup>97</sup> *Gareth Lee v Ashers Baking Co Ltd* [2015] NICty 2.

<sup>98</sup> At [16].

<sup>99</sup> At [16].

<sup>100</sup> At [22].

<sup>101</sup> The political opinion discrimination element of the case (dealt with at [47]-[69]) is the result of the Fair Employment and Treatment (Northern Ireland) Order 1998. It is a piece of legislation peculiar to Northern Ireland and not directly relevant for our purposes.

<sup>102</sup> Again, this was dealt with under Northern Irish law (The Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006), but their equality regulations are essentially the same as the Regulations considered in *Wilkinson* and *Bull*.

cake, not Mr Lee’s sexual orientation per se.<sup>103</sup> However, the Judge resisted this finding.<sup>104</sup> The Judge declared that “the criterion... “support for same sex marriage” ... is indissociable from sexual orientation.”<sup>105</sup> Because Ashers refused the cake order because of this message, they were really discriminating on the grounds of sexual orientation; therefore, direct discrimination. The Judge did not even entertain the possibility of a defence under the alternative head of indirect discrimination noting “...there can be no justification.”<sup>106</sup>

The Judge also considered whether the right to religious freedom under the Convention was justly limited (the same exercise as in *Bull*). The Judge easily found that the Regulations were prescribed by law,<sup>107</sup> and a legitimate aim.<sup>108</sup> The final element was whether the limitation on religious freedom was ‘necessary in a democratic society’? Again ‘reasonable accommodation’ was raised, and failed, the Judge noting:<sup>109</sup>

“Where a person seeks accommodation for a religious belief which is discriminatory on a prohibited ground, and outside the *specific exemptions* provided for by Parliament or the Assembly itself, then the refusal to grant such accommodation should be justified.”

After a review of *Bull*, and several other authorities, the Judge came to the conclusion that this was a justified limitation.<sup>110</sup> The Judge had this to say to Ashers:<sup>111</sup>

The Defendants are entitled to continue to hold their genuine and deeply held religious beliefs and to manifest them but, in accordance with the law, *not to manifest them in the commercial sphere if it is contrary to the rights of others.*

This echoed a point the Judge made earlier in the case:<sup>112</sup>

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<sup>103</sup> At [38].

<sup>104</sup> At [40].

<sup>105</sup> At [42].

<sup>106</sup> At [46].

<sup>107</sup> At [75].

<sup>108</sup> At [76].

<sup>109</sup> At [83]. Emphasis added.

<sup>110</sup> At [91].

<sup>111</sup> At [93]. Emphasis added.

<sup>112</sup> At [40]. Emphasis added.

...I do not accept the Defendants submissions that what the Plaintiff wanted them to do would require them to promote and support gay marriage which is contrary to their deeply held religious beliefs. Much as I acknowledge fully their religious belief is that gay marriage is sinful, *they are in a business supplying services to all, however constituted. The law requires them to do just that...*

These findings should come as no surprise against the background of *Wilkinson* and *Bull*.

## Canada

### *1. Overview of Canadian Law*

At the federal level, Canada guarantees the right to freedom of religion under s 2(a) of the Canadian Charter of Rights and Freedoms.<sup>113</sup> Discrimination against a person's sexual orientation is prohibited under the right to equality in s 15. The Charter only applies to the federal and provincial governments,<sup>114</sup> equality rights are protected in the private sector via a patchwork of federal and provincial provisions. At the federal level, the Canadian Human Rights Act 1985 protects homosexual people against discrimination in the provision of goods and services,<sup>115</sup> and accommodation.<sup>116</sup> There are also provincial human rights codes that provide protections against discrimination in the private sphere.

The two cases I will consider were decided under the Human Rights Code of British Columbia.<sup>117</sup> Under the Code, discrimination complaints are two tiered. Firstly, prima facie discrimination must be established.<sup>118</sup> The second step places the onus of justification on the respondent. If the respondent fails to establish a justification, then an ultimate finding of discrimination is made.

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<sup>113</sup> Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

<sup>114</sup> Section 32, Constitution Act 1982.

<sup>115</sup> Canadian Human Rights Act RSC 1985 c H-6, section 5.

<sup>116</sup> Section 6.

<sup>117</sup> Human Rights Code RSBC 1996 c 210.

<sup>118</sup> Note that no distinction is drawn between direct and indirect discrimination.

## 2. *Smith and Chymyshyn v Knights of Columbus*

This case concerned a hall owned by the Knights of Columbus (a fraternal order for Catholic laymen).<sup>119</sup> The Knights had reserved it for Ms Smith and Ms Chymyshyn – a lesbian couple.<sup>120</sup> The couple hired the hall for their wedding reception, and when the Knights learned of this, they cancelled the reservation based upon the Church’s stance against same-sex marriage.<sup>121</sup> The Knights conceded that the cancellation was *prima facie* discrimination under the Code; they argued however that the cancellation was justified.<sup>122</sup>

To succeed in justification, the Knights had to satisfy the *Meiorin* test:<sup>123</sup>

1. They adopted a standard for a purpose or goal that is rationally connected to the function being performed;
2. They adopted a standard in good faith, in the belief that it is necessary for the fulfilment of the purpose or goal; and
3. The standard they adopted is reasonably necessary to accomplish their purpose or goal, in the sense that they cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

Considering element 2, the Panel accepted that the standard to be “that they do not rent the Hall for purposes that are contrary to their core Catholic beliefs.”<sup>124</sup> It was accepted that promoting or assisting the celebration of same-sex marriage in anyway would be contrary to Catholic belief;<sup>125</sup> and that this standard was adopted in good faith.<sup>126</sup> The case turned on elements 1 and 2 of the *Meiorin* test.

Element 1 of the *Meiorin* test required the Panel to establish three things: the purpose of the standard; the ‘function’ being performed; and whether the purpose was rationally connected to

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<sup>119</sup> *Smith and Chymyshyn v Knights of Columbus and others* (2005) BCHRT 544 (“Knights”).

<sup>120</sup> At [5]-[44].

<sup>121</sup> At [26]-[29].

<sup>122</sup> Human Rights Code, s 8.

<sup>123</sup> *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 SCR 868 at [20] applying *British Columbia (Public Service Employee Relations Commission) v. BCGSEU* [1999] 3 SCR 3 (“*Meiorin*”).

<sup>124</sup> *Knights* at [55].

<sup>125</sup> *Ibid*, at [55].

<sup>126</sup> *Ibid*, at [90].

the function?<sup>127</sup> The purpose of the standard was to maintain their standing with the Catholic Church, and to preserve their own fidelity to Church teaching.<sup>128</sup> The ‘function being performed’ required an objective analysis of the function of the Hall. Reviewing the evidence, the Panel concluded that the function was “not only to rent the Hall, but that any group renting or using the Hall could not engage in activities that could cause the Knights difficulties with the Catholic Church...”<sup>129</sup> Given this function, the purpose of the standard (maintaining relations with the Church) was rationally connected, thereby establishing element 1 of *Meiorin*. In understanding this finding, a counter example is instructive: if the function of the Hall was simply to ‘make money’, then then the purpose ‘maintain relations with the Church’ could not be rationally connected.

Concerning element 3 of *Meiroin*, the Panel began by framing this dispute within the Charter context.<sup>130</sup> The Panel noted that the same-sex couple enjoyed the right to equality in s 15 of the Charter, and the Knights had the right to religious freedom under s 2(a).<sup>131</sup> It was within this context that the Panel had to determine how far the Knights would have to accommodate the lesbian couple. The Panel described their approach as a ‘spectrum analysis’:<sup>132</sup>

...it is necessary for the Panel to determine where on the spectrum, between balancing the right of the Knights not to be required to act contrary to their core religious beliefs against the rights of the complainants to be free from discrimination based on their sexual orientation in accessing a public service, this case falls. As the Courts have found, the further the act at issue is from the core religious belief of the person denying the service, the less likely the act will be found to be justified.

In placing the Knights on the spectrum, the Panel heavily relied on *Brockie* which is Canadian authority for the principle that religious freedom extends into the commercial public sphere, but when religion is in the public sphere it is accorded less weight.<sup>133</sup> This is achieved through a ‘core elements of religion’ element: “The further the activity is from the core elements of the freedom, the more likely the activity is to impact on others and the less deserving the activity is

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<sup>127</sup> *Knights*, at [59].

<sup>128</sup> At [60].

<sup>129</sup> At [85].

<sup>130</sup> A helpful summary of the case law on these right were provided in *Knights* at [117].

<sup>131</sup> For the leading case on religious freedom see *R v Big M Drug Mart Ltd* [1985] 1 SCR 295. See also *Trinity Western University v British Columbia College of Teachers* [2001] SCC 31.

<sup>132</sup> *Knights* at [106].

<sup>133</sup> *Brockie v Ontario (Human Rights Commission)* [2002] OJ No 2375 (Ont Div Ct).



of protection. Service of the public in a commercial service must be considered at the periphery of activities protected by freedom of religion.”<sup>134</sup>

Therefore, in purely commercial contexts, religious freedom is accorded little weight. The Panel stated as much when they noted that the couple would have been entitled to rent the hall if the hall was available for rent to the public and had no religious affiliation.<sup>135</sup> The Panel noted that the converse would be the case if the couple wanted to have their wedding reception in the Parish Church.<sup>136</sup> In this case, the hall was semi-commercial. It was rented out to the general public, but the religious affiliation was clear: if the Knights rented out the hall they would be acting against their religious beliefs. Therefore the Panel believed that this case “lies at neither end of the spectrum, but somewhere along the continuum, requiring a delicate balance.”

The final question concerned reasonable accommodation to the point of undue hardship:<sup>137</sup> that is “whether, in the circumstances of this case, the Knights were required to accommodate the complainants, short of acting contrary to their core religious beliefs.”<sup>138</sup> It was at this stage that the rights of the couple were balanced by placing obligations of accommodation on the Knights, the purpose being “to search for a pragmatic and workable solution that minimizes the adverse effects on the rights of a complainant.”<sup>139</sup> The Panel decided that the Knights did not provide reasonable accommodation: the Knights did nothing to mitigate the detrimental effect on the couple of the refusal of the hall. The Knights should have met with the couple, formally apologised and immediately offer reimbursement.<sup>140</sup> Because the Knights did not accommodate to the point of undue hardship, they did not satisfy the third element of *Meiroyin*, thereby failing in their justification.

### *3. Eadie and Thomas v. Riverbend Bed and Breakfast*

The Riverbend was a bed and breakfast operated out of the home of Mr and Mrs Molnar, self-described evangelical Christians believing all sex outside of marriage is wrong (marriage being

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<sup>134</sup> *Brockie* at [51].

<sup>135</sup> *Knights* at [110].

<sup>136</sup> At [109].

<sup>137</sup> At [116].

<sup>138</sup> At [119].

<sup>139</sup> At [121].

<sup>140</sup> At [124].

only one man and one women).<sup>141</sup> The Molnars wanted the Riverbend to be a ministry, in their words “an extension of our Christian faith.”<sup>142</sup> A booking was made for Mr Eadie and Mr Thomas, a gay couple. The Molnars suspected this and when Mr Molnar rang Mr Eadie about his sexual orientation, Mr Eadie said they were gay to which Mr Molnar said “this is not going to work out.”<sup>143</sup> There was some debate over what this phone call meant, but the Panel took it to be a cancellation of the reservation.

This cancellation was held to be a prima facie case of discrimination under the Human Rights Code.<sup>144</sup> In the course of argument, the Molnars attempted to argue that they were discriminating against sexual conduct rather than their sexual orientation.<sup>145</sup> This status/conduct distinction is very familiar in Christian thought, but was unpersuasive before the Panel. They were aware that this distinction had been explicitly rejected by the Supreme Court of Canada.<sup>146</sup> The Panel also questioned whether conduct was Mr Molnar’s biggest concern because he equivocally stated that no gay people would be allowed a room, “even if they agreed not to engage in sexual relations while staying there.”<sup>147</sup> More importantly however was the rejection of the status/conduct distinction for homosexuals by the Supreme Court of Canada.<sup>148</sup>

Having established prima facie discrimination, the issue of bona fide and reasonable justification was then considered. Considering element 1 of the *Meiorin* test, the Panel accepted that the Molnars had a sincere religious belief about the sinfulness of same-sex sexual relations, and that it would harm their relations with God if they allowed a same-sex couple a bed.<sup>149</sup> The standard they adopted was that the Riverbend would not “rent rooms with a single bed to persons who may engage in sexual relations outside a committed marriage between a man and a woman.”<sup>150</sup> The “function of the Riverbend was to offer temporary accommodation, without any express restriction, to the general public.”<sup>151</sup>

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<sup>141</sup> *Eadie and Thomas v Riverbend Bed and Breakfast and others* (No. 2), 2012 BCHRT 247 at [15].

<sup>142</sup> At [20].

<sup>143</sup> At [48].

<sup>144</sup> Section 8.

<sup>145</sup> At [109].

<sup>146</sup> *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772.

<sup>147</sup> *Riverbend* at [111].

<sup>148</sup> *Riverbend* at [112], citing *Trinity Western University* at [69].

<sup>149</sup> At [139].

<sup>150</sup> At [140].

<sup>151</sup> At [141].

Given this construction of purpose, standard and function, the Panel refused to find a rational connection. They stated: “the standard was rationally connected to the Molnar’s personal religious beliefs, but not to the function or purpose of the Riverbend.”<sup>152</sup> The Riverbend’s function was not related to religion for several reasons: it was a for-profit business; the Molnars were individual citizens (contrast *Knights* where the owners owned it in a religious capacity); and the advertising and marketing did not make it clear that it was a religiously operated bed and breakfast.<sup>153</sup> With no religious function, it would be inappropriate to apply a religious standard – so the Molnars failed on the first element of *Meiroyin*.

The Panel assumed the second branch of the *Meiroyin* test was satisfied, and moved onto consider the third branch, that is whether the Molnars reasonably accommodated the couple to the point of undue hardship.<sup>154</sup> Informing the Panel’s approach was their findings on the ‘spectrum analysis’, as featured in *Knights*. The Panel held that this case was closer to the commercial end of the spectrum; “While the business was operated by individuals with sincere religious beliefs respecting same-sex couples, and out of a portion of their personal residence, it was still a commercial activity.”<sup>155</sup> The Molnars also raised the point that the Panel should adopt a more lenient approach given that the Riverbend was also their home;<sup>156</sup> but this argument was not accepted because “they designated space for the exclusive use and occupancy of Riverbend guests.”<sup>157</sup> Essentially, the commercial nature of the bed and breakfast discounted the value of religious freedom in the balancing exercise (while not cited in *Riverbend*, this is the *Brockie* principle).

The Panel’s conclusion was that the Molnars failed in their duty of reasonable accommodation because they did not extend the couple some form of lodgings. Mr Molnar also used “ill-considered and offensive language”,<sup>158</sup> the Panel holding that he should have done more to explain the situation to Mr Eadie. Therefore, the Molnars’ failed to establish elements 1 and 3 of the *Meiroyin* test.

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<sup>152</sup> *Riverbend* at [144].

<sup>153</sup> *Riverbend* at [141]-[144]. There was argument that the fish symbol featuring on their advertising would have been enough to identify them as Christian. However, this was insufficient, which is quite a reasonable finding by the Panel. Most people have little knowledge about religious symbols.

<sup>154</sup> *Riverbend* at [151].

<sup>155</sup> *Riverbend* at [165].

<sup>156</sup> Note that this factor alone would be enough to exempt the Molnars from discrimination under New Zealand’s Human Rights Act 1993, s 54.

<sup>157</sup> *Riverbend* at [161].

<sup>158</sup> *Riverbend* at [48] for the details of the phone call between Mr Molnar and Mr Eadie.

In coming to this conclusion, the Panel offered further comments about the Molnars situation, stating that they “are not deprived of a meaningful choice<sup>159</sup> in the exercise of their religion.”<sup>160</sup> Because they entered freely into the commercial sphere, they were expected to comply with the anti-discrimination legislation, along with all other businesses. Furthermore, because they choose to enter the commercial sphere, they can also choose to leave if the law is too onerous. This notion further discounted the harm to the Molnars’ religious manifestation in the balancing equation.

### Australia and the United States

I will note in passing some cases of RMD from Australia and the United States. Unfortunately, I cannot explore them in full detail;<sup>161</sup> however I do not believe that they change the picture already painted by the Canadian and English law.

*Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* was an Australian case of RMD.<sup>162</sup> Christian Youth Camps, which was owned by Christian Brethren, refused a booking from Cobaw, who wanted the camp site to run a young adult homosexual support group.<sup>163</sup> This was held to be discrimination; CYC appealed this finding and lost. Interesting points<sup>164</sup> were raised about whether CYC could rely on a statutory exemption clause for ‘bodies established for religious purposes’.<sup>165</sup> The Court held that it was not a body established for religious purpose because it was primarily a commercial enterprise which was ‘in itself secular’.<sup>166</sup> Also there were no limits imposed by CYC within its founding documents and promotional material. Maxwell P concluded “The only religious aspect of the business resides

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<sup>159</sup> This language of ‘meaningful choice’ was drawn from the Supreme Court decision of *Alberta v Hutterian Brethren of Wilson Colony* [2009] SCC 37 at [95]. “...in many cases, the incidental effects of a law passed for the general good on a particular religious practice may be less serious. The limit may impose costs on the religious practitioner in terms of money, tradition or inconvenience. However, these costs may still leave the adherent with a meaningful choice concerning the religious practice at issue... A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives.”

<sup>160</sup> *Riverbend* at [169].

<sup>161</sup> Due to the constraining word limit.

<sup>162</sup> *Christian Youth Camps Ltd v Cobaw Community Health Service Ltd* [2014] VSCA 75.

<sup>163</sup> At [2]-[4].

<sup>164</sup> This case also raised the question of whether a corporation could hold religious beliefs. That is another interesting topic that cannot be taken up here.

<sup>165</sup> Equal Opportunity Act 1995 (Vic), s 75.

<sup>166</sup> At [246].

in CYC’s *aspiration* that facilities should be managed in a Christian spirit...” and for the Court, this was not enough to make it a religious body.<sup>167</sup>

*Craig and Mullins v Masterpiece Cakeshop* is a recent case of RMD to come out of the United States.<sup>168</sup> The dispute arose when Mr Phillips refused to decorate a wedding cake for a gay couple. This was held to be discriminatory. The cake maker tried to use the Free Exercise Clause of the First Amendment, but this argument did not succeed.

*Hands On Originals Inc v Lexington-Fayette Urban County Human Rights Commission* is the only case where a religionist in the commercial sphere has won.<sup>169</sup> Hands On was a company owned by Christians (three owners), and they refused to print gay pride t-shirts.<sup>170</sup> The local human rights commission had found Hands On to be in breach of a local public accommodation ordinance.<sup>171</sup> This decision was overturned by the Court because it breached Hands On’s right to freedom of expression under the First Amendment.<sup>172</sup> Hands On was also protected by the Kentucky state Religious Freedom Restoration Act.<sup>173</sup> While this is a win for a religionist, it is only a district court level case. What it might tell us is that courts are able to apply religious conscience clauses effectively.

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<sup>167</sup> At [253].

<sup>168</sup> *Craig and Mullins v Masterpiece Cakeshop* No. 14CA1351 (Colorado COA 2015). For a case of RMD in the context of photography see: *Elane Photography LLC v Willock* 309 P.3d 53 (N.M. 2013).

<sup>169</sup> *Hands on Originals, Inc v Lexington-Fayette Urban County Human Rights Commission and Aaron Baker for Gay and Lesbian Services Organization* No. 14-CI-04474, slip op. at 9 (Fayette Cir. Ct. Apr. 27, 2015).

<sup>170</sup> At 6.

<sup>171</sup> Detailed at 2.

<sup>172</sup> At 11.

<sup>173</sup> At 13, KRS 446.350.

# IV

## The New Zealand Approach to Religiously Motivated Discrimination

This chapter seeks to demonstrate that religionists will, in all likelihood, fail to justify their actions under New Zealand law. Much of this chapter is predictive, but I contend that they are safe predictions. Our law shares in the legal tradition of Canada and England; accordingly, the same values on display in the overseas cases will most likely operate against religionists in the New Zealand context. The law is established in such a way that only the most extremely activist court might come to a finding in favour of a religionist.

### Overview of New Zealand Law

As a signatory to the International Covenant on the Protection of Civil and Political Rights, New Zealand affirms the rights to freedom of religion and freedom from discrimination.<sup>174</sup> These rights are further recognised in the New Zealand Bill of Rights Act 1990 (“NZBORA”).<sup>175</sup> These rights act as a constraint on the exercise of public power,<sup>176</sup> therefore, these rights are not generally enforceable against private citizens. For example, a victim of RMD cannot sue a private business for a breach of their right to be free from discrimination.<sup>177</sup>

The right to freedom from discrimination reaches into the private sphere through the Human Rights Act 1993 (“HRA”), which creates a form of statutory tort.<sup>178</sup> The Act provides a list of prohibited grounds upon which it is unlawful to make decisions – this list explicitly includes “sexual orientation, which means a ...homosexual, lesbian, or bisexual orientation”.<sup>179</sup> Part 2 of

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<sup>174</sup> International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

<sup>175</sup> Freedom of religion is protected under ss 13 and 15. Freedom from discrimination is affirmed under s 18.

<sup>176</sup> NZBORA, s 3.

<sup>177</sup> There is no tort against discrimination in New Zealand. See generally, Paul Rishworth “Taking Human Rights into the Private Sphere” in Dawn Oliver and Jorg Fedtke (eds) *Human Rights and the Private Sphere* (Routledge and Cavendish, Wiltshire, 2007) at 330.

<sup>178</sup> See Phillip A Joseph *Constitutional & Administrative Law in New Zealand* (3<sup>rd</sup> ed, Thomson Brookers, Wellington, 2007) at 269.

<sup>179</sup> HRA, s 21(1)(m).

the HRA sets out the situations within which it is unlawful to discriminate on a prohibited ground. Most situations of RMD in the commercial sphere will be captured by ss 44 and 53, which make it unlawful to discriminate in the provision of goods and services; and accommodation respectively. Indirect discrimination on a prohibited ground is also prohibited under section 65.

Should a case of RMD arise under the HRA, the dispute will proceed as follows. Firstly, conflict resolution procedures under the Act will be attempted. Should that fail, the issue will be argued before the Human Rights Review Tribunal (or court as I will consider). At law, there will be three general issues that will arise (similar to the *Bull* case). The first question will be whether the discrimination is direct or indirect? The next issue will be whether the RMD can fit within a statutory exception, or establish a general justification. The final issue that will most likely be argued is whether the HRA is rights compatible.

### Dispute Resolution

If someone feels they have suffered discrimination, their first move is to get in touch with the Human Rights Commission.<sup>180</sup> The Commission has a screening process for complaints, but a sufficient case of RMD will undoubtedly make it through.<sup>181</sup> A complaint of discrimination on the grounds of sexual orientation will certainly be taken seriously by the Commission.

At the complaints stage, the Commission provides a range of services “designed to facilitate resolution of the complaint, including information, expert problem-solving support, mediation, and other assistance.”<sup>182</sup> The Commission has noted that “most complaints are resolved either informally or through mediation. Settlement may involve an apology, an agreement not to repeat the action, education, training or compensation.”<sup>183</sup> Ideally, cases of RMD would be solved at the mediation stage: it is good for parties to come to their own resolutions over such sensitive issues. But we do not live in an ideal world.

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<sup>180</sup> The body established under section 76(2)(a) of the HRA to deal with complaints of discrimination.

<sup>181</sup> Sylvia A Bell (ed) *Brookers Human Rights Law* (looseleaf ed, Brookers) at [HRA.05] The Commission adopts a basic test for deciding whether to proceed with a potential complaint; the following conditions must be satisfied: 1) there is evidence that a person has been treated differently; 2) the different treatment can be attributed to one of the prohibited grounds of discrimination; and 3) The treatment results in disadvantage.

<sup>182</sup> HRA, s 76(2)(c).

<sup>183</sup> Human Rights Commission *Human Rights in New Zealand 2010* at 31.

When dispute resolution fails, the Commission can bring the complaint before the Human Rights Review Tribunal.<sup>184</sup> A case of RMD would almost certainly be removed to the High Court given the difficult questions such a case will raise.<sup>185</sup>

### Direct or Indirect Discrimination?

The first question for a court faced with RMD is to determine whether it is direct or indirect discrimination.<sup>186</sup> This categorisation is particularly important because the defence for direct discrimination is arguably harder to establish than the general defence under indirect discrimination.<sup>187</sup>

Just what is required to find direct discrimination depends upon the applicable section of the HRA. RMD can arise in many contexts, such as the provision of goods and services (*Ashers* and *Knights*), or accommodation (*Riverbend* and *Bull*). A suitable case of RMD might also foreseeably fall under s 42 which deals with discrimination in the access of places, vehicles and facilities. What section and subsection is relied on to find unlawful discrimination will depend on the facts. I will eschew a meticulous analysis of each section; instead I will address some common issues that will arise in all RMD cases (regardless of section pursued).

All the sections mentioned share a two tiered structure. Firstly, the discriminator's actions must fit within a subparagraph. For example, under s 44(1)(a), a complainant must prove that there was a refusal of goods or services – foreseeably, such a criteria will be a relatively uncontroversial finding on the facts. A criterion of 'less favourable' treatment will be less straightforward, so I will consider that point next.<sup>188</sup> The second tier is to show that the action falling within the subparagraph was 'by reason of' a prohibited ground; this will also be a contestable point warranting some consideration.

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<sup>184</sup> HRA, s 92B.

<sup>185</sup> HRA, s 122A(2)(a) "an important question of law is likely to arise in the proceedings or matter other than incidentally."

<sup>186</sup> This first question might also be phrased "Was there prima facie discrimination." This would accord with the language in *Air New Zealand Ltd v McAlister* [2009] NZSC 78, per Tipping J at [51].

<sup>187</sup> Mize, above n 49, at 33 notes however that "the differences in defence might be more procedural than substantive" given that there is a general s 97 defence to all discrimination under the HRA.

<sup>188</sup> Some examples are ss 53(1)(b) and 44(1)(b).



### 1. *Less favourable?*<sup>2</sup>

To treat someone less favourably is a relative term: less favourable compared to whom? Answering this question entails a comparative exercise,<sup>189</sup> requiring the court to determine an appropriate comparator group.<sup>190</sup>

The *Bull* case illustrates how the comparator group can change the outcome of a case.<sup>191</sup> The Bulls’ argued that the gay couple received the same treatment that any other non-married couple would receive.<sup>192</sup> However, the majority believed that the gay couple (via their civil union) were in comparable circumstances to a married couple. The question then becomes whether the gay couple was treated less favourably than another married couple? Of course they were and this justified a finding of direct discrimination. Accordingly, the comparator group will be a highly contested element (should it arise) in a case of RMD.

The leading authority on the comparator exercise in New Zealand is the Supreme Court decision in *Air New Zealand v McAlister*.<sup>193</sup> Tipping J noted that the approach to the comparator should be “guided by the underlying purpose of anti-discrimination laws and the context in which the issue arises;” it should be “purposive and untechnical”.<sup>194</sup> If a comparator rules out prima facie discrimination at an early stage (particularly if statutory exceptions and defence and available), then the comparator is too narrow.<sup>195</sup> In most cases, “the most natural and appropriate comparator is likely to be a person in exactly the same circumstances as the complainant but without the feature which is said to have been the prohibited ground,”<sup>196</sup> this has been referred to as a mirror comparator.<sup>197</sup>

Given these principles, it seems very unlikely that a genuine case of RMD will fail at the comparator stage – especially given the concerns about a purposive approach to the HRA. If

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<sup>189</sup> *Smith v Air New Zealand* [2011] NZCA 20 at [27].

<sup>190</sup> *Ministry of Health v Atkinson* [2012] NZCA 184 at [56]. Noted that the language of comparator is not universally accepted, but is nonetheless the language now used in this area of law.

<sup>191</sup> The Court in *Bull* did not speak specifically about a comparator, but effectively that was what their reasoning concerned.

<sup>192</sup> This was the implicit understanding of the dissenting judges who used that point to draw a conclusion of indirect discrimination.

<sup>193</sup> [2009] NZSC 79.

<sup>194</sup> *McAlister* at [51].

<sup>195</sup> *McAlister* at [35]-[37].

<sup>196</sup> *McAlister* at [52].

<sup>197</sup> *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402 at [46].

the mirror comparator is adopted, then most cases of RMD will be ‘less favourable’ treatment. Wedding cakes, wedding receptions, and double bedded rooms are only refused because of the perceived sin of homosexual orientation – remove the ‘gay’ element (*ceteris paribus*) and most religious folk will be willing to serve.

## *2. By reason of Sexual Orientation?*

All the sections in Part 2 of the HRA require that the discrimination occurred ‘by reason of’ a prohibited ground: in this case sexual orientation. To satisfy the ‘by reason of’ element, a complainant must, on the balance of probabilities, prove that sexual orientation was a ‘material ingredient’ in the making of the decision.<sup>198</sup> This was taken to be weaker than the ‘substantial and operative factor’<sup>199</sup> standard which required “...too strong a link between the outcome and the prohibited ground.”<sup>200</sup> In establishing this material ingredient, the courts may be assisted by the “presence or absence of a subjective intention”, but it will not be determinative.<sup>201</sup> What must be established is the reason, rather than the motive for the action.<sup>202</sup>

This inquiry into causation is a question of fact,<sup>203</sup> and it is hard to probe this point further without facts. However, in most cases it is likely clear that the reason why a religionist refuses services is because of a belief in the sinfulness of same-sex conduct. This fact alone should be reason enough to find that sexual orientation was a material ingredient in the decision.

A recurring argument in RMD cases is to argue that sexual orientation protections do not extend to sexual conduct; stated another way that the Christian did not discriminate by reason of sexual orientation, but *sexual conduct*. This status/conduct is a genuine distinction within Christian thought.<sup>204</sup> This distinction has not been argued before a New Zealand court, but it has been heard numerous times (and rejected) overseas.

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<sup>198</sup> *McAlister* at [49].

<sup>199</sup> *Human Rights Commission v Eric Sides Motors Company Ltd* (1981) 2 NZAR 447 at 465.

<sup>200</sup> *McAlister* at [48]

<sup>201</sup> *Fehling v Appleby* [2015] NZHC 75 at [74].

<sup>202</sup> *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18 at [58].

<sup>203</sup> *Winther* at [60].

<sup>204</sup> See chapter II.

As already considered, the status/conduct distinction was rejected in *Ashers*, which I contend correctly states the law in England.<sup>205</sup> A similar position prevails in Australia<sup>206</sup> and Canada.<sup>207</sup> There is also a long line of American law which rejects the status/conduct distinction, the essence of the reasoning encapsulated in the line “[a] tax on wearing yarmulkes is a tax on Jews.”<sup>208</sup> When the conduct is so closely linked to the status, the law cannot draw a distinction between the two.<sup>209</sup>

The weight of these international precedents, coupled with the ‘purposive’ approach to the HRA suggests that the position will be no different in New Zealand. Same-sex marriage or same-sex partnership (in the context of a hotel room) is so closely linked to sexual orientation that to distinguish the two would frustrate the purpose of the HRA to protect people from unlawful discrimination. Accordingly, religionists in New Zealand will probably fail to distinguish conduct from status.

### 3. Indirect Discrimination

Most cases of RMD will probably be direct discrimination – this has been the trend overseas. However, some cases of RMD might give rise to indirect discrimination as well. Mize notes that “a situation justifying a finding of both direct and indirect discrimination for the same action occurs when there are “neutral” reasons that are so closely identified with prohibited grounds that imposing them is tantamount to direct discrimination.”<sup>210</sup>

Recall that indirect discrimination is the imposition of a neutral principle that disproportionately affects a protected group. Religionists are generally concerned with avoiding complicity in sin which means that a prima facie discriminatory policy may be neutral. Hypothetically, the Catholic Church may invoke a ‘contrary to Church teaching’ reason in refusing to hire their function hall. This policy has resulted in the refusal of gay wedding receptions, Planned

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<sup>205</sup> *Ashers* is going to be appealed, but I doubt this point will be overturned. Judge Brownlie, at [36] noted that “if there is any merit in this argument [separating status from conduct] it would have been raised and considered in the Supreme Court [in *Bull*] but it is not referred to in the judgment.”

<sup>206</sup> See *Cobaw* at [57]-[66].

<sup>207</sup> *Trinity Western University v British Columbia College of Teachers* [2001] SCC 31 at [69] “The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected...”

<sup>208</sup> *Craig and Mullins v Masterpiece Cakeshop* No. 14CA1351 (Colorado COA 2015) at [39] citing *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993).

<sup>209</sup> Mize, above n 49, writing in the New Zealand context of indirect discrimination affirms this reasoning.

<sup>210</sup> *Ibid*, at 34.

Parenthood meetings and second marriage receptions.<sup>211</sup> This policy is neutral because it affects everyone wanting the hall, and because an exact coincidence between sexual orientation and the disadvantaged group cannot be drawn, that reason cannot be easily inferred. However, the effect of the policy disadvantages gay people who will never be able to rent the hall for their weddings which would justify a finding of indirect discrimination.<sup>212</sup>

This hypothetical scenario is one example where RMD might be indirect discrimination. But in most cases of RMD, direct discrimination will most likely be the result. It is even possible that a court might find direct discrimination in my earlier hypothetical scenario: a court might inquire behind the policy and find that the church teaching against same-sex marriage is discrimination by reason of sexual orientation. If a court can connect the refusal with a belief (albeit it a religious one) that same-sex marriage is wrong, that this will be direct discrimination.

### **Can the religionist make out a defence?**

The HRA is structured in the form of general rules, and specific exceptions. Unfortunately for religionists, very few of these exceptions are useful. A counsellor discriminating against a gay couple<sup>213</sup> might fall under the s 45 exception.<sup>214</sup> In the context of accommodation, a discriminating bed and breakfast operated out of the family home will certainly have a defence in section 54. Beyond those contexts however, religionists will find no further relief in the statutory exceptions.

#### *1. Genuine Justification*

Section 97 of the HRA provides the only general defence to unlawful discrimination in the form of an order of ‘genuine justification’. Since most cases of RMD will be direct discrimination, this will be standard that most religionists will have to establish.

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<sup>211</sup> Divorce and remarriage is anathema to the church catholic. As Jesus said “So they are no longer two, but one flesh. Therefore what God has joined together, let no one separate.” Matthew 19:6.

<sup>212</sup> For consideration of the effects necessary under s 65 of the HRA, see Mize, above n 49, at 39-46.

<sup>213</sup> In the English case of *McFarlane* a counsellor working for a larger firm refused to give sexual counselling to same-sex couples. While this was a problem in the employment context, it is demonstrative that some counsellors have religious concerns. If McFarlane was a sole practitioner, it would not be hard to imagine a case of RMD arising.

<sup>214</sup> HRA, s 45 “Nothing in section 44 shall prevent the holding of courses, or the provision of counselling, restricted to persons of a particular sex, race, ethnic or national origin, or sexual orientation where highly personal matters, such as sexual matters or the prevention of violence, are involved.”

*Avis Rent A Car v Proceedings Commissioner* provides the only guidance we have on the defence.<sup>215</sup> The Tribunal stated that s 97 should only be used in exceptional cases – the concern being that an overly liberal approach to s 97 would “erode those human rights which Parliament sought to protect.”<sup>216</sup> It was also noted that commercial expediency would not be an appropriate ground for a justification. The discrimination needed to be imposed in good faith and in the belief that the discrimination can be justified. The Court also had to consider the extent and the sort of harm imposed on those discriminated against, and the benefit to the general community.<sup>217</sup> Essentially, s 97 requires a balancing exercise; that was what the Tribunal believed it was doing in *Avis*.<sup>218</sup>

*Avis* clearly establishes a high standard for genuine justification – a standard religionists are unlikely to meet. Firstly, it is unlikely that a case of RMD will be exceptional. *Avis* was exceptional because the policy considered had several societal benefits,<sup>219</sup> whereas exempting RMD could be seen as creating societal harms. Compared with the weighty status harm that gay individuals suffer when they are discriminated against, religionists have little to offer on their side of the scales. The prevailing attitude is that religion has no place in the commercial sphere when it starts interfering with profit maximisation,<sup>220</sup> so it will be unconvincing to say that the benefit is allowing business owners to follow their religion.

The ‘good faith’ element might also frustrate a religionist. In *Avis* the discriminatory policy was in place several years before the enactment of the HRA, this suggested that *Avis* was bona fides: they were sincere and believed such a policy could be justified. People now live in a time of heightened awareness about gay rights, and cases of RMD receive plenty of media attention. In this sort of environment, a religionist claiming that they genuinely believed their discriminatory policy could be justified would be spurious at best.

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<sup>215</sup> *Avis Rent a Car v Proceedings Commissioner* (1998) 5 HRNZ 501.

<sup>216</sup> *Avis Rent a Car* at 5.

<sup>217</sup> *Avis Rent a Car* at 6.

<sup>218</sup> *Avis Rent a Car* at 6 “At its broadest our task is to balance the rights of this group of drivers to hire this type of car against the rights of the community generally to be protected against the risk posed to it by this group in these cars.”

<sup>219</sup> The policy sought to prevent hiring high performance cars to young drivers. There was a social benefit in keeping them off the road. Hence this case was “the kind of exception case for which s. 97 was designed.” *Avis* at 6.

<sup>220</sup> See chapter V.

The other point to note is that s 97 requires a balancing of rights and interests. This will mean that there will be some overlap with the NZBORA rights analysis. However, I argue that that too will not favour the discriminating religionist. Essentially, s 97 will be a non-starter for religionists.

## 2. *Good Reason*

If a religionist faces a finding of prima facie indirect discrimination, the religionist might have an easier task (relative to s 97) justifying their actions under the ‘good reason’ defence.<sup>221</sup> There is some debate however over exactly what constitutes a “good reason”. A relaxed standard prevailed in early Human Rights Commission decisions, but there has been a trend towards a stricter approach.<sup>222</sup>

The strict approach places the level of justification at necessity. One commentator suggests that this ‘strict’ approach to “good reason” is too exacting.<sup>223</sup> She rightly observes that “Parliament legislated a requirement of “good reason”, not “great reason”, and did not use the word “necessary””.<sup>224</sup> Her argument is bolstered by the Court of Appeal’s recent comments that “good reason” might be understood as a variant of reasonableness.<sup>225</sup> The suggestion is that a variable standard to “good reason”, one that takes account of the context, is to be preferred to the current necessity approach.<sup>226</sup> Foreseeably, a court might adopt the variable standard, but it is doubtful whether this will aid a religionist. Because RMD raises very sensitive policy issues, a variable standard would most likely be set so high that it would approximate the strict standard.

Therefore, I proceed on the basis that a religionist will have to satisfy ‘good reason’ to the standard established in *Northern Regional Health Authority v Human Rights Commission*.<sup>227</sup>

The defendant must satisfy the court that:<sup>228</sup>

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<sup>221</sup> Section 65 HRA.

<sup>222</sup> See Mize, above n 49, at 51-55.

<sup>223</sup> Ibid, at 51-55.

<sup>224</sup> Ibid, at 53.

<sup>225</sup> *Smith* at [56]-[57]. See contra *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, per Cartwright J at 242: “‘Good Reason’ should not, however be confused with a reasonableness test. It is a test which requires the plaintiff to justify its policy.”

<sup>226</sup> Mize, above n 49, at 54.

<sup>227</sup> *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, for a similar ‘strict’ approach see *Vallant Hooker & Partners v Proceedings Commissioner* [2001] 2 NZLR 357.

<sup>228</sup> *Northern Regional Health Authority* at 243.

1. The means chosen meets a genuine need of the enterprise;
2. The policy is suitable for attaining the objective;
3. The policy must be necessary for that purpose.

Further adding to those principles, the policy must be based on objectively justified factors that are unrelated to any prohibited form of discrimination.<sup>229</sup> The spirit of this test is to achieve a balance between the policy and its discriminatory impact. In applying the test, our courts will undoubtedly utilise the English and Canadian authorities reviewed in chapter II,<sup>230</sup> the latter of weighty persuasive value given their *Meiorin* tests similarity to our own.<sup>231</sup>

Foreseeably, most religionists will struggle with the first element of *Northern Regional*. Most RMD has been committed by small bakeries, photographers and bed and breakfasts. What are the genuine needs of these enterprises? In the eyes of the law, their needs probably go no further than profit making and service/goods provision.<sup>232</sup> If the courts opt for a thin, commercial account of these enterprises, then the religionist will fail. This distinction between the enterprise and religious believer means that the ‘means chosen’ will meet the need of the believer, but not the ‘genuine need of the enterprise’.

Recall, that this was the result in the Canadian case of *Riverbend*. The Panel found that the function (or needs) of the Riverbend bed and breakfast was to simply offer temporary accommodation (a finding that was informed by the for-profit nature and the fact that the Molnars were individual citizens).<sup>233</sup> The Molnar’s had Christian imagery on their advertising, but that was not enough to give the Riverbend a religious function. *Knights* was an example where the Hall had a religious function, but that was because it was owned by the Knights who were a charitable organisation.

It is likely that our courts will follow the logic of *Riverbend*. Determining the needs of an enterprise is an objective inquiry - if it was simply what the religionist asserted it to be, then that element would be meaningless. However, as in *Riverbend*, it is doubtful whether businesses

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<sup>229</sup> Ibid, at 242.

<sup>230</sup> Ibid, Cartwright J stated at 244, that it is particularly “useful to refer to overseas authorities to assist in the interpretation of New Zealand legislation.”

<sup>231</sup> Mize, above n 49, has also recognised this parallel. At 50.

<sup>232</sup> See Rex Ahdar “Slow Train Coming: religious Liberty in the Last Days” 12 OLR 37, at 40, notes this dualism in the context of the *Eric Sides* case.

<sup>233</sup> *Riverbend* at [140].

owned by religionists will ever present enough religious aspects for a court to recognise a religious function. Essentially, courts are looking for evidence that never occurs in real life.<sup>234</sup> Unless the enterprise is connected with a church, or has some other clear identifier that it is religious, then the businesses will remain commercial, and non-religious.

But let us say that a court is willing to collapse the distinction between the enterprise and the religious believer, identifying one with the other. There is still the problem of step three of *Northern Regional*. A policy must be necessary for a purpose and the purpose in the RMD context is to adhere to religious belief. This will probably move a court into NZBORA considerations, requiring a consideration of religious freedom. If religious freedom does not extend into the commercial sphere (which I contend that it will not in any meaningful way), then a court would be loathe to find that a discriminatory policy is necessary. Stated another way, if religious freedom (the purpose) only extends as far as it does not harm others, then a discriminatory policy that harms others cannot be necessary.

Speaking broadly, the test is about balancing the policy against the social impact. The Courts in *Bull* and *Wilkinson* stated numerous reasons why the balance cannot work out in favour of discriminating religionists': there is a fear of creating a class of people exempt from discrimination laws, and the status harms to gay people are well recognised. These factors will also work against religionists, probably weighing on the 'necessity' element of *Northern Regional*. The deck is stacked against religionists – most will fail to establish 'good reason' under s 65.

### NZBORA Review

The final challenge a RMD can raise is that the HRA is an unreasonable limitation on their right to religious freedom under s 5 of the NZBORA. Implicitly courts consider this question in the context of justification – but as seen in *Bull*,<sup>235</sup> the question of rights may be raised separately. This argument is perhaps the most important one for the religionist because it determines whether their justification stands or falls. If the HRA is an unjustified limit, then the

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<sup>234</sup> See chapter V.

<sup>235</sup> Even though that case concerned European Convention Rights, the principles are analogous to the NZBORA.



courts may take a more liberal approach to s 97 or s 65.<sup>236</sup> If the HRA is a justified limit, then the preceding analysis of the justifications will most likely stand and the RMD will lose.

When undertaking NZBORA analysis, it is important to note that the rights involved do not directly clash.<sup>237</sup> Broadly understood this analysis is about s 15 and s 19 rights, but it would be wrong to frame the analysis around which right should trump the other.<sup>238</sup> It is not a matter of rights versus rights; rather it is rights versus interests.<sup>239</sup> Section 15 is being limited, and the interest on the other side is the state interest in protecting people from discrimination on the grounds of sexual orientation.<sup>240</sup> With that doctrinal point out of the way, let us consider the elements of an NZBORA assessment:<sup>241</sup>

1. Establish that the right to religious freedom is implicated by the HRA;
2. Decide whether the HRA imposes an unreasonable limit on the right to religious freedom under s 5 inquiry;
3. If the HRA imposes an unreasonable limit, then strive for a rights consistent reading of the HRA;
4. If no consistent meaning is available, then adopt the inconsistent meaning under s 4.

Steps 3 and 4 should be unproblematic; a lenient justification test under either ss 97 or 65 will achieve a rights consistent reading of the HRA – a declaration under s 4 will be unnecessary. It also makes sense to achieve consistency via the justifications because the case law has demonstrated that they are already concerned with balancing harms and interests. Perhaps rights consistency means the ‘good reason’ standard is moved down to subjective reasonableness; there are many paths available to the same conclusion – the justifications can be read in a rights consistent way. Steps 1 and 2 however, are not so simple, and I will consider them further.

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<sup>236</sup> See *Bull* at [42]. Lady Hale suggested that if a rights compatible reading was necessary, then they might hold that the direct discrimination was indirect discrimination and justified.

<sup>237</sup> *Living World Distributors v Human Rights Action Group* [2000] 3 NZLR 570, at [41].

<sup>238</sup> In *Living World*, the High Court and the Board of Review had both been found to have applied the law wrongly in framing the analysis in terms of competing rights (in that case s 14 versus s 19).

<sup>239</sup> Paul Rishworth *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) at 55.

<sup>240</sup> See Selene Mize “Resolving Cases of Conflict Rights under the New Zealand Bill of Rights Act” (2006) 22 NZULR 50.

<sup>241</sup> Paul Rishworth “Human Rights” (2012) NZLR 321 at 324. This approach was first articulated in *Ministry of Transport v Noort* [1992] 3 NZLR 260 (CA). Affirmed in *R v Hansen* [2007] NZSC 7.

### *1. Is Religious Freedom Affected?*

It seems strange to raise this question now: I have presumed from the start that RMD is a manifestation of religion. Furthermore, all the cases reviewed have approached RMD as engaging the right to religious freedom. However, this presumption is not unshakable. There is an argument that RMD may not be an issue of religious freedom, and this needs to be addressed.

Sections 13 and 15 of the NZBORA together protect religious freedom in New Zealand; s 15 is particularly relevant:

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

There exist two possible interpretations of this right: it can either be read broadly (ad hoc approach) or narrowly with internal limitations (definitional approach).<sup>242</sup> On a broad reading, rights are given nearly limitless scope, and RMD as a manifestation of religious practice in public would easily fall within the right. The narrow approach might however derail a religionist's case under the NZBORA: definitional balancing avoids clashing rights through restrictive readings of rights. If s 15 is interpreted in such a way as to place RMD outside its protection, then step 1 would fail because the HRA would not be affecting religious freedom.

Section 15 provides us with little guidance as to whether a broad or definitional approach is to be used. Courts have in the past used a definitional approach to s 15, as seen in *Re J*.<sup>243</sup> In that case, a child required a blood transfusion, but the parents (who were Jehovah's Witnesses) would not allow it. There seemed to be a conflict between the child's right to life<sup>244</sup> and the parents' right to religious freedom. However, the Court defined the scope of s 15 to exclude any actions that would harm the child.<sup>245</sup> *Re J* reasoning could equally apply to an RMD case, particularly because it involves the same right. It could be that RMD harms homosexual

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<sup>242</sup> See generally, James Little "Religious Exemptions and the New Zealand Bill of Rights" (2009) 27 Sing L Rev 109.

<sup>243</sup> *Re J (An Infant): B and B v Director-General of Social Welfare* [1996] 2 NZLR 134.

<sup>244</sup> NZBORA, s 8.

<sup>245</sup> At 146.

individuals' rights, or it could be that religious freedom does not protect commercial enterprises – either method might be adopted by a court.

The chances of courts adopting *Re J* however are slim. Many commentators are critical of the definitional approach because it essentially pre-empts justification that should rightfully be undertaken under s 5.<sup>246</sup> The case of *Lange v Atkinson*<sup>247</sup> also marked a deliberate turn away by the Courts from the definitional approach in favour of the ad hoc approach.<sup>248</sup> Furthermore, the definitional approach looks like judicial sleight of hand. People see this as a religious issue: if religious freedom is not engaged when considering RMD, this surely creates a disjunction between peoples' understanding and the law which is a state of affairs to be avoided. Plus the weight of the overseas laws makes definitional balancing quite unlikely.

Therefore, while definitional balancing raises the possibility that religious freedom is not affected by the HRA, this outcome seems unlikely. Most likely, religionists will be able to show that the HRA is impacting their right to manifest religion under s 15.

## 2. Unreasonable limitations?

Having established that RMD is a manifestation of religious belief under s 15, the next question is whether the HRA (in preventing all discrimination including RMD) is a reasonable limit on s 15 in terms of s 5 of the NZBORA. To be a reasonable limit, it has to be “demonstrably justified in a free and democratic society”. This requires what is essentially a proportionality exercise, to make sure (paraphrasing Tipping J in *Moonen*) that a sledgehammer is not being used to crack a nut.<sup>249</sup> The s 5 test was articulated in *Hansen*.<sup>250</sup>

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<sup>246</sup> See generally, Rishworth, above n 239, at 53. Rex Ahdar and Ian Leigh *Religious Freedom in the Liberal State*, (2<sup>nd</sup> ed, Oxford: Oxford University Press, 2013) at 193. Mize, above n 240. For a defence of definitional balancing, see James Little, above n 242.

<sup>247</sup> *Lange v Atkinson* [1998] 3 NZLR 424. For a recent case disavowing the definitional approach, see *Brooker v Police* [2007] NZSC 30.

<sup>248</sup> See Rishworth, above n 239, at 53-54 noting that Canadian courts have also turned away from the definitional approach.

<sup>249</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [18].

<sup>250</sup> *R v Hansen* [2007] NZSC 7 at [104]. This approach is directly inspired by the Canadian proportionality test in *R v Oakes* [1986] 1 SCR 103. *Hansen* was applied in *Child Poverty Action Group Inc v AG* [2013] NZCA 402 at [76].

- (a) Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom
- (b)
  - i. Is the limiting measure rationally connected with its purpose?
  - ii. [minimal impairment] Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?
  - iii. [proportionality] Is the limit in due proportion to the importance of the objective?

It goes without saying that the protection of people from discrimination (particularly on the grounds of sexual orientation) is an important purpose justifying the curtailment of religious freedom and the operation of the HRA is rationally connected with that purpose. There is little doubt over these points; minimal impairment and proportionality require more analysis however.

#### i) Minimal Impairment

Regarding minimal impairment, there are some issues concerning the appropriate test. Recently, the Court of Appeal has stated that minimal impairment is satisfied where the approach taken falls within a range of reasonable alternatives.<sup>251</sup> Some have noted that this reasonable standards approach places the focus on reasonableness rather than the intrusiveness on the right, and that it is at odds with the decision in *Hansen*.<sup>252</sup> The Court of Appeal seems to have seized upon Tipping J’s judgment in *Hansen*, but there are four other judgments in that decision. Anderson J stated the test as “least possible impairment”.<sup>253</sup> Elias CJ held that a “limitation must be no more than is reasonably necessary to achieve the purpose”.<sup>254</sup> So there is clearly room for argument over approach, particularly because the Supreme Court has yet to consider this trend of the Court of Appeal.

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<sup>251</sup> *Child Poverty Action Group v AG* [2013] NZCA 402 at [102]. Similar test applied in *Ministry of Health v Atkinson* [2012] NZCA 184 at [151] “This limb of the test can be addressed by considering whether the Ministry’s approach fell within a range of reasonable alternatives.”

<sup>252</sup> Max Harris “Justified Discrimination?” [2013] NZLJ 363 at 364.

<sup>253</sup> *Hansen* at [272].

<sup>254</sup> *Hansen* at [42].

The approach to ‘minimal impairment’ may change the outcome of the assessment. The goal is to protect people from discrimination on the grounds of sexual orientation. The HRA (as it stands) most likely falls within a range of reasonable alternatives. Under the strict ‘least possible impairment’ approach, it might be argued that provision for reasonable accommodation would provide a lesser impairment on religious freedom while still achieving HRA’s aim.<sup>255</sup> Canada provides for reasonable accommodation as a means of balancing rights, whereas Lady Hale in *Bull* appears to have rejected outright this proposition.<sup>256</sup> It is an arguable point, but it is a point unlikely to be raised under the ‘reasonable alternatives’ approach that the Court of Appeal has been applying.<sup>257</sup>

The other factor to consider is the amount of latitude or leeway that should be accorded to the HRA as it stands. As stated in *Hansen*, the review function of s 5 needs “to allow some discretion to Parliament in its determination of whether a limit on a freedom or right is reasonable and justified.”<sup>258</sup> Where the issue is one of major political or social importance, a more deferential approach may be warranted.<sup>259</sup> The HRA is a statute of immense social and constitutional importance that clearly favours freedom from discrimination over freedom to manifest religion.<sup>260</sup> The courts will probably be hesitant to second guess the balance struck by Parliament, given the highly political nature of the issue. If the courts take this line of reasoning, exploring whether reasonable accommodation might be a less rights impairing option may be unwarranted.<sup>261</sup>

The reduced intensity of review that deference demands in this case probably guarantees that the HRA will be a ‘minimal impairment’ on the right to freedom of religion; regardless of whether a ‘reasonable alternatives’ or ‘least impact’ test is used. Furthermore, the presence of s 97 as a wide and general defence will probably alleviate any concerns that the law is too restrictive.

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<sup>255</sup> As argued in *Bull v Hall* at [45]-[51].

<sup>256</sup> At [51].

<sup>257</sup> The High Court has also applied a ‘reasonable alternatives’ approach. See *Wadsworth v Auckland Council* [2013] NZHC 413 at [70].

<sup>258</sup> Per Tipping J at [105]. Also see *CPAG* at [91] “in approaching the s 5 analysis, some latitude or leeway is given to the legislature or the decision maker particularly in a case like the present which involves the complex interaction of a range of social, economic, and fiscal policies.”

<sup>259</sup> At [116].

<sup>260</sup> See Joseph, above n 178, at 269.

<sup>261</sup> *Brookers Human Rights Law* (online looseleaf ed, Brookers) at 5.05.

## ii) Proportionality

The first point to note is that this head will hardly ever be determinative. As noted in *Child Poverty Action Group v AG*, “Once it is accepted that the other limbs of the s 5 test are met, it inevitably becomes harder to say that the measure that results is not proportionate”.<sup>262</sup> Nevertheless, under this head, the court must determine whether the social advantage outweighs the harm to the right.<sup>263</sup> This analysis will be taken in light of “all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.”<sup>264</sup>

Firstly, the protection of homosexuals is a very important goal in the current zeitgeist. In *Bull*, Lady Hale spent some time outlining the great suffering that homosexuals have suffered in history.<sup>265</sup> The Strasbourg jurisprudence requires “very weighty reasons” to justify discrimination on the grounds of sexual orientation.<sup>266</sup> While we have had little judicial consideration of this point, it is likely that our courts would reflect these sentiments. Sexual orientation is so closely linked to a person’s identity that great harm would be caused in not preventing discrimination on that ground. Therefore, there is a large benefit to society in structuring the HRA to allow few exemptions to discrimination.

On the other hand, the courts will probably see minimal harms to religionists.<sup>267</sup> Our own jurisprudence speaks little on this point, but we will likely follow in the spirit of the English and Canadian law. Essentially, because this is in the commercial sphere and religious people choose to enter the marketplace, then laws against discrimination are not as great a harm on them.<sup>268</sup> As seen in *Alberta v Hutterian Brethern* it is permissible for a certain degree of economic inconvenience to be suffered as a result of a generally applicable law, and such reasoning will probably come through here.<sup>269</sup> If you wish to follow your religion, then you need to bear the cost. The doctrine of meaningful choice works against them.

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<sup>262</sup> *CPAG* at [151].

<sup>263</sup> *Hansen* at [134].

<sup>264</sup> *Moonen* at [18].

<sup>265</sup> *Bull* [52]-[53].

<sup>266</sup> Observed in *Bull* at [53].

<sup>267</sup> See chapter V.

<sup>268</sup> See *Alberta v Hutterian Brethern of Wilson Colony* [2009] SCC 37 at [94].

<sup>269</sup> *Ibid*, at [97].

### iii) Conclusion about NZBORA

On this analysis it would appear that there is little hope for a religionist to argue for a more lenient defence via s 6 of the NZBORA. The HRA will undoubtedly be a justified limitation on the right to manifest religion. Also given the HRA's constitutional status, the courts will be very hesitant to get involved in reviewing the legislation.

## V

### Is the Law Getting it Right?

Having reviewed the law, one trend should be obvious: religionists do not win. In every case (except one),<sup>270</sup> attempts to justify RMD have fallen flat. This should be a concern, because as already considered,<sup>271</sup> the harms and benefits on either side of an RMD dispute are so finely balanced that a more even distribution of wins and losses should be expected. In this chapter I will seek to understand how it is that religionists lose nearly every RMD dispute, and I will ultimately ask whether this is justified? I will conclude that it is not.

#### Why Religionists Cannot Win?

##### *1. Lack of statutory exemptions*

If no statutory defence is provided, then religionists will automatically lose.<sup>272</sup> This issue is particularly acute in the UK: as established in *Bull*, most cases of RMD will be instances of direct discrimination to which there is no defence. If the law is structured in such a way, then there is no way for courts to consider the particular merits of a case. Essentially, the only question will be whether direct discrimination existed – and as already shown, it will be nearly impossible for religionists to resist this finding.

##### *2. Unfavourable Judicial Doctrines and Attitudes*

One might claim that a general justification (such as s 97 of the HRA, or the Canadian *Meiorin* test), ensures that the law is balanced. Clearly, if there is a deserving religionist (on the merits of the case), then the court can exonerate him, therefore ensuring balance.<sup>273</sup> However, I contend that the ‘deserving religionist’ will never be found given the law’s current approach. I submit that the following factors work together to frustrate any attempt to justify RMD.

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<sup>270</sup> *Hands on Original*.

<sup>271</sup> See Chapter II.

<sup>272</sup> Courts have in the past crafted common law defences. See *Lange v Atkinson*. But such feats of judicial activism are unlikely given the unpopular nature of religious freedom – particularly at the cost of gay rights.

<sup>273</sup> See Arden LJ obiter dicta statement in *Wilkinson* at [71] where she suggested the kind of extraordinary situation where RMD could be justified.



## i) Deference

Deference marks the leeway that courts give to the decisions of Parliament. Especially on a matter of sensitive public policy, the courts are generally unwilling to upset the decision of the democratic majority. This doctrine was recently applied in the New Zealand case of *CPAG*.<sup>274</sup> Directly in *Wilkinson*,<sup>275</sup> and in *Bull*,<sup>276</sup> the Courts accorded significant weight to the balance struck between the rights by the legislature. Lord Dyson MR concluded:<sup>277</sup>

...in deciding the proportionality issue that arises in this case, the court should give weight to the fact that, after wide consultation, the matter was carefully considered by the legislature, which produced a scheme which gives priority to religious belief, but only in certain narrowly circumscribed circumstances. The issue of how to strike the balance between the competing interests of homosexual couples and persons who, on religious grounds, believe that sexual relations should only be permitted between married heterosexual couples involves difficult and controversial questions of moral judgment. For that reason, this is a case which... is pre-eminently one in which respect should be shown to what Parliament has decided.

This doctrine disadvantages religionists in two ways. Firstly, it guarantees that religionists will not succeed under bills of rights claims of incompatibility. Because the balance between gay and religious rights is a very sensitive issue, the judiciary are unlikely to conduct an intense review of the legislation. This was the result in *Bull* and *Ashers*, and most likely will be the case in New Zealand.<sup>278</sup> Secondly, deference is used to contain the scope of general defences. This was witnessed in *Wilkinson*: because Parliament did not include a specific exemption for RMD, then it was reasoned that RMD should not be justified via the catch-all justification. In other words, it would be wrong for discriminators to achieve through the courts what they could not achieve through the democratic process.<sup>279</sup> Therefore, in the context of RMD, the lack of a

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<sup>274</sup> Although the court in *CPAG* disavowed the term deference, it serves as a useful label for what is a wider phenomenon. Margin of appreciation might capture the same idea, although it is a term of art drawn from European jurisprudence.

<sup>275</sup> At [45]-[49].

<sup>276</sup> At [38].

<sup>277</sup> *Wilkinson* at [49].

<sup>278</sup> See Chapter IV.

<sup>279</sup> *Wilkinson* at [47], considering *R (Countrywide Alliance) v Attorney General* [2007] UKHL 52 at [45] “The democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament.”

specific exemption is taken as a reason why the general exemption should not be granted to religionists.

## ii) Dislike of Exemptions

In *Bull*, the Court was concerned with creating a class of people that were exempt from the general law, noting “we do not normally allow people to behave in a way which the law prohibits because they disagree with the law.”<sup>280</sup> This is a very fair concern because exemptions can be seen to conflict with the rule of law. Dicey noted:<sup>281</sup>

...when we speak of the "rule of law" as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here *every man*, whatever be his rank or condition, is *subject to the ordinary law of the realm*...

The demands of the rule of law work against religious interests. Antidiscrimination laws understood as general laws that apply to everyone; exempting religionists from these laws appears to place them above the law. In the landmark case of *Employment Division v Smith* the US Supreme Court clearly had the rule of law in mind when they decided that a liberal approach to religious exemptions would effectively be “courting anarchy.”<sup>282</sup> This factor surely weighs against a religionist when attempting to argue for a justification.

## iii) Privatising Religion

As I considered in Chapter II, the religionist draws their identity from their religion, therefore, limiting religious manifestation causes status harms similar to that suffered by gay people when they cannot express their identity. However, courts regularly fail to recognise the harm done to religionists by antidiscrimination laws because of the public/private paradigm which skews religious freedom.

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<sup>280</sup> *Bull* at [37].

<sup>281</sup> A V Dicey “Introduction to the Study of the Law of the Consitution” (Macmillan, London, 1915) at 115.

<sup>282</sup> *Employment Division, Department of Human resources of Oregon v Smith* 494 US 872 (1990) at 888 per Scalia J.

Consider the *Brockie* principle: the more commercial the venture, the less relevant the harm to religion will be. This reasoning was also echoed in *Ashers* and in *Wilkinson*. This reasoning reflects the liberal public/private paradigm<sup>283</sup> which divides political life into two spheres:<sup>284</sup> the public sphere where people relate to each other primarily as economic actors; and the private sphere where individuals pursue their personal conception of the good. The insight is that each sphere is dedicated to a different purpose, or pursuit of a ‘good’.<sup>285</sup> Religion as an aspect of personal fulfilment belongs to the private sphere. The public sphere of economic transaction is geared towards economic satisfaction, not personal development. Therefore, the state has no qualms in regulating religion in the public sphere because religion is in a place it should not be.

This paradigm harms religionists because it privileges private religion but discounts public religion. RMD is religious manifestation in public; accordingly, any harm done to that religious interest is not perceived as serious because in the commercial sphere, profit-maximisation is the aim, not religious fulfilment. However, the cleavage between ‘personal life’ and ‘work life’ is a recent innovation of modernity.<sup>286</sup> For the Christian, their religion impacts both their private and public lives – St Benedict’s motto *laborare est orare* (to work is to pray) captures how meaningful work can be to the Christian.<sup>287</sup> It makes no difference to the Christian that their religious practice is in the commercial sphere, if they cannot discriminate in accordance with their religious conscience they will suffer. The law simply fails to recognise this – the result being that religionists have little to place on their side of the scales when weighing up the harms in RMD cases.

#### iv) Failure to recognise religious function

To establish the *Meiorin* justification at Canadian law, a standard must be rationally connected to the enterprise’s function. I believe a similar requirement is required to establish ‘good reason’ under the HRA. This requirement will frustrate every small business religionist because

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<sup>283</sup> See Jose Casanova “Private and Public Religions” (1992) 59 Social Research 1 at 20, for different ways of understanding the public private divide.

<sup>284</sup> Ngaire Naffine “How Religion Constrains Law and the Idea of Choice” in Paul Babie and Neville Rochow *Freedom of Religion Under Bills of Rights* (University of Adelaide Press, 2012) at 14.

<sup>285</sup> Alasdair MacIntyre *Whose Justice? Which Rationality?* (University of Notre Dame Press, Indiana, 1988) at 337.

<sup>286</sup> See Ronald J Colombo “The Naked Private Square” (2013) 51 Houston LRev 1, at 9. “Thus, the concept of segmenting one’s “work” from one’s “personal” and “religious” life would have been largely alien to the pre-Industrial labourer....Talk of achieving an appropriate “work/life” balance, so familiar today, would have been unintelligible.

<sup>287</sup> Ibid at 9. See also Ahdar and Leigh, above n 246, at 339.

it separates the religious person from their business. The court must then be able to see that the business objectively has a religious function (which I doubt will ever happen).

Recall that in *Riverbend*, the Panel refused to admit that the Riverbend had any religious function. Its function was to simply provide accommodation. However, to the Molnars, the Riverbend was a ministry, “dedicated to the Lord.”<sup>288</sup> One needs to ask however, what kind of evidence will point to a religious function? In *Knights*, the religious function of the hall was inferred by the para-church status of the Knights of Columbus. But most religiously-minded proprietors will run their businesses in ways that hardly distinguish them from secular counterparts. For the religionist, the service itself is imbued with meaning – remember that even work can be prayer for the Christian. Therefore, the religious function of the business comes from the internal understanding of the religionist; an outsider looking in (such as an agnostic court) might fail to recognise this.<sup>289</sup> Essentially, the evidence that the court is looking for (perhaps a big cross on the door, the charitable nature of the business or the restriction of services to only church members) will hardly ever exist.

#### v) Little Weight Given to Economic Loss

In Chapter II, I noted the negative economic effects that antidiscrimination laws have on religionists. The law can force religionists out of the marketplace. However, there seems to be a worrying trend of courts ignoring this factor.

In *Wilkinson*, Arden LJ noted that “the financial impact on an existing business may be relevant to justification if appropriate evidence were available.”<sup>290</sup> However, Mrs Wilkinson failed to provide evidence on that point and it was not taken further.<sup>291</sup> So far *Wilkinson* has been the only case that has given serious consideration to the financial interests on the religionist side. If courts do not account for the severe economic harm that a finding of discrimination will cause the religionist, then the justification analysis will be incomplete. Without a fair picture of the benefits and harms on either side, then the outcome will not be

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<sup>288</sup> *Riverbend*, at [16].

<sup>289</sup> See Brett G Scharffs “Equality in Sheep’s Clothing: The Implications of Anti-Discrimination Norms for Religious Autonomy” (2012) *Santa Clara Journal of International Law* 107, at 119. Notes how easy it is for agnostic courts to miss the religious aspect in seemingly secular activities. A Canadian courts were unwilling to find that caring for the disabled was a religious activity. Scharffs noted that this was certainly at odds with Christ’s commands to care for the downtrodden.

<sup>290</sup> *Wilkinson*, at [70].

<sup>291</sup> *Wilkinson*, at [68] “[the Court] cannot build bricks without straw. The appellant must provide the straw.”

fair (especially in the context of RMD, where economic disadvantage constitutes the bulk of the harm to religionists).

### **What is wrong with the law?**

In chapter II, I indicated just how finely balanced the harms and benefits are in RMD disputes. Given this balance, the law should be structured in a way where both parties can potentially win, context permitting. Jonathan Lipson noted: “If we respect gay people and religious actors equally, then it will almost always come down to the “equities of each case.””<sup>292</sup> However, the aforementioned factors skew the equities of the case against the religionist.

Where no exemption is provided, there is no opportunity for a balanced outcome. But even when general exemptions are provided, religionists cannot win. Deference means that courts are unwilling to protect religionists via general exemptions (the reasoning being that if Parliament did intend this class of people to be exempted, parliament would have included a specific exemption for them). The other factors (chief among them being the preference for private religion) coincide to discount the real harms that religionists suffer when they cannot discriminate in line with their religious conscience. This creates an asymmetry of harms; the status harms that discrimination inflicts are well appreciated, but the courts fail to grasp the extent of harm to the religionist’s interests. On this view, religionists will rarely succeed in RMD disputes.

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<sup>292</sup> Jonathan C Lipson “On Balance: Religious Liberty and Third-Party Harms” (2000) 84 Minnesota Law Review 589, At 669

# VI

## Future Challenges

Lady Hale recently gave an address in Ireland where she expressed concerns about the decision in *Bull*.<sup>293</sup> Reflecting on the need to consider religious interests, she opined, “I am not sure that our law has yet found a reasonable accommodation of all these different strands. The story has just begun.”<sup>294</sup> Indeed it has.

I set out to answer whether the law concerning RMD is getting it right? I hope I have shown that it is not. The law either misses, or deliberately refuses to recognise the extent of the harms suffered by religionists when they cannot discriminate in line with their religious conscience. Because the interests of religiously conservative business owners are not properly grasped in court, they have very little chance of succeeding against the well-recognised interests of gay people in a RMD dispute. This is wrong because, the normative balance as considered in chapter II is nearly even, and the laws fail to represent that balance.

Of course it is easy to criticise – it is much harder to come up with solutions. This dissertation has done the easy work – it has identified the problem: the interests of religionists are discounted and ignored by the law. This is an issue because the state guarantees the right to freedom of religion equally with the right to be free from discrimination. If these rights are respected equally, then the interests of both groups need to be equally considered – this cannot happen until decision makers fully understand the harms that religionists face when they cannot discriminate. Solving this problem will take a lot more work.

Fully appreciating the harms suffered by religionists’ should not lead to religionists succeeding in every RMD dispute. However, some form of specific exemption appears to be in order to properly respect religionists’ interests. A group of American scholars<sup>295</sup> have proposed that some small religiously-minded businesses should receive an automatic exemption where they

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<sup>293</sup> Lady Hale, Baroness of Richmond and Depty President of the Supreme Court of the United Kingdom, “Freedom of Religion and Belief” (Annual Human Rights Lecture for the Law Society of Ireland, 13 June 2014).

<sup>294</sup> *Ibid*, at 20.

<sup>295</sup> Letter from Robin Fretwell Wilson, Thomas C Berg, Carl Esbeck, Richard W Garnett, and Edward McGlynn Gaffney Jr to Rosalyn H Baker (Senator of Hawaii) regarding Religious Liberty Implications of Proposed Hawaii Marriage Equality Act of 2013 (17 October, 2013).

are forced to provide goods or services related to the celebration of a same-sex marriage, provided that there is no substantial hardship to the gay couple. This is but one example of a specific exemption for religionists.<sup>296</sup> I believe that the solution lies in the direction of the Canadian ‘reasonable accommodation’ standard.

I do not wish to solve the problem of RMD here, nor do I believe that one person can. Instead, I will suggest some factors to orient the further debate. Firstly, we need to be aware that RMD presents a tragic choice. In the cases of RMD that I reviewed, the courts offered little sympathy to the religionist. What the courts and society need to realise is that the religious interest is similar to the gay interest; they are both integral parts of that person’s identity. In either preventing or permitting RMD, a person’s dignity is harmed, and this is always regrettable. If we respect the dignity of all people equally, then decision makers in the RMD context should be aware of their ‘dirty hands’.<sup>297</sup> A contrite tone that sympathises with both parties is more appropriate.

Because this is a tragic choice, it is important that the debate continues in public; this highlights the issue, and allows everyone to engage in planning for a future “non-tragic society.”<sup>298</sup> In this regard, I believe that the courts have done the right thing in taking a strong deferential approach to antidiscrimination legislation. Any solution to this issue should be fashioned by democratic forces, given the sensitive questions that RMD raises. Society needs to consider carefully how the values of tolerance and liberty fit alongside the every growing force of equality. Only after we have considered these issues can a better solution be reached.

Finally, if a solution is to be fair, then the interests of religious people need to be recognised. This will require a change in attitude towards religion. Julian Rivers notes that religion today is seen as a source of human rights breaches, given its opposition to ‘gender ethics’.<sup>299</sup> On this account, it might be seen as a good thing that religion is being closeted. But we need to accept

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<sup>296</sup> See generally Andrew Koppleman “Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law” (2015) 88 Southern California Law Review 619, at 631-639 for a discussion of different attempts at religious conscience exemptions in the US.

<sup>297</sup> Nussbaum, above n 6, at 1017.

<sup>298</sup> Ibid, at 1027.

<sup>299</sup> Julian Rivers “Law, Religion and Gender Equality” (2007) 9 Ecclesiastical Law Journal 24 at 33. Note that this attitude is quite recent, as Rivers observed ““for the last 150 years English law has proceeded on the assumption that religion generally is an unqualified human good.”

that religious people see the world differently. If in the name of ‘equality’, we squeeze religious people out of the public sphere, then we are weakening liberty, the base of liberal society.<sup>300</sup>

Society also needs to recognise that religion is not just about belief. The dominant paradigm of religion is Protestant shaped: it privileges internal belief over conduct.<sup>301</sup> This paradigm also shapes religious freedom to the detriment of religionists.<sup>302</sup> Religionists suffer real harm when they cannot live their faith – it is disingenuous to claim that there is no major suffering because the real realm of religion (the interior realm of belief) remains intact.<sup>303</sup> We need to see the religious significance in what might appear to be secular acts – when work can be prayer, even ditch digging can be religiously significant.

Similarly, we need to reassess the public/private distinction. Chai Feldblum, a prolific pro-LGBT scholar noted the injustice that the private/public distinction can cause: “gay people-of all individuals-should recognize the injustice of forcing a person to disaggregate belief or identity from practice. For years, gay people have been told by some entities that they should separate their status from their conduct.”<sup>304</sup> The old understanding was that you could be gay, just not in public. We have since moved on – we should not commit the same mistake with religiously-minded business owners. We should not say that religious identity stops when you set foot in the marketplace,<sup>305</sup> if we do so, we are ignoring the dignity of religious people.

RMD is an unfortunate phenomenon, and if we are going to respect both religionists and gay people, then RMD is going to remain. Andrew Koppelman notes:<sup>306</sup>

It is possible for gay people and conservative Christians to live together, each following their own deepest allegiances. But the coexistence that this entails will necessarily be

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<sup>300</sup> Brammer J Brady “Religious Groups and the Gay Rights Movement: Recognizing Common Ground” (2006) 4 Brigham Young University Law Review 995 at 995.

<sup>301</sup> Frank S Ravitch “The Unbearable Lightness of Free Exercise Under *Smith*: Exemptions, Dasein, and the More Nuanced Approach of the Japanese Supreme Court” 2012 44 Tex Tech L Rev 259.

<sup>302</sup> There is a particular irony in the fact that most religionists so far have been Evangelical Christians, a denomination which sprouted from the ever sprouting vine of Protestantism.

<sup>303</sup> Marci A Hamilton “The Belief/Conduct Paradigm in the Supreme Court’s Free Exercise Jurisprudence: A Theological Account of the Failure to Protect Religious Conduct” (1993) 54 Ohio State Law Journal 713 at 770.

<sup>304</sup> Chai Feldblum “Moral Conflict and Conflicting Liberty: Gay Rights and Religion” (2006) 72 Brook L Rev 61, at 103.

<sup>305</sup> The *Brookie* principle might suggest such an approach.

<sup>306</sup> Andrew Koppelman “You Can’t Hurry Love Why Antidiscrimination Protections for Gay People Should Have Religious Exemptions” (2007) 72 Brook.L.Rev 125, at 142.



painful for both. The only way to achieve comfort for either would be to make the other disappear or pretend to disappear.

Any fair solution will place burdens on both religiously conservative business owners and gay people. Right now, the balance disfavours religionist's because the law does not adequately grasp the interests of religiously conservative business owners. Now that we know the problem, we can start working towards a solution.

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