Religious Symbols and Clothing in the Workplace: Balancing the Respective Rights of Employees and Employers

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The right to wear religious clothing and symbols in the workplace is often a contentious issue and one that requires balancing the individual interests of employees and the interests of the employer. The article examines the European Court of Human Rights decision in the case of *Eweida and Others v The United Kingdom* (15 January 2013) in which the right of two employees to visibly wear a Christian cross at work was decided. The article further considers the issue within the Australian workplace context in which the principles applied in the *Eweida* case find relevant application. The case demonstrates the centrality of the proportionality test in balancing competing rights and interests, and the legitimate grounds upon which rights may be justifiably limited in the workplace. The decision also highlights the need for employers to have appropriate workplace uniform policies or dress codes that reasonably accommodate employees' rights to manifest their religious beliefs in the workplace through religious clothing and symbols and to avoid potentially discriminatory actions.

1. Introduction

Wearing religious clothing and symbols in the workplace is often a contentious issue and one that at times highlights the tensions between competing and conflicting personal and professional values and expectations. It also brings forth competing religious and secular views about the place of religion in the workplace. This has recently played out in the European Court of Human Rights case *Eweida and Others v The United Kingdom*[1] concerning the right to manifest religion at work, in which two of the applicants were restricted from wearing a Christian cross in the workplace. This case recognises the importance of religious freedom and addresses key questions about the rights of employees to wear religious clothing in the workplace and when such rights may be limited by the employer. In Australia there is limited research and jurisprudence on this particular issue, but the *Eweida* case is instructive in considering the principles applied in limiting the exercise of religious rights and freedoms in the workplace. The purpose of this article is therefore to firstly examine the *Eweida* case within the context of related jurisprudence and the European Court of Human Right's approach to balancing rights and charting a compromise between competing rights in a democratic and pluralistic society, and secondly to examine the right to and limitations of wearing religious clothing in the workplace in Australia. Part 2 provides an overview of the procedural history of the case in the United Kingdom. Part 3 discusses the right to religious freedom pursuant to Article 9 of the *European Convention on Human Rights* and the decision of the European Court of Human Rights and the application to the *Eweida* case. Part 4 examines the right to wear religious symbols and clothing in the Australian workplace and the implications for employers.

2. Background to the *Eweida* Case and Procedural History

Ms Eweida, the first applicant, worked as check-in staff at British Airways ('BA') (a private company) from 1999 and was required to wear the prescribed corporate uniform. The

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[1] *Eweida and Others v The United Kingdom* (European Court of Human Rights, Chamber, Application Nos. 48420/10, 51671/10 and 36516/10, 15 January 2013) <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115881#{"itemid":["001-115881"]}>. This case joins four applications against the United Kingdom and Northern Ireland. This article only addresses the matter concerning the first two applicants, Ms Nadia Eweida and Ms Shirley Chaplin dealing with religious clothing and symbols in the workplace.

company's uniform policy specifically provided that clothing or accessories worn for religious reasons must be covered at all times by the uniform. It was the policy of the company that 'personal jewellery or items (including any item worn for religious reasons) should be concealed by the uniform unless otherwise expressly permitted by [the employer].'[2] At times, authorisation was given to employees to wear certain items that could not be concealed. For example, female Muslim ground staff were authorised to wear the hijab in approved corporate colours.

Ms Eweida wore a silver cross (one to two inches high) on a chain concealed under her uniform blouse for a period of time, but later she started wearing her cross openly. She wore the cross as a personal choice and not because it was a specific requirement of the Christian religion. She was instructed by her employer to conceal the cross, but after refusing to comply with the uniform policy the applicant was sent home without pay. She remained at home between September 2006 and February 2007. She was subsequently offered another administrative position that would not require her to wear a uniform, which she declined. Following negative media publicity of this event,[3] the company amended its uniform policy so that religious symbols could be worn openly provided they were authorised. The cross and the Star of David were given immediate authorisation.

In 2008 Ms Eweida lodged a claim in the Employment Tribunal (Reading)[4] ('the Tribunal') for direct and indirect discrimination on the grounds of religious belief within the meaning of regulation 3 of the *Employment Equality (Religion and Belief) Regulations 2003* ('the regulations'). Ms Eweida also claimed that there had been unlawful deductions of wages when the employer refused to pay her for the time she was absent from work.

Pursuant to regulation 3(1)(b), which deals with indirect discrimination, a person discriminates against another person if:

> A applies to B a provision, criterion or practice which he [sic] applies or would apply equally to persons not of the same religion or belief as B, but (i) which puts or would put persons of the same religion or belief as B at a particular advantage when compared with other persons, (ii) which puts B at a disadvantage, and which (iii) A cannot show the treatment or, as the case may be, provision, criterion or practice — to be a proportionate means of achieving a legitimate aim.[5]

The operation of the regulation therefore required that the claimant must be placed at a disadvantage *and* that it 'must be a disadvantage shared by others who share her religion or belief.'[6] The challenge facing the claimant was to show that the impugned provision in the uniform policy had a 'disparate impact'[7] on the disadvantaged group. It was not sufficient that the claimant suffered a detriment or disadvantage by not being able to wear a visible cross that was a personal manifestation of her religious belief.

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[2] *Eweida v British Airways plc* [2009] ICR 303 (Appeal Number UKEAT/123/08), 13 V http://www.bailii.org/ew/cases/EWCA/Civ/2010/80.html>.
[3] In the Court of Appeal case, Lord Justice Sedley observed that 'it is regrettable that print and broadcast media continue to publicise allegations made against BA by Mrs Eweida which have been rejected by a responsible judicial tribunal': *Eweida v British Airways plc* [2010] EWCA Civ 80.
[4] As the Tribunal's report is not available, the findings of the Tribunal are gleaned from *Eweida v British Airways plc* [2009] ICR 303 (Appeal Number UKEAT/123/08).
[5] *Eweida v British Airways plc* [2009] ICR 303 (Appeal Number UKEAT/123/08), 9.
[6] Ibid.
[7] Ibid.

The Tribunal dismissed the claim of indirect religious discrimination on the basis that the applicant failed to show that the British Airways uniform policy was discriminatory by placing Christian members of staff in general (that is a defined group) at a disadvantage. It was held that the requirement to conceal jewellery or religious items was applicable to all employees regardless of faith and that it did not put 'Christians as a group at a particular disadvantage when compared with other persons' as required by regulation 3(1)(b).[8] In a large uniformed workforce there had not been a request or demand to visibly wear a cross, and other Christians had not complained about the policy. As there was no finding of direct or indirect discrimination, the question of justification did not arise. The Tribunal, however, ventured to explain that had it found indirect discrimination, it would *not* have found the uniform rule to be justifiable and proportionate to achieving what was agreed to be a legitimate aim. In this case the aim of the uniform policy was to create a particular corporate brand.[9] The Tribunal accepted that the uniform policy sought to achieve a legitimate business aim but argued that the uniform rule was not proportionate to the aim of maintaining a particular corporate image. In applying the test of proportionality, the Tribunal noted:

> We consider that a proportionate means is one which is achieved as a result of a balancing exercise between all parties involved recognising the importance of the business need, analysing the case and the rationale put forward by the employers … and forming our view of whether justification had been proved …[10]

The Tribunal submitted that the uniform rule would not be considered proportionate because:

> It fail[ed] to distinguish an item which represents the core of an individual's being, such as a religious symbol, from an item worn purely frivolously or as a piece of cosmetic jewellery. We do not consider that the blanket ban on everything classified as 'jewellery' struck the correct balance between corporate consistency, individual need and accommodation of diversity.[11]

The Tribunal's decision was appealed in the Employment Appeal Tribunal ('the EAT'). It was claimed that the Tribunal ought to have held 'that adherents of a religious faith [had] suffered a particular disadvantage' for the purpose of the regulation.[12] The Tribunal should have concluded that persons of the same religion or belief did share the claimants religious views and were likewise disadvantaged by the uniform rule. Moreover, it was claimed that the Tribunal ought to have found that to constitute a particular disadvantage it was sufficient that the employee 'conscientiously objected on religious grounds to the imposition of the provision, even if he or she were to comply with it.'[13]

The EAT considered two issues: what constitutes a 'particular disadvantage' and whether 'persons of the same religion belief' were similarly disadvantaged.[14] The claimant therefore must have been 'placed at a disadvantage' and had to demonstrate that persons of the same religion or belief were disadvantaged.[15]

The EAT did not support the Tribunal's view that there was no disadvantage to which the individual was put and indeed found this 'a little puzzling' because the claimant had clearly

[8] Ibid.
[9] Ibid 17.
[10] Ibid 18.
[11] Ibid 19. It is noted, however, that the uniform rule did not in fact provide a 'blanket ban'.
[12] Ibid 23.
[13] Ibid 22.
[14] Ibid 33.
[15] Ibid 11, 46.

been put at a disadvantage.[16] By insisting that the employee wear the cross concealed 'operated as a barrier to her being able to work and to be paid'.[17] The fact that it was possible to comply with the requirement did not prevent employees from claiming indirect discrimination.[18] In this regard, the EAT noted that for a particular 'detriment' or 'disadvantage' to be established within the meaning of indirect discrimination it need not be specifically linked to an inability to comply with a particular condition or requirement. The claimant then did show that the detriment arose from an inability to comply with the requirement (as was the situation in earlier definitions of indirect discrimination). Therefore a 'particular disadvantage' can also result from compliance with a condition or requirement.[19] In this case the fact that the claimant could comply with the uniform requirement but chose not to, did not act as a bar against a claim for indirect discrimination.

However, as in the case of the Tribunal, the EAT similarly concluded that 'the concept of indirect discrimination implied discrimination against a defined group' and the claimant would have to show evidence of group disadvantage. Following the Tribunal's position, the EAT noted that in terms of indirect discrimination as contemplated by the regulations, the criterion or practice must have a 'disparate impact' (detriment) on the affected group: 'the whole purpose of indirect discrimination is to deal with the problem of group discrimination'.[20] Despite the fact that religious beliefs and practices may be highly personal, subjective and not necessarily always shared by a particular group, the question of whether or not there is an arguable case of indirect discrimination based on religious discrimination is determined with reference to the 'disparate impact' on an identifiable group.

In terms of the second element, the EAT found that there was no evidence to establish such group disadvantage. It was argued for the claimant that it was 'self-evident' that there would be other Christians who would share the claimant's beliefs and it was 'not a matter of evidence but logic' given that the wearing of a cross is a widely adopted practice in the Christian religion.[21] However, the EAT did not accept this line of reasoning as persuasive and in the absence of a 'scintilla of evidence'[22] the appeal was dismissed: 'the claimant could not simply circumvent the lack of evidence by stating the necessary group advantage was self-evident'.[23] Furthermore it was held that it 'is not enough that persons of the same religion and beliefs are fortuitously affected by the provision. It must be something connected with the religion or belief that causes the adverse effect.'[24]

As there was no finding of indirect discrimination on religious grounds, the EAT likewise did not have to consider the question of whether the uniform provision served a legislative aim and was proportionate to the aim. Nonetheless, the issue was given cursory consideration. In dealing with the issue of proportionality, the EAT rejected the Tribunal's statement that the policy imposed a 'blanket ban on wearing jewellery', but was satisfied that the Tribunal view

[16] Ibid 16.
[17] Ibid 16.
[18] Ibid 36, 44.
[19] Ibid 45.
[20] Ibid 58.
[21] Ibid 56.
[22] Ibid 58.
[23] Ibid.
[24] Ibid 46.

that the uniform policy would have been held to be disproportionate was supported by clear reasons and evidence before the Tribunal.[25]

The EAT decision was appealed to the Court of Appeal[26] on the basis that the EAT had erred in law as indirect discrimination only required evidence that a single person had been disadvantaged. The claim therefore shifted from one in which an identifiable group had been disadvantaged to one based on the individual claimant being disadvantaged, which was sufficient to find that discrimination had occurred. The Court of Appeal rejected this 'single person disadvantaged' argument.[27] Although Lord Justice Sedley commented that he did not share the view of EAT that 'the whole purpose of indirect discrimination is to deal with the problem of group discrimination',[28] he did conclude that it is still the common approach when dealing with indirect discrimination that it is first determined whether an identifiable group is actually or potentially affected by the adverse requirement and second whether the particular claimant (individual) has been disadvantaged.[29]

On the issue of whether the uniform policy was in pursuit of a legitimate aim, the Court of Appeal indicated its support for the argument that British Airways would have been justified in putting the material requirement in place and keeping it there pending its negotiation and eventual modification.[30] The Court of Appeal noted that indirect discrimination is not necessarily unlawful if the 'defendant employer can show that, in spite of its negative effect, the provision, criterion or practice, despite its unequal impact, constitutes a proportionate means of achieving a legitimate aim.'[31] Departing from the Tribunal's finding that the uniform rule would be held to be disproportionate, the Court of Appeal further argued that if the claim of indirect discrimination were sustainable it would be defeated by BA's claim of justification. The Court of Appeal rejected the notion that 'a previously unobjectionable rule' that had no negative impact on employees and raised no concern for some period of time could somehow 'become disproportionate once the claimant had raised the issue'.[32] On the evidence it seemed that in some seven years no-one had complained about the uniform rule, and in fact, once it had been raised as an issue, the uniform policy was changed thereby removing the potential source of discrimination. Moreover the Court of Appeal dismissed the sectarian basis of the claim holding that there was no evidence to suggest that wearing the cross was anything other than a personal choice and that that there was no suggestion that her 'religious belief, however profound, called for it.'[33] This is arguable as it would seem at first instance that although the claimant did not dispute that the cross was worn as a matter of personal choice, this was as opposed to it being a mandatory religious requirement; it was nonetheless for personal religious reasons and a manifestation of her faith. The silver cross was not a mere piece of jewellery but a symbol of faith.

Disconcertingly, the Court of Appeal did not see the need to consider the matter under Article 9 of the European Convention on Human Rights arguing that the 'the jurisprudence on Art. 9 does nothing to support the claimant's case.'[34] In this regard the Court of Appeal, citing *R (on*

[25] Ibid 75.
[26] *Eweida v British Airways plc* [2010] EWCA Civ 80.
[27] Ibid 28 - 29.
[28] Ibid 13.
[29] Ibid 13.
[30] Ibid 29.
[31] Ibid 30.
[32] Ibid 37.
[33] Ibid.
[34] Ibid 22.

the application of Begum) v Headteacher and Governors of Denbigh High School, took a somewhat narrow dismissive view that 'the Strasbourg institutions have not been at all ready to find an interference with the right to manifest religious belief in practice or observance where a person has voluntarily accepted an employment or role which does not accommodate that practice'.[35] This stance was rejected by the European Court of humans Rights as discussed below. Subsequently, the Supreme Court refused leave to appeal.

The second applicant, Ms Chaplin, brought a similar action. In this matter the applicant who worked as a nurse in a state hospital was also prohibited from wearing a cross at work. The hospital's uniform policy included the requirement that 'No necklaces will be worn to reduce the risk of injury when handling patients'.[36] When the hospital introduced a V-necked tunic for staff, the applicant was required to remove her necklace cross. The applicant sought permission to wear the cross on religious grounds but this was refused at it posed a potential risk if patients grabbed onto the necklace or it came into contact with open wounds. The applicant lodged a complaint in the Employment Tribunal claiming direct and indirect discrimination. The claim was dismissed as there was no evidence that persons had been disadvantaged and the hospital's response was proportionate to achieving the aim of health and safety. The applicant was advised that based on the *Eweida* case (in relation to the first applicant) there was no prospect of a successful appeal.

Both applicants (Ms Eweida and Ms Chaplin) thereafter commenced proceedings in the European Court of Human Rights ('ECHR') in 2010. They claimed that domestic law had failed to project their rights to manifest their religion and that their rights to religious freedom had been violated in terms of Article 9 of the European Convention on Human Rights (the 'Convention'),[37] an international treaty to protect human rights and fundamental freedoms in Europe. Before examining the *Eweida* decision it is useful to provide a general exposition of the general principles and scope of Article 9.

3. The Right to Religious Freedom and General Principles Under Article 9 of the Convention

Religious freedom is a fundamental human right that is enshrined in numerous international and national laws.[38] Article 9 (Freedom of thought, conscience and religion) of the Convention provides that:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
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> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

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[35] Ibid 22 - 23.

[36] *Eweida and Others v The United Kingdom* (European Court of Human Rights, Chamber, Application Nos. 48420/10, 51671/10 and 36516/10, 15 January 2013), 19.

[37] The European Convention on Human Rights (formerly the Convention for the Protection of Human Rights and Fundamental Freedoms) opened for signature 4 November 1950 (entered into force 3 September 1953). http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/Convention_ENG.pdf

[38] See, eg, *Human Rights Act 1998* (UK) Article 9; *Canadian Charter of Rights and Freedoms 1982* Article 2; Bill of Rights 1990 (NZ) s 15; *Constitution of South Africa 1996* s 15.

The first paragraph of Article 9 defines the content of the right to religious freedom and the second paragraph explains when the right may be limited.

3.1 A Belief and Manifestation

Article 9 makes provision for the freedom of thought, belief and conscience as well as the manifestation of such beliefs.[39] Although the ECHR has generally steered away from explicitly defining the concept 'religion',[40] the provision is nonetheless broadly interpreted to include a wide range of theistic and non-theistic belief systems such as Scientology, Druidism[41] and the Moon Sect.[42] In *Şahin v Turkey,*[43] in which the ECHR upheld a decision by a university to prohibit a student from wearing a headscarf in lectures and examinations, Judge Tulkens observed that 'the right to freedom of religion guaranteed by Article 9 of the Convention is a "'precious asset' not only for believers, but also for atheists, agnostics, sceptics and the unconcerned.'[44] Article 9 also encompasses both individual and collective belief, as well as the practice of belief in both public and private spaces. In *Kalaç v Turkey*, for example, it was stated that:

> while religious freedom is primarily a matter of individual conscience it also implies, inter alia, freedom to manifest one's religion not only in community with others, in public and within the circle of those whose faith one shares, but also alone and in private.[45]

Importantly, Article 9 expressly includes the right to 'manifest' one's belief. The manifestation of a religious belief may take the form of worship, teaching, practice and observance. Manifestations are thus central to the person's religious beliefs and practices. The wearing of religious dress and symbols is recognised by the ECHR as a manifestation, observance and practice of one's religious beliefs. However, not every act or 'manifestation' motivated or encouraged by religion or belief will fall within the ambit of Article 9.[46]

In *Regina v Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* ('*Williamson*') Lord Nicholls of Birkenhead noted in reference to Article 9 that religious freedom 'is not confined to freedom to hold a religious

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[39] Jim Murdoch, *Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (2007) Human Rights Handbook No 9, Council of Europe: Strasbourg, 9

[40] Ibid 12.

[41] Ibid.

[42] See, eg, *X v Austria* (European Court of Human Rights, Application no. 8652/79, 15 October 1981) 26 (concerning the Moon Sect in Austria) and *X v United Kingdom (*European Court of human Rights, Application no. 7291/75, 4 October 1977) (concerning the Wicca faith).

[43] *Şahin v Turkey* (European Court of Human Rights, Grand Chamber, Application no. 44774/98, 10 November 2005). See also *Karaduram v Turkey* (1993) 74 DR 93. In this case the applicant was denied a certificate of graduation because she refused to be photographed without a headscarf. The Commission held that the applicant's right to religious freedom under Article 9 had not been interfered with. The case, however, differs from *Şahin* in that the ECHR found no interference with Article 9 and therefore Article 9(2) did not arise.

[44] *Şahin v Turkey* (European Court of Human Rights, Grand Chamber, Application no. 44774/98, 10 November 2005) (Tulkens J, dissenting opinion), 1.

[45] *Kalaç v Turkey* (European Court of Human Rights) Reports of Judgments and Decisions 1997-IV 1199-1210, 1 July 1997), 27.

[46] See, eg. *Arrowsmith v the United Kingdom* (1978) DR 19, 5. For example, belief in assisted suicide does not fall within Article 9 as demonstrated in *Pretty v the United Kingdom* (European Court of Human Rights, Application no. 2346/02) ECHR Reports 2002-III.

belief. It includes the right to express and practise one's beliefs. Without this, freedom of religion would be emasculated.' [47]

However, Lord Nicholls of Birkenhead further stated that:

> [t]he belief must relate to matters more than merely trivial. It must possess an adequate degree of seriousness and importance. As has been said, it must be a belief on a fundamental problem. With religious belief this prerequisite is readily satisfied. The belief must also be coherent in the sense of being intelligible and capable of being understood.[48]

Whether or not an assertion of religious belief and practice is accepted by the courts is a subjective enquiry with reference to the person's personal convictions, and determined on the facts of each case. In *Williamson* the House of Lords rejected the proposition that religious belief could be tested objectively by the court stating that freedom of religion protects the subjective belief of an individual. Lord Nicholls of Birkenhead observed that:

> It is necessary first to clarify the court's role in identifying a religious belief calling for protection under Article 9. When the genuineness of a claimant's professed belief is an issue in the proceedings the Court will inquire into and decide this issue as a question of fact. This is a limited inquiry. The Court is concerned to ensure an assertion of religious belief is made in good faith: 'neither fictitious, nor capricious, and that it is not an artifice', to adopt the felicitous phrase of Iacobucci J in the decision of the Supreme Court of Canada in *Syndicat Northcrest v Amselem* (2004) 241 DLR (4th) 1, 27, para 52. But, emphatically, it is not for the Court to embark on an inquiry into the asserted belief and judge its 'validity' by some objective standard such as the source material upon which the claimant founds his belief or the orthodox teaching of the religion in question or the extent to which the claimant's belief conforms to or differs from the views of others professing the same religion. Freedom of religion protects the subjective belief of an individual.[49]

3.2 Limitations: Necessary for a Democratic Society

The second paragraph in Article 9 provides for the 'balancing of rights against competing considerations found elsewhere in the European Convention of Human Rights, and most obviously Articles 8, 10 and 11'.[50] Article 9(2) sets out the 'test' to determine whether or not an interference with or limitation on the right to religious freedom are justified under section 9(2). The test requires that the limitation or interference must be prescribed by law, ie, have a basis in law and be necessary in a democratic society. In other words the limitation must have a legitimate purpose and it must be proportionate in scope and effect.[51] In *Handyside v The United Kingdom*, the Court ruled that the term 'necessary' meant that there must be a 'pressing social need' for the interference.[52]

The ECHR has consistently recognised and pronounced the importance of freedom of religion in a democratic society, but at the same time it has reiterated that rights are not absolute and the right to freedom of religion may be limited. While the right to 'believe' may be absolute, the manifestation of belief, which may impact on others, has certainly been subject to

[47] *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others* [2005] UKHL 15, 16.
[48] Ibid 23.
[49] *Regina v. Secretary of State for Education and Employment and others*, above n 47, 22.
[50] Murdoch, above n 39, 10.
[51] See *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, 26.
[52] *Handyside v The United Kingdom* (European Court of Human Rights, Application No 5493/72, 7 December 1976), 48.

limitations. It is recognised that the practice of religious beliefs may be in conflict with other rights, for example, the right to equality or the right to safety and security. In *Kalaç v Turkey*, it was noted that 'Article 9 does not protect every act motivated or inspired by a religion or belief.'[53] The crux of the matter is aptly summed up by Judge Tulken in *Şahin v Turkey*: 'Freedom to manifest a religion entails everyone being allowed to exercise that right, whether individually or collectively, in public or in private, subject to the dual condition that they do not infringe the rights and freedoms of others and do not prejudice public order.'[54] Thus in 'democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interest of various groups.'[55]

The limitation or restriction on religious clothing and symbols in the workplace is not automatically or necessarily a violation of the right to religious freedom. The key consideration is whether such limitation serves a legitimate aim and may be justified in a pluralistic, democratic society.[56] The challenged measure must generally have a basis in domestic law that is accessible and foreseeable.[57] Justifiable grounds for limiting freedom of religion, thought and conscience have included public health, public safety, national security, protecting the rights and freedoms of others and preventing fundamentalist religious movements from exerting pressure on others.[58]

3.3 Margin of Appreciation and Proportionality

The limitation imposed and the 'necessity' of an interference contemplated by Article 9 is also analysed with due consideration to the doctrine of a 'margin of appreciation'. This means that the ECHR will defer to national decision-making as the court is not necessarily in the best position to know the local context.[59] Essentially the margin of appreciation provides some leeway and discretion to domestic authorities to resolve disputes giving due regard to local circumstance. The doctrine recognises the different national contexts and legal regimes, and offers some discretion (margin) to national governments to determine 'whether and the extent of interference is necessary'.[60] In *Handyside* the Court rationalised this by stating that the state authorities 'by reason of their direct and continuous contract with the vital forces of the countries, … are in principle in a better position than the international judge to give an opinion on the exact content of these [moral] requirements'.[61] The depth and breadth of this discretionary 'margin' will be influenced by various factors and circumstances. In *Lautsi v Italy*,[62] for instance, it was pointed out by an intervening government that Contracting States had been given a wide margin appreciation by the ECHR in relation to culturally sensitive matters and, in particular, with regard to the wearing of religious symbols in state schools.

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[53] *Kalaç v Turkey*, above n 45, 27.
[54] *Şahin v Turkey*, above n 44. 8.
[55] Ibid 105, 106.
[56] Ibid.
[57] Murdoch, above n 39, 27.
[58] *Karaduman v Turkey*, above n 43; *Kalaç v Turkey*, above n 45, 552.
[59] Murdoch, above n 39, 30.
[60] *Şahin v Turkey*, above n 44, 83.
[61] *Handyside v The United Kingdom*, above n 52, 48.
[62] *Lautsi and Others v Italy* (European Court of Human Rights, Grand Chamber, Application No. 30814/06, 18 March 2011).

There is, however, not an 'unlimited power of appreciation' on the part of Contracting States:[63] 'the margin of appreciation goes hand in hand with European supervision' and hence the 'Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society".'[64] In *Dahlab v Switzerland* the ECHR affirmed that it is settled law that 'Contracting States have a certain margin of appreciation in assessing the existence and extent of any interference, but this margin is subject to European supervision.'[65] To this end the ECHR is concerned whether the measures taken by the state are 'necessary' and *proportionate* to the aim that is seeks to achieve. The test of proportionality seeks to ensure a fair balance between the interference of a right or freedom and the intended outcomes. This is illustrated in *Dahlab* in which the ECHR upheld a ban on a Swiss school teacher from wearing a traditional Muslim headscarf. The applicant was a school teacher in a non-faith primary school in the Canton of Geneva. In 1991 the applicant converted from the Catholic faith to Islam and married Mr Dahlab. At that time the applicant started wearing an Islamic headscarf in class in order to 'observe a precept laid down in the Koran whereby women were enjoined to draw their veils over themselves in the presence of men and male adolescents.'[66] The school requested the applicant to stop wearing the headscarf while carrying out her professional duties as such conduct was incompatible with section 6 of the Education Act. The applicant refused and claimed a breach of Article 9 of the Convention. The ECHR accepted that wearing a headscarf is a manifestation of one's religion but again referred to the Strasbourg decisions affirming the importance of the freedom of religion, conscience and thought in a democratic society and the possible need to limit such freedom provided such limitations comply with Article 9(2).[67] In this case it was held that the restriction imposed on the applicant did have a basis in law in that it was clearly prescribed by the relevant Education Act and that the wording was 'sufficiently precise to enable those concerned to regulate their conduct'.[68] In terms of the second part of the test, the ECHR further held that the restrictions pursed a legitimate aim and were proportionate in relation to the aims pursued. In this regard the ECHR accepted the respondent's claim that limitations on wearing a headscarf while engaged in professional activities were justified 'by the potential interference with the religious beliefs of her pupils, other pupils at the school and pupils' parents, and by the breach of denominational neutrality in schools.'[69]

The ECHR acknowledged that it is difficult to assess the impact of 'a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children', but nonetheless noted that the applicant's pupils were aged between four and eight years of age, an age at which children are easily influenced and 'it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising[70] effect'.[71] The ECHR therefore held that the measures adopted by the education authorities were not disproportionate or unreasonable. Clearly in this case the rights of the employee in the workplace were examined within the particular context of a school

[63] Murdoch, above n 39, 32.
[64] *Handyside v The United Kingdom*, above n 52, 49.
[65] *Dahlab v Switzerland* (2001) V ECHR 449, 14.
[66] Ibid 1.
[67] Ibid 13.
[68] Ibid 14.
[69] Ibid 14.
[70] *Kokkinakis v Greece* (European Court of Human Rights, Chamber, 25 May 1993). The ECHR upheld that the prohibition on proselytising sought to protect the rights and freedoms of others. In this case a Jehovah's Witness had been sentenced to imprisonment for proselytism, which was an offence prohibited under the Greek Constitution.
[71] *Dahlab v Switzerland*, above n 65, 15.

environment and weighed against the competing rights of students and parents in a public secular institution. In this case the age of the students was a persuasive factor in the outcome.

3.4 Application of Article 14

The primary basis on which claims have been brought in relation to the limitation or restriction on religious clothing and symbols, is the right to religious freedom, conscience and thought under Article 9 of the Convention. However, it is also possible to frame the claims under protections against discrimination. Article 14 of the Convention provides that:

> The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 14 is an associated and overlapping right that is read with Article 9. However, it does not confer a 'free-standing right or substantive right but rather expresses a principle to be applied to the substantive rights conferred by other provisions', [72] that is by the rights set forth in [the] Convention. Hence read with Article 9, a claimant can also bring an action for discrimination based on religion. In determining discrimination, Murdoch[73] notes that the crux of the test is whether or not the applicant has been treated in a different way to a relevant competitor, and if there is differential treatment, whether such treatment is justified. The onus is on the state to show the limitation was both objectively and reasonably justifiable. Different treatment is not automatically discriminatory under Article 14. In *Dahlab* it was reiterated that for the purposes of Article 14 'a difference in treatment is discriminatory if it does not pursue a legitimate aim or if there is not a relationship of proportionality between the means employed and the aim sought to be realised.'[74] To this end, the ECHR is not likely to consider the issue of discrimination if there is no violation of Article 9. Similarly, according to Murdoch the 'European Court of Human Rights will generally decline to consider any complaint of discrimination under Article 14 when it when it has already established that there has been a violation of a substantive guarantee raising substantially the same point'.[75] In *Şahin v Turkey* the ECHR held that 'the reasons which led the Court to conclude that there has been no violation of Article 9 of the Convention or Article 2 of Protocol No. 1 incontestably also apply to the complaint under Article 14, taken alone or in conjunction with the aforementioned provisions'[76] and therefore there was no violation of Article 14.

3.5 Application to the *Eweida* Case

Ms Eweida and Ms Chaplin claimed that domestic law had failed to project their rights to manifest their religion and that their rights to religious freedom had been violated in terms of Article 9 of the Convention. In this section the general principles of Article 9 discussed above are analysed and applied to the facts of the case.

3.5.1 Manifestation of Religious Belief

In the *Eweida* case, Ms Eweida (the first applicant) and Ms Chaplin (the second applicant) both argued that the visible wearing of the cross was a recognised practice of Christianity and

[72] Murdoch, above n 39, 55.
[73] Ibid 54.
[74] *Dahlab v Switzerland*, above n 65, 16.
[75] Murdoch, above n 39, 55
[76] *Şahin v Turkey*, above n 44, 165.

a manifestation of their religious faith. It was further argued that no distinction should be made between religious 'requirements' and 'non-requirements'; Article 9 should not be interpreted as only protecting mandatory religious requirements. The respondent government on the contrary submitted that wearing a cross was a personal choice and not a mandatory religious requirement and that religiously motivated or inspired behaviour that was not a generally recognised act of practice or requirement of Christianity fell outside the scope of Article 9. This argument was rejected, as a religious belief or practice does not have to be mandatory to be protected or to be accepted as a religious belief or practice.

It is uncontentious that wearing a cross for religious reasons is a manifestation of one's religious belief and is protected by Article 9. The ECHR restated its position that 'freedom of thought, conscience and religion is one of the foundations of a democratic society' and that it 'encompasses the freedom to manifest one's belief, alone and in private but also to practice in community with others and in public'.[77] The ECHR further noted that in terms of the manifestation of a religion or belief, the 'act in question must be intimately linked to the religion or belief', but it need not be mandated by the religion to be a valid manifestation of one's belief.[78] Hence there is no requirement on the applicant 'to show that he or she acted in fulfilment of a duty mandated by the religion in question'.[79]

It both instances the applicants were not prohibited from wearing a cross but it had to be concealed under the clothing. A restriction on wearing visible items arguably defeats the purpose of being able to openly and freely manifest and communicate one's belief and faith to the others. For Ms Eweida the dilemma was ultimately removed when British Airways amended its uniform policy to allow authorised religious symbols to be visibly worn. For Ms Chaplin a compromise was sought by giving her the option of wearing a cross in the form of a brooch attached to her uniform. However, Ms Chaplin declined as she did not 'consider that this would be sufficient to comply with her religious convictions'.[80] This was rather curious as wearing a brooch achieves the aim of visibly manifesting and expressing one's faith through a religious symbol. It also appears to be a reasonable compromise of 'fair balance' in meeting the personal and professional needs of employee and employer.

3.5.2 Interference with the Right to Religious Freedom and Proportionality

The applicants also argued that the requirement to wear the cross concealed (first applicant) and to remove or cover the cross at work (second applicant) did constitute interference with the right to manifest a religion or belief. The respondent argued that there was no interference with the right to religious freedom as they were not denied the right to practice their religion — there were other options available. Moreover, it was submitted that if it were to be held that there was interference, then it was justifiable in pursuit of a legitimate aim. It was argued that the measures taken by the respective employers were proportionate to the legitimate aims pursued. In the case of Ms Eweida, it was argued that British Airways was entitled to have a uniform policy for 'maintaining a professional image and strengthening recognition of the company brand' and that it had a 'contractual right to insist its employees wore a uniform.'[81]

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[77] *Eweida and Others v The United Kingdom* (European Court of Human Rights, Chamber, Application Nos. 48420/10, 51671/10 and 36516/10, 15 January 2013), 80.
[78] Ibid 82.
[79] Ibid.
[80] Ibid 99.
[81] Ibid 61.

In the case of Ms Chaplin the purpose of the restriction was 'to reduce risk and injury when handling patients.'[82]

The ECHR acknowledged authority for the proposition that if a person is able to take steps or pursue alternative courses of action such as seeking other employment to ameliorate the effect of the requirement, then on the face of it there is not an interference with the right under Article 9 and the limitation need not be justified.[83] The ECHR showed caution in adopting this approach and position, which had been followed by the Court of Appeal. Instead, the ECHR pursued the following approach:

> rather than 'holding that the possibility of changing job would negate any interference, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.[84]

In terms of the first applicant, Ms Eweida, it was necessary to weigh the rights of the individual and the employer and achieve a 'fair balance'. On one side of the scales is the right of the individual to manifest their religious belief because 'healthy democratic society needs to tolerate and sustain pluralism and diversity' and because the individual has made 'religion a central tenet of his or her life'.[85] On the other side, is the right of the employer to maintain a professional corporate image. It was not disputed that the company's aim was legitimate; the issue was whether the uniform rule was proportionate to achieving that aim. The ECHR concluded that too much weight had been given to the importance of the corporate image. There was no evidence that wearing authorised religious items impacted negatively on the corporate brand. The fact that the company amended the uniform policy suggests that the prohibition on wearing visible religious jewellery was not 'crucially important'[86] to maintaining the corporate image.

In applying the balancing act to the particular circumstances in the case of Ms Chaplin, the ECHR held that the there was an interference with her freedom to manifest her religion but that interference was proportionate to achieving a legitimate aim, which was the health and safety of nurses and patients. The applicants are distinguished in that the first worked in a private company and the aim of the uniform policy was to achieve a particular professional corporate look, and the second applicant worked in a public hospital and the uniform policy was based primarily on health and safety considerations. It is not surprising that greater consideration was given to the serious issue of health and safety, which is appropriately distinguished from the desire to create a particular corporate look. Article 9 expressly identifies health and public safety as two possible legitimate means within a democratic society for interfering with the right to religious freedom. It is not uncommon for hospitals and other medical facilities to either ban (in certain areas of the hospital) or strictly limit the wearing of jewellery, irrespective of the nature of the jewellery and whether or not it has any religious significance.

In the case of Ms Chaplin, the ECHR also applied the principle of 'margin of appreciation' and held that 'this is a field where the domestic authorities must be allowed a wide margin of appreciation' because the hospital managers are better placed to make decisions about clinical safety. This is particularly relevant when an international court has heard no direct evidence

[82] Ibid 62.
[83] Ibid 83.
[84] Ibid.
[85] Ibid 94.
[86] Ibid 94.

on the issue. Therefore, it was concluded that the 'interference with her freedom to manifest her religion was necessary in a democratic society and that there was no violation of Article 9'.[87]

3.5.3 Positive Obligations on Private Employers

As Ms Eweida was employed by a private company and could not claim direct interference by the State, she claimed that domestic law failed to protect her rights under Article 9. The State, it was submitted, did not do enough to ensure that private employers permitted them to give expression to their religious beliefs at work. The respondent government contended that there is little authority to support the proposition that there is a positive obligation on states under Article 9, and even if there were, this is sufficiently met by the domestic regulation that protects discrimination on the grounds of religion. In regards to Ms Eweida, the ECHR found that the lack of specific legislative protections under domestic law [that specifically addresses religious clothing in the workplace] does not in itself mean that the right to exercise one's religious freedom at work is not sufficiently protected.[88] The ECHR analysed the law and practice relating to the wearing of religious symbols at work across several countries and found that in most countries it is unregulated. In some countries, for example, France and Germany, there is a strict ban on civil servants and state employees wearing religious clothing or symbols in the workplace. Moreover, a complete ban on private employees is not permitted anywhere.[89] However, having analysed and weighed the respective rights of Ms Eweida and British Airways, the ECHR concluded that there was an interference and that the interference was not justified as it was disproportionate to the aim being pursued. The ECHR held that the domestic authorities had failed to protect Ms Eweida's right to manifest her religion, in breach of a positive obligation under Article 9. Wearing a discreet cross did not detract from her professional appearance and, as discussed above, there was no evidence that wearing authorised religious clothes and symbols diminished the corporate brand.[90]

4. The Australian Context

In the *Eweida* case, the Court canvassed the law and practice relating to the wearing of religious symbols in the workplace across several European states as well as in the United States and Canada. The key findings were that in general the wearing of religious clothing and symbols at work is unregulated and while some countries place certain restrictions on civil servants and state employees, a total ban on wearing religious symbols by private employees is not permitted. Although it is recognised that employers have a right to impose certain limitations on dress, religious freedom is protected to a lesser or greater extent. In the United States, for example, the wearing of religious clothing and symbols by civil servants and government employees is protected under the United States Constitution (the Establishment Clause and Free Exercise Clause) and *Civil Rights Act 1964*.[91] The ECHR noted that there is no constitutional limitation on private employers to restrict the wearing of religious symbols and clothing but Title VII of the *Civil Rights Act* may apply. It was also noted by the ECHR that in Canada religious freedom is protected under section 1 of the *Canadian Charter of*

[87] Ibid 100.
[88] Ibid 92.
[89] Ibid 47, 49.
[90] Ibid 95.
[91] Ibid 48.

Rights and Freedoms 1982 and that, in general, Canadian employers are expected to 'adjust workplace regulations that have a disproportionate impact on certain religious minorities'.[92]

Similarly in Australia, the wearing of religious clothing and symbols at work is unregulated. There is no legislation[93] that deals specifically with religious clothing and symbols or which proscribes employers from implementing dress codes in the workplace provided the dress codes are not unreasonable and discriminatory. The absence of specific laws or regulations however, does not mean that there is no protection or that protection under the law is inadequate. Dress codes may fall within the broader ambit of the right not to be discriminated against on the grounds of religious freedom and practice. Religious freedom and the right not to be discriminated against in the workplace on the basis of religious beliefs and practices is recognised in Australia.

Religious freedom generally is provided for in section 116 of the Australian Constitution, which states that the '[t]he Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion …'.[94] This recognises religious diversity and prohibits the formation of a state religion and limits the legislative power of the Commonwealth to make laws that impose any requirements to engage in a religion or any law that prohibits the fair exercise of religion. However, this freedom only binds the Commonwealth and therefore does not prohibit the States from passing such laws.

Although constitutional protection of religious freedom may be limited, religious freedom in the workplace is nonetheless protected by federal, state and territory anti-discrimination legislation.[95] However, in Australia, this is to some extent a woolly area with each jurisdiction having its own legislation. At the federal level there is no single legislation that deals specially with religious freedom. Although the *Race Discrimination Act 1975* (Cth) prohibits discrimination on the basis of 'race, colour, descent, or national or ethnic origin' it does not provide specific protection for religious freedom associated with race or ethnic origin. The *Australian Human Rights Commission Act 1989* (Cth) ('AHRC Act') does make provision for dealing with complaints in relation to religious discrimination in the area of employment.[96] The protection of the rights of employees not to be discriminated against based on religion in employment under the AHRC is underpinned by Australia's obligations pursuant to the International Labor Organisation *Discrimination (Employment and Occupation) Convention* 1958), Schedule 1 of the AHRC Act, which prohibits discrimination of religion in employment and occupation.[97] The AHRC may investigate complaints and attempt to conciliate disputes between parties but cannot impose decisions binding the parties. If a dispute cannot be resolved the AHRC can submit a report on the matter to Parliament.

In terms of state and territory legislation, the scope and meaning of religious freedom is generally ill-defined and there are some inconsistencies and gaps across state legislation. Generally, employers must not directly or indirectly discriminate against employees on the

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[92] Ibid 49.
[93] The South Australian *Equal Opportunity Act 1984* does however refer specifically to religious clothing in Part 5B.
[94] *Commonwealth of Australia Constitution Act 1900.*
[95] See, eg, *Discrimination Act 1991* (ACT) ss 1(i), 18; *Anti-Discrimination Act* 1992 (NT) ss 19(m), 29; *Anti-Discrimination Act 1991* (Qld) ss 7(i), 38, 39; *Anti-Discrimination Act 1998* (Tas) s 16(o); *Equal Opportunity Act 2010* (Vic) s 6(n); *Equal Opportunity Act 1984* (WA) ss 53, 61.
[96] The *Australian Human Rights Commission Act 1989* (Cth), s 3.
[97] Ibid, Sch 1, Art 1.

basis of 'religion or political conviction',[98] 'religious belief or activity'[99] and 'religious belief or association'.[100] These concepts are generally not defined and in the few instances in which they are defined the definitions are generally broad, vague and circuitous. For instance, in the Tasmanian legislation 'religious activity' is defined as 'engaging in, not negating in, or refusing to engage, in religious activity'. A similar definition is found in the Queensland legislation but includes the qualifying word '*lawful* religious activity'. There is no hint as to what constitutes 'religious activity' or what would constitute a 'lawful activity'. Likewise 'religious belief' is also not defined save to say that it means 'holding or not holding a religious belief'[101] and even less helpful is the definition found in Western Australian legislation, which provides that 'religious or political conviction shall be construed so as to include a lack or absence of religious belief or conviction'.[102] But it is likely that such concepts would be interpreted widely[103] and would include manifesting one's religion through religious symbols and clothing.

In New South Wales and South Australia, anti-discrimination legislation is silent on religious freedom and religion as one of the protected grounds. However, significantly in South Australia, Part 5B on the prohibition of discrimination on other grounds, it is unlawful to 'discriminate on the ground of religious appearance or dress'.[104] This applies to the areas of work and education. A person discriminates on this basis:

(a) if he or she treats another unfavourably because of the other's appearance or dress and that appearance or dress is required by, or symbolic, of the other's religious beliefs; or
(b) if he or she requires a person to alter the person's appearance or dress and that appearance or dress is required by, or symbolic of, the other's religious beliefs; or
(c) if he or she treats another unfavourably because of the appearance or dress of a relative or associate of the other and that appearance or dress is required by, or symbolic of, the relative or associate's religious beliefs.

According to explanatory material, it is not unlawful to discriminate on religious dress and appearance for health and safety reasons. Employers are also entitled to impose reasonable dress codes. Moreover it is lawful to require a person to show their face for identification purposes, if covered by clothing.[105]

In the absence of religion as a protected attribute in New South Wales and South Australia, a complainant would need to establish a case of discrimination based on 'race' where there is a strong association between the person's religiosity and ethnicity. This is made possible by the fact that in some legislation 'race' is defined to include 'ethnic, ethno-religious or national origin'[106] and 'ancestry of the person'.[107] However, these concepts are not defined and it remains unclear what religious affiliation or identity would fall within this ground. *A obo V*

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[98] *Discrimination Act 1991* (ACT) s 7(i).
[99] *Anti-Discrimination Act* 1992 (NT) s 19(m); *Anti-Discrimination Act 1991* (Qld) s 7(i); *Equal Opportunity Act 2010 (Vic)* s 6(n).
[100] *Anti-Discrimination Act 1998* (Tas) s 16(o).
[101] *Anti-Discrimination Act 1998* (Tas) s 3; *Anti-Discrimination Act 1991* (Qld), Schedule, Dictionary.
[102] *Equal Opportunity Act 1984* (WA) s 4.
[103] See eg, *Church of the New Faith v Commissioner of Payroll Tax (Vic)* (1983) 154 CLR 120, the key Australian case on the meaning of religion, in which Mason ACJ and Brennan J at 136 held that the criteria of religion are twofold 'first the belief in a supernatural Being, Thing or Principle; and second, the acceptance of canons of conduct in order to give effect to that belief'. In this case Scientology was held to be a religion.
[104] *Equal Opportunity Act 1984* (SA) s 85T(f).
[105] Government of South Australia, Equal Opportunity Commission, Religious Dress Information Sheet <http://www.eoc.sa.gov.au/eo-you/what-discrimination/types-discrimination/religious-dress>.
[106] *Anti-Discrimination Act 1977* (NSW) s 4; *Anti-Discrimination Act 1998* (Tas) s 3.
[107] *Equal Opportunity Act 1984* (SA) s 5.

and A v NSW Department of Education[108] demonstrates the difficulty of establishing religious discrimination on this ground. In this case, a Jewish parent complained about certain Easter and Christmas activities in the school his two young children attended. He objected to his children participating in the activities and claimed the activities conducted in a state school were 'ethno-religious' discrimination. The complaint was dismissed. The Appeal Tribunal noted that the term 'ethno-religious' is 'ambiguous and obscure' and that it is not defined in the legislation nor did it appear in standard English language dictionaries. The Tribunal was therefore entitled to refer to extrinsic material in particular the Second Reading Speech of the Attorney General from which it was held that 'it is not appropriate within the meaning of the anti-discrimination law of NSW, to refer to the Jewish faith as comprising a race' and it was not designed to allow 'members of ethno-religious groups such as Jews, Muslims and Sikhs to lodge complaints in respect of discrimination on the basis of their religion'.[109]

In addition to anti-discrimination legislation in Victoria and the Australian Capital Territory religious freedom is also protected under the *Charter of Human Rights and Responsibilities Act 2006* (s 14) and the *Human Rights Act 2004* (s 14) respectively. Both charters recognise that reasonable limitations may be placed on a human right where it 'can be demonstrably justified in a free and democratic society'.[110] The content of these provisions and limitations based on a 'free and democratic society' echo that of article 9 *European Convention on Human Rights* discussed above and as applied in the *Eweida* case. Although these two charters are important for the protection of human rights, including the exercise of religious freedom in the workplace, provision in the Victorian legislation can be overridden by legislation[111] and courts do not have the power to invalidate legislation that does not comply with the human rights legislation but can only issue a declaration of incompatibility.[112]

More recent legislation in the form of the *Fair Work Act 2009* (Cth) (FW Act) has introduced a further source of protection for employees against discrimination based on religion, which may fill the lacuna in states where religion is not a protected attribute or the law is possibly inadequate. The 'general protections' in Part 3-1 protect employees against various adverse actions.[113] Adverse actions against an employee covers dismissal; injuring an employee in his or her employment; altering the position of an employee to the employee's prejudice; or discriminating between the employee and other employees of the employer.[114] In particular, 'an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.'[115] Therefore, unless an exception applies, an employee who is dismissed or whose work is altered for reasons relating to the wearing of religious clothing and symbols (such as moving the person to a different position as was offered to Ms Eweida) may amount to an adverse action. However, as in anti-discrimination legislation, which provides exceptions such as the inherent requirements of a job (as in Ms Chaplin's case), the FW Act provides that the conduct will not amount to an adverse action:

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[108] *A obo V and A v NSW Department of Education* [2000] NSWADTAP 14.
[109] Ibid 14.
[110] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7; *Human Rights Act 2004* (ACT) s 28.
[111] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 31.
[112] *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36; *Human Rights Act 2004* (ACT) s 32.
[113] It is, however, important to note that the general provision in Part 3-1 only applies to those entities set out in Division 2.
[114] *Fair Work Act 2009* (Cth) s 342(1).
[115] Ibid s 285.

> if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed [and it is] taken in (i) good faith; and (ii) to avoid injury to the religious susceptibilities of adherents of that religion or creed.[116]

It is possible that many organisations and institutions will qualify under this adverse action provision, but it remains to be tested in relation to dress codes and religious symbols. Moreover, it is important to note that whilst the general provisions in Part 3-1 apply to all employees 'regardless of their status',[117] the application is nonetheless limited to the entities set out in Division 2, which essentially cover corporations and Commonwealth entities.[118] Therefore, the protections will not necessarily cover all employees, especially those in the State public sector.[119] In New South Wales, Queensland, South Australia and Tasmania, State government and most local government workplaces fall outside the scope of the Fair Work system and the protections under Part 3-1. Similarly, most workplaces in Western Australia, including sole traders, partnerships, unincorporated entities, non-trading corporations and public sector bodies are not covered by the Fair Work system.[120] Therefore, employees who claim they have been discriminated on the basis of religious practices in relation to employment dress codes will not necessarily have an action under the *Fair Work Act*.

The preceding discussion highlights the patchwork of Australian anti-discrimination legislation and workplace law that recognises the right of employees not to be discriminated against on the basis of religious belief, conscience and practices. As noted, one area in which claims for discrimination may arise is in relation to dress codes, especially where dress codes prohibit or restrict the wearing of religious clothing and symbols in the workplace.

There is no law preventing employers from prescribing dress codes for health and safety reason, and for meeting reasonable standards of dress that are in keeping with the nature of the employment and industry. This is demonstrated in *Australian Telecommunications v Hart*[121] in which a direction to an employee not to wear a caftan and thongs and in *Woolworths v Brown*[122] in which a direction to an employee to refrain from wearing an eyebrow ring were held to be reasonable and lawful in terms of the dress code required for employees working directly with customers. These cases are instructive in that they confirm the right of employers to adopt and implement reasonable and appropriate dress codes, and that a failure to comply with a lawful and reasonable dress code may constitute a valid reason

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[116] In *OV v OZ (No 2)* [2008] NSWADT 115 in which the Wesley Commission decision to deny an application by a homosexual couple to become foster parents was upheld on appeal. The Tribunal in the first instance and the Appeal Panel considered the meaning of 'religion', 'doctrine' and 'religious susceptibilities of adherents'. The case illustrates the challenges in defining such terms.

[117] Andrew Stewart, *Stewart's Guide to Employment Law* (2013, Federation Press, 285).

[118] Ibid, 285; Fair Work Act 2009 (Cth) s 338.

[119] Ibid 285.

[120] Fair Work Ombudsman, The Fair Work System < http://www.fairwork.gov.au/faqs/the-fair-work-system/pages/default.aspx>.

[121] *Australian Telecommunications v Hart* (1982) 53 ALR 165. In this case Mr Hart was dismissed for refusing to comply with the company's dress code and for refusing to obey a reasonable instruction to desist from wearing a caftan and thongs that

[122] *Woolworths Limited (t/as Safeway) v Brown* (2005) 145 IR 285. In this case Mr Brown worked as a butcher for a Safeway store. He had been instructed on several occasions by several managers to remove the eyebrow ring, which contravened the workplace dress policy. When he refused to comply with the instruction he was provided with several warnings and finally dismissed for a breach of policy and failing to obey a reasonable and lawful instruction. The policy provided that 'No visible body piercing is permitted, which includes (visible) tongue piercing, eyebrow piercing, nose, lip etc piercing.' (at 45) The policy was imposed for hygiene and food safety reasons. On appeal, the dismissal was upheld.

for dismissal. However, although dress codes may be imposed for maintaining a 'corporate image', this will not necessarily justify a particular dress code as demonstrated in the *Eweida* case. In terms of dress codes supporting a professional, corporate image, they should be reasonable and 'appropriate to the occasion',[123] and 'rationally related to the business'.[124] What is considered 'reasonable' depends on all the 'circumstances including the nature of the employment, the established usages affecting it, the common practices which exist and the general provisions of the instrument governing the [employment] relationship.'[125] Importantly, dress codes must not be discriminatory and therefore employers need to reasonably accommodate religious beliefs and practices. Moreover, as noted, in determining whether or not a limitation is reasonable due consideration would be given to the nature of employment and workplace environment, the objects sought in imposing restrictions, and whether the limitation serves a legitimate aim in a free and democratic society.

5. Concluding Comments

The fundamental right to religious freedom and conscience is well-entrenched in law and is often a hotly contested and controversial area of human rights given the immense diversity of deeply held religious beliefs and practices. The right to *have* (or hold) a particular religious belief, or not to believe, is generally considered sacrosanct. However, the right to *manifest* or display a religious belief is not and may be subject to limitations. Rights are limited against a raft of competing rights and freedoms. The law does not intrude into what is privately held in people's minds and conscience, but is concerned about the observable display and expression of religious beliefs and practices. The manifestation of beliefs and practice are most likely to evoke reaction and action, especially when religious manifestations are different and confronting giving rise to claims of discrimination.

Notwithstanding the rights of employers to prescribe reasonable dress codes, religious manifestations in the workplace enjoy a measure of protection. As demonstrated in the *Eweida* case and related ECHR cases, the right to religious freedom and conscience has consistently been recognised as a fundamental right in democratic societies and this extends to the right to wear religious clothing and symbols in the workplace, both private and public. However, these rights are not unlimited but any interference by Contracting State authorities with the right to manifest one's belief must be for a legitimate, necessary reason and proportional to the social objectives sought in a democratic society. What constitutes 'necessary' and 'proportional' itself presents challenges of interpretation and application, hence the doctrine of 'margin of appreciation' that gives some discretion and latitude to state authorities to make decisions on such issues. The different outcomes for *Eweida* and *Chaplin* are indicative of the balancing of interests and application of the test of proportionality.

In Australia, as in many other countries, the right to religious freedom is protected in the workplace, whether or not there are explicit laws relating to religious clothing and symbols in the workplace. And despite any ambiguities and difficulties that might arise in defining 'religious activity' and 'ethno-religious', the adverse action provision in the FW Act provides concrete protection in relation to religious freedom with which relevant employers will need to comply.

[123] *Australian Telecommunications v Hart*, above n 121, 168.
[124] *Woolworths Limited (t/as Safeway) v Brown*, above n 122, 45.
[125] Ibid 35.

It is therefore incumbent on employers to ensure that uniform policies or dress codes are fair and reasonable, and appropriately recognise religious diversity in the workplace, and that any adverse action or interference with the right to religious freedom is necessary and justifiable. Uniform policies or dress codes need to clearly articulate the employers' rules, standards and requirements. They need to accommodate religious beliefs and practices balanced against the nature of the employment, health and safety matters and the reasonable requirements of the job. Employees have the right to religious freedom, and to manifest their right to their religious beliefs and practices in the workplace but this in not unlimited and is balanced against the rights of the employer and others.