

BANNING RELIGIOUS DRESS AND SYMBOLS IN PUBLIC SCHOOLS: IMPLICATIONS FOR SCHOOL POLICY MAKERS

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The banning of religious clothing and symbols in public schools is an ongoing and contentious issue in education. This article examines the banning of religious clothing and symbols in public schools in light of United Kingdom and European Court of Human Rights decisions involving both students and teachers. The article addresses three key themes that emerge from the cases: (1) the right to religious freedom and its limitations; (2) religious dress and the right not to be discriminated against; and (3) secularism as a legitimate basis to limit human rights. The final part of the article considers the position in the Australian context and the scope of public secular schools in Australia to develop and implement religious-neutral school uniform policies.

I INTRODUCTION

In November 2009 the European Court of Human Rights delivered another far-reaching judgment on the display of religious symbols in public schools. In *Lautsi v Italy*¹ the applicant challenged the presence of the crucifix in classrooms in public schools in Italy. The applicant claimed that it was unconstitutional to display the crucifix in a state school and that it breached her right to freedom of conscience and religion as protected by Article 9 of the *European Convention on Human Rights*. The respondent State argued that the crucifix is not merely a religious symbol but a symbol of the Italian State and was in fact one of the ‘secular values of the Italian Constitution’. This argument was dismissed by the European Court of Human Rights and in a unanimous decision by the Chamber of seven judges it was held that the compulsory display of the crucifix, a symbol of Catholicism, in state schools was a violation of Article 2 of Protocol No I and Article 9 of the Convention. The State was to observe confessional neutrality in the context of public religion and ‘refrain from imposing beliefs in premises where individuals were dependent on it’.²

The banning of religious clothing and symbols in public schools is an ongoing and contentious issue in education. All belief systems have their own traditions, customs and symbols. Many of these symbols are highly emotive and often confronting for those who do not share in a particular belief system. Human rights law, however, recognises that people have the right to wear religious clothing and display symbols that are an expression of their religious beliefs, whether in private or public. However, the wearing of religious clothing and symbols in some public spaces, such as schools, has generated a great deal of international controversy. In 2004 the international debate on this issue was re-ignited when the French National Assembly passed a law by 494 votes to 36 prohibiting students in French public schools from wearing any conspicuous sign of religious

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affiliation.³ This drew international condemnation and some support, and once again raised the issue of religious expression and activities in public secular schools and the implications of banning or restricting religious clothing and symbols. France, however, is not alone in banning or limiting religious clothing and symbols in public schools. This is a wider international issue: cases involving religious clothing and symbols in public schools have arisen in many countries including Canada,⁴ the United Kingdom,⁵ Germany,⁶ the Netherlands⁷ and South Africa,⁸ to mention a few. In Australia there are no reported cases; however, this is an issue that has arisen in schools and continues to challenge school principals and governors.

This article is concerned with the vexing question of how far public schools in Australia should be required to accommodate religious diversity and whether public schools can develop and implement school policy that limits religious dress and symbols. In addressing this issue, this article focuses on United Kingdom⁹ and European Court of Human Rights (ECHR) (Strasbourg) jurisprudence involving the right to religious freedom and the banning of religious clothing and symbols in educational institutions.¹⁰ Whether or not Australian courts would follow this jurisprudence remains to be seen, it nonetheless provides an instructive framework for considering similar matters that might arise in public secular schools in Australia. The key issue or question dealt with in the case law is whether a right to religious freedom has been infringed, and if so, was the right to manifest a religious belief restricted in a way that is justified. Therefore, the first part of the article discusses the following three dominant themes that emerge from the case law: (1) the right to religious freedom and its limitations; (2) religious dress and the right not to be discriminated against; and (3) secularism as a legitimate basis to limit human rights. The second part of the article considers the position in the Australian context in light of the UK and ECHR jurisprudence, and the right of public secular schools in Australia to develop and implement religious-neutral school uniform policies.

II RELIGIOUS CLOTHING AND SYMBOLS IN PUBLIC SCHOOLS

In several cases, attempts by educational institutions, including schools, to implement policy that bans or restricts religious dress or symbols have been met with litigation by both teachers and students. These challenges are generally based on a violation of the right to religious freedom and, in some instances, discrimination based on religion, gender or race. However, in a number of decisions the courts, in particular the ECHR, have consistently found no interference with the claimant's right to manifest and practise their religious beliefs. In so doing, the courts have recognised the authority of educational authorities to implement policies and regulations restricting religious clothing and symbols in educational institutions. In this section of the article, the decisions of several key cases are examined with regard to the three prevailing themes — the right to freedom of religion and its limitations; religious dress and discrimination; and secularism as a basis for limiting rights.

A Right to Freedom of Religion and its Limitations

International human rights law¹¹ and domestic law¹² recognise the right to freedom of religion and conscience, and the importance of this right in culturally diverse, democratic societies has been recognised by courts internationally. In the oft cited seminal Canadian case *R v Drug Mart Ltd*¹³ Dickson CJC stated that ‘the essence of the concept of religious freedom is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrances or reprisal, and the right to manifest religious belief by worship

and practice or by teaching and dissemination'. The importance of religious freedom is also summed up by Sachs J in *Christian Education South Africa v Minister of Education*:

There can be no doubt that the right to freedom of religion, belief and opinion in the open democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act and not to act according to his or her beliefs or non beliefs, is one the key ingredients of any person's dignity.¹⁴

Relevant to the discussion in this article is Article 9 (Freedom of thought, conscience and religion) of the *European Convention on Human Rights* (1950) (the 'Convention') which 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.
- (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.

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. Article 9 makes provision for the freedom of thought, belief and conscience as well as the manifestation of such beliefs.¹⁵ In *Kokkinakis v Greece*¹⁶ it was stated that:

freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

Although the ECHR has largely refrained from defining the concept 'religion'¹⁷ the provision is nonetheless broadly construed to include a wide range of theistic and non-theistic belief systems such as Scientology, Druidism¹⁸ and Moon Sect.¹⁹ Judge Tulkens in *Şahin v Turkey* (discussed in detail below) observes 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'²⁰.

Article 9 encompasses both individual and collective belief, as well as the practice of belief in both public and private spaces. Manifestation may take the form of worship, teaching, practice and observance. Murdoch²¹ states that a manifestation implies a 'perception on the part of the adherent that a course of activity is in some manner prescribed or required'. Manifestations are thus central to the person's religious beliefs and practices. However, not every act or 'manifestation' motivated or encouraged by religion or belief will fall within the ambit of Article 9.²² The wearing of religious dress and symbols is recognised by the courts as a manifestation, observance and practice of one's religious beliefs. In the cases discussed below, wearing the Muslim headscarf is a manifestation of one's religious beliefs. In *Dogru v France*,²³ discussed below, the court reiterated that 'according to its case-law, wearing the headscarf may be regarded as "motivated or inspired by a religion or religious belief"'.²⁴

The second paragraph 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’.²⁴ Whilst the right to religious freedom is recognised, like other fundamental human rights, it is not absolute and may be limited. Other equally competing and compelling rights may limit the exercise of religious freedom in public spaces. 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. The right to freedom of religion does not mean that one can exercise that right at any time or place without limitation. For instance, in *Ahmad v United Kingdom*,²⁵ the court stated ‘the freedom of religion, as guaranteed by Article 9, is not absolute, but subject to the limitations set out in Article 9(2)’. This is reiterated in the ECHR decisions. In *Kalaç v Turkey*²⁶ 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’ and that ‘article 9 does not protect every act motivated or inspired by a religion or belief. Moreover, in exercising the freedom to manifest his religion, an individual may need to take his specific situation into account’. This was endorsed by the Grand Chamber in *Şahin v Turkey* in which it was held that ‘Article 9 does not protect every act motivated or inspired by religion or belief’ and that ‘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’.²⁷ Article 9(2) thus sets out the ‘test’ to determine whether or not an interference with or limitation on the right to religious freedom is justified. The test requires that the limitation or interference must be (a) prescribed by law, i.e. have a basis in law; and (b) be necessary in a democratic society, i.e. have a legitimate purpose, and it must be proportionate in scope and effect.²⁸ The limitation or restriction on religious clothing and symbols in schools 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. The challenged measure must have a basis in domestic law that is accessible and foreseeable. Justifiable grounds for limiting freedom of religion, thought and conscience have included the public health, public safety, national security, protecting the rights and freedoms of others²⁹ and preventing fundamentalist religious movements from exerting pressure on others.³⁰

In light of the above discussion, the first case that is considered relating to banning of religious clothing in schools is the UK case of *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* (“*Begum*”),³¹ in which the House of Lords reversed the Court of Appeals decision that a school violated a student’s right to freedom of religion by refusing to allow her to wear the traditional jilbab to a public school.³² In this case Shabina Begum attended a co-educational school that was culturally and linguistically diverse, although the students were mostly Muslim. The school had a specific school uniform policy that offered three uniform options. However, it did not permit students to wear the jilbab (a long loose fitting garment worn by Muslim women). For two years Shabina and her sister wore the prescribed school uniform without complaint or objection. In 2002 Shabina started wearing the jilbab on her brother’s insistence. Shabina was advised by the school that she would not be permitted to wear the jilbab which the school uniform policy did not permit. The school was concerned that Shabina should attend school but the brother acting for Shabina, would not compromise on the dress requirement as an absolute obligation of the Muslim faith. The applicant pursued legal action on the basis that the school had breached her human rights under UK and European human rights law, in particular Articles, 9, 8 and 14 and Article 2 of Protocol 1 of the Convention. Shabina

Begum lost her case in the High Court³³ but succeeded on appeal where the Court of Appeal held that there was a violation.³⁴ On appeal to the House of Lords it was held that Article 9 of the Convention had not been violated or interfered with. The Lords accepted that wearing religious clothing is a manifestation of religious belief and therefore fell within the ambit of Article 9(1).³⁵ However, in applying the test in Article 9(2) it was unanimously held there were justifiable grounds to limit the applicant's right to wear religious clothing of her choice. It was affirmed that 'Article 9 does not require that one should be allowed to manifest one's religion at any time and place of one's choosing'.³⁶ Lord Bingham of Cornhill noted the authority set down by the Grand Chamber of the European Court of Human Rights that in some situations it is necessary to restrict freedom to manifest one's religious beliefs citing 'the value of religious harmony and tolerance between opposing or competing groups; the need for compromise and balance; the role of the state in deciding what is necessary to protect the rights and freedoms of others; the variation of practice and tradition among states; and the permissibility on some contexts of restricting the wearing of religious dress'.³⁷

In this case the limitations on religious clothing were viewed as reasonable; it was based on a fair and reasonable school uniform policy and it pursued a legitimate aim of protecting the rights and freedoms of others.³⁸ In particular, it was noted that the school had gone to great length to develop a school uniform policy through a process of community consultation and the policy had been endorsed by the parent body, which consisted mostly of Muslim parents. The policy made provision for modest Muslim dress. The school emphasised the importance of the policy in promoting harmony, stability and order in the school. Lord Bingham concluded that: 'the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. ... The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute'.³⁹ In arriving at their decision, the Lords gave effect to the fact that the school in question is a secular school and that rights are not absolute and may be subjected to reasonable limitation. The majority also emphasised the role of choice in arriving at their decision. It was argued that the applicant was at liberty to attend a school that allowed the jilbab. Lord Hoffman noted that Shabina's family had chosen that school with its school uniform policy and Lord Scott was of the view that as there were other schools in the area that would permit Shabina to wear the jilbab 'arrangements could have been made for Shabina to transfer to one of those schools'.⁴⁰ However, the issue of choice should not be overstated as choice of schooling may in practical terms be limited. As Lord Nicholas cautioned on the issue of choice: 'I think this may overestimate the ease with which Shabina could move to another, more suitable school and underestimate the disruption this would likely cause to her education'.⁴¹

The *Begum* decision followed a line of decisions of the ECHR that has consistently upheld the position that limitations placed on religious freedom, including religious clothing and symbols, do not necessarily amount to a violation or interference of religious freedom.⁴² Whilst these decisions have been contested and controversial and have not necessarily presented a coherent or rigorous analysis of what constitutes a manifestation of religious beliefs that are protected and what would amount to an interference,⁴³ Lord Bingham of Cornwall notes that 'even if it is accepted that the Strasbourg institutions have erred on the side of strictness in rejecting complaints of interference, there remains a coherent and remarkably consistent body of authority which our domestic courts must take into account and which shows that interference is not easily established'.⁴⁴

The first ECHR case that is considered is *Dahlab v Switzerland*⁴⁵ in which the Commission upheld a ban on a Swiss school teacher from wearing a traditional Muslim headscarf. In this

case 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’.⁴⁶ 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 court accepted that wearing a headscarf is a manifestation of one’s religion but again referred to the ECHR 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).⁴⁷ In this case it was held that the clothing restrictions imposed on the applicant did have a basis in law in that it was clearly prescribed by the relevant education act and the wording was ‘sufficiently precise to enable those concerned to regulate their conduct’.⁴⁸ In terms of the second part of the test, the court further held that the restrictions pursued a legitimate aim and were proportionate in relation to the educational aims pursued. In this regard the court 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’.⁴⁹ The court 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 4 and 8 years of age at which children are easily influenced and ‘it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising⁵⁰ effect’.⁵¹ The court thus held that the measures adopted by the education authorities were not disproportionate or unreasonable.

The principles laid down in *Dahlab v Switzerland* continued to be applied in *Şahin v Turkey*⁵² in which the court likewise upheld a decision by a university to prohibit a student from wearing a headscarf in lectures and examinations.⁵³ Leyla Şahin was a fifth year medical student at Istanbul University. She had worn the Islamic headscarf as she considered it her religious duty to do so. However, in 1998 students were advised via a university circular that students whose heads were covered and students with beards would not be admitted to lectures, courses or tutorials. Students who failed to comply would be subject to disciplinary action. In accordance with this policy, invigilators refused the applicant access to an examination because she was wearing a headscarf. She was also refused enrolment to a course and was barred from a lecture. Having unsuccessfully pursued the matter through the domestic courts, the applicant pursued legal action in the ECHR based on a violation of the rights and freedoms under Articles 8, 9, 10 and 14 of the Convention. The Chamber held unanimously that there had been no violation of Article 9. The Chamber found that the university regulations restricting a right to wear the Islamic headscarf had interfered with the applicant’s right to manifest her religious freedom but in applying Article 9(2) it held that the interference was prescribed by law (that is, it had a basis in law) and that it pursued a legitimate aim as contemplated by Article 9(2), namely to protect the rights and freedoms of others, and to protect public order.⁵⁴ The matter was referred to the Grand Chamber for review. In *Şahin v Turkey*⁵⁵ the Grand Chamber affirmed the decision of the Chamber. It reiterated that freedom of religion is one of the foundations of a democratic society but that ‘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 interests of the various groups’. The court agreed that there was a legal basis for the

interference in Turkish law and that ‘the law was also accessible and can be considered sufficiently precise to satisfy the requirement of foreseeability’.⁵⁶ The thorny issue in this case is the decision regarding the legitimate aim pursued by the respondent, which was primarily the protection of the rights and freedoms of others and of public order. The court affirmed the rights of universities to take measures to ‘prevent certain fundamentalist religious movements from exerting pressure on students who did not practice their religion or who belong to another religion’.⁵⁷ The court reasoned that universities may regulate the manifestation of the rites and symbols of religion by imposing restrictions as to the place and manner of such manifestations with the aim of pursuing peaceful co-existence between students of various faiths and thus protecting public order and the beliefs of others’.⁵⁸ However, there is no analysis of how religious clothing and power symbols such as the headscarf in the *Şahin* case posed a threat to public order or the beliefs of other students. In this regard, Judge Tulkens, in a dissenting opinion, cautions that while ‘everyone agrees on the need to prevent radical Islamism, a serious objection may be made to such reasoning’ since ‘merely wearing the headscarf cannot be associated with fundamentalism’.⁵⁹

The more recent case of *Dogru v France* confirms the position of the court in the preceding cases and clearly demonstrates that it will continue to be difficult for applicants to establish a violation of Article 9 of the Convention. In this case the applicant aged 11 at the time attended a state secondary school in Flers, France. The applicant wore a headscarf to school. During physical education and sports classes the applicant refused to remove her headscarf which was in breach of education regulations. The school discipline committee resolved to expel the applicant from school for breaching the ‘duty of assiduity by failing to participate actively in physical education and sports classes’, which were mandatory classes. Students were also required to wear clothing that ‘complies with health and safety rules’.⁶⁰ The applicant subsequently claimed her right to manifest her religion within the meaning of Article 9 had been violated. The court held that the wearing of the headscarf is a manifestation of belief as contemplated by Article 9(1) and that the ban on wearing the headscarf and the expulsion from school amounted to a restriction on the exercise of her religious freedom. The issue was whether the restrictions met the limitation requirement under Article 9(2). The school rules and regulations in question were held to have a basis in law, in particular, the decision of the French *Conseil d’Etat* that had systematically upheld disciplinary penalties imposed on students who breached the duty to attend classes regularly by refusing to remove their headscarf. The court reiterated that it accepts that the ‘interference complained of mainly pursued the legitimate aim of protecting the rights and freedoms of others and public order’. However, the court does not expand on the issue of protecting public order. The rules and regulations, however, do concern themselves with health and safety.⁶¹ This is a more compelling justification as student safety is paramount and students can legitimately be compelled to comply with reasonable rules that are necessary for their protection during classes such as physical education that present more dangers to students.

In all the cases considered, the banning of religious clothing and symbols did not amount to a denial of religious freedom and it was recognised that protection of the rights of others may require rights to be limited in certain circumstances. The cases illustrate the difficulty of proving a violation of the right to freedom of religion and establishing an interference with the right to manifest one’s religious and practices. The ECHR has consistently recognised and reiterated the importance of freedom of religion in a democratic society. However, rights are not absolute and the right to freedom of religion may be limited. There is a substantial body of ECHR jurisprudence that demonstrates the balance in favour of upholding limitations that are grounded in the pursuit of a legitimate aim and necessary for a ‘democratic society’. For instance in *Kokkinakis v Greece*

the court emphasised that Article 9 ‘recognises that in democratic societies, in which several religions co-exist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone’s beliefs are respected’.⁶² The crux of the matter is aptly summed up by Judge Tulkens: ‘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’.⁶³ Moreover, the ECHR has generally applied the principle of a ‘margin of appreciation’ which essentially means that the court will defer to national decision-making as the court is not necessarily in the best position to know the local circumstances.⁶⁴ An assessment of the necessity of an interference with Article 9 is, therefore, ‘closely allied to the issue of subsidiarity’ which holds that ‘the primary responsibility for ensuring that Convention rights are practical and effective is that of the national authorities’.⁶⁵ There is, however, not an ‘unlimited power of appreciation’ on the part of Contracting States.⁶⁶ In regard to religious practices in educational institutions, the court also acknowledges the authority and expertise of educational authorities to draft rules and regulations.⁶⁷ In *Dahlab v Switzerland* the court noted 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’.⁶⁸ To this end the court is concerned whether the measures taken by the State are proportionate to the aims that it seeks to achieve.

B *Religious Dress and Discrimination*

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’,⁶⁹ 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 Murdoch⁷⁰ notes that the crux of the test is whether or not the applicant has been treated in a different way to a relevant comparator, 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 v Switzerland* 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’.⁷¹ In the cases considered above, discrimination was not considered separately but in association with Article 9, where applicable.⁷² To this end, the court 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 has already established that there has been a violation of a substantive guarantee raising substantially the same point’.⁷³ In *Şahin v Turkey* the court 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’⁷⁴ and therefore there was no violation of Article 14.

A case that is similar to *Dahlab v Switzerland* that illustrates the application of discrimination and the ‘comparator test’ is *Azmi v Kirkless Metropolitan Borough Council*⁷⁵ in which the UK Employment Appeal Tribunal upheld a finding of the Employment Tribunal that a decision by the education authority to suspend a teaching assistant for refusing to adhere to an instruction not to wear her veil in class was not direct discrimination. The Tribunal held that although it was indirect discrimination,⁷⁶ it was lawful and proportionate in support of a legitimate aim. In this case, the appellant was a bi-lingual support worker (teaching assistant) who was employed to ‘assist in the educational activity relating to children from ethnic minority backgrounds’. One of her tasks was to provide bi-lingual support. At her interview for the position the appellant, a devout Muslim, had not worn a veil that covered her face and at no stage did she indicate that this would be required. Once the term had commenced the appellant changed her mind stating that she would have to wear the veil at all times in the presence of male colleagues. This was denied and the appellant was instructed not to wear the veil, as it was essential for the children to see her face when she was speaking to and communicating with them. However, she was free to wear a veil at other times. After a protracted period of meetings and discussions between the appellant and the education authority, the appellant was eventually suspended. The issue was whether by suspending the appellant she had been ‘treated less favourably than another would be treated in a comparable situation, and whether that less favourable treatment was on grounds of religion or belief’. The Tribunal found no direct discrimination; the appellant failed to show she had suffered less favourable treatment than a ‘comparator in similar circumstances’. There was dispute as to the ‘characteristics of the comparator’ but the Tribunal concluded that the correct comparator was ‘such a person [who] would have been issued an instruction, and if she had refused to comply with it, would have been suspended’.⁷⁷ The Tribunal did find that there was a potential case for indirect discrimination; however, the decision was a ‘proportionate means of achieving a legitimate aim’.⁷⁸ In particular, the educational aim of teaching language to children from minority ethnic backgrounds. The Tribunal concluded that based on the Respondent’s teaching methodology for children with a second language ‘any such comparator would also have been suspended since the person’s face and mouth would be obscured, which would be a barrier to effective learning by those children in circumstances where the Respondent’s policy was that the education of children was paramount’.⁷⁹ The Tribunal also noted the European Union Council Directive 2000/78/EC that establishes a framework for equal treatment and non-discrimination in employment provides that in certain circumstances ‘a characteristic related to religion can constitute a genuine and determining occupational requirement where the objective is legitimate and proportionate’.⁸⁰

In the context of school uniform policies, rules that favour one group over another or where a rule has less favourable impact on one group may be construed as discriminatory. This is illustrated in the UK case of *Mandla v Dowell Lee*,⁸¹ in which a Sikh boy who wore a turban for religious reasons was refused admission to the school. The school uniform rule that required all boys to wear a school cap but not a turban was declared to be indirect discrimination. Thus, a school that ordered a Catholic student to remove a crucifix necklace, while allowing Muslim and Sikh students to wear religious symbols,⁸² and a school that banned students from wearing Christian purity rings but allowed Sikh students to wear kara⁸³ bracelets⁸⁴ have been accused of acting discriminately. The French law specifically prohibits overt or obvious religious signs or

dress. According to a report on the French law a total of 639 religious signs were recorded in 2004-2005 that fell within the ambit of the law.⁸⁵ The Islamic headscarf is one such item that is considered overt and by which the wearer's religious affiliation is immediately identifiable⁸⁶ and it is the banning of Islamic headscarves that has been at the centre of most cases and discrimination claims.

It has been argued that prohibiting Islamic headscarves amounts to indirect discrimination because it has a greater impact on Muslim students because of the visible nature of the clothing and the fact that it is more prescriptive. Plesner,⁸⁷ for instance, argues that French laws banning headscarves are not neutral and do discriminate indirectly as they have more impact on particular Muslim students with little impact on Christians and 'those who do not feel obliged to wear any religious signs'. Knights⁸⁸ also contends that the French law may amount to indirect discrimination because it disproportionately affects certain religious groups for instance Muslims, Sikhs and Jews as against the Catholic majority who will be able to comply by wearing a small cross. The distinction made here is whether or not the requirement to wear religious clothing is a mandatory (obligatory) tenet. However, as Thomas points out there are students in France 'wearing headscarves as a matter of personal conviction and those who do not want to wear headscarves but are forced to do so by familial or community pressure'.⁸⁹ This was the situation in the *Begum* case in which it was evident on the facts and history of the case that for two years the respondent Ms Begum wore the school uniform without complaint, until her brother (the litigation friend) intervened after the death of the parents and insisted that his sister comply with strict Muslim dress code and wear the jilbab.⁹⁰ It was the brother who challenged the school on its uniform policy and encouraged his sister to conform to a strict dress code. However, in the case of headscarves, there is not consensus as to whether certain religious clothing is a religious mandate. In the *Begum* case, the school had received a statement from the Muslim Council of Britain on Muslim dress code for women stating that 'there was no recommended style; modesty must be observed at all times; trousers with long tops or shirts for school wear were absolutely fine'.⁹¹

Paradoxically, it has been equally argued that compelling girls to wear headscarves is discriminatory and a violation of the right to equality and non-discrimination on the grounds of gender. In *Dahlab v Switzerland* the Court suggested that wearing the hijab is 'irreconcilable with gender equality', a view that is shared by many, including Muslim women, but strongly rejected by others.⁹² In *Şahin v Turkey*⁹³ the Court reiterated the view in *Dahlab v Switzerland* that stressed the 'powerful external symbol' which a 'headscarf represented' and that 'wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others, and above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils'.⁹⁴ Furthermore, the court referred to the Supreme Administrative Court (Turkey) decision which upheld a higher education law prohibiting headscarves stating that 'beyond being a mere innocent practice, wearing the headscarf is in the process of becoming the symbols of vision that is contrary to the freedoms of women and the fundamental principles of the Republic'.⁹⁵ However, conversely the restriction might result in some students leaving public schools (and universities) and possibly dropping out of education altogether if they cannot access private schools that permit religious dress and symbols. Whilst acknowledging France's commitment to secular education, the UN Committee on the Rights of the Child has itself raised concerns about the French law and the fact that banning religious clothing and symbols could be counterproductive to a child's access to education. To this end, the Committee has recommended that the State monitor the expulsion of girls.⁹⁶

C *Secularism and Maintaining Denominational Neutrality*

A recurring theme throughout the Strasbourg decisions discussed above is the right of schools, and in fact in some countries a duty, to ‘maintain denominational neutrality’. In all the cases considered, the fundamental principle of secularism and state neutrality has been invoked as a legitimate ground for limiting the right to freedom of conscience, thought and religion as ‘necessary in a democratic society’. The thrust of the argument is that the prohibition on religious dress and symbols is based on the legitimate interest in upholding secularism and maintaining religious neutrality in educational institutions in order to protect the rights and freedoms of others, and recognising religious diversity. The court has accepted this position stating that ‘the Court notes that in a democratic society in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of various groups and ensure everyone’s beliefs are respected’.⁹⁷ The court considers the ‘notion of secularism to be consistent with the values underpinning the Convention’⁹⁸ and reiterates that ‘an attitude that fails to respect that principle will not necessarily be accepted as being covered by the freedom to manifest one’s religion and will not enjoy the protection of Article 9 of the Convention’.⁹⁹

Secularism essentially refers to the absence of religion in state affairs: ‘this principle contains the notion that government and society must be protected from religious overreaching in order to preserve the secular nature of government and the public’.¹⁰⁰ However, the meaning of ‘secularism’ or ‘neutrality’ is far from simple and may have different meanings and applications in different states.¹⁰¹ As Gibson cogently argues ‘secularism appears in liberal and fundamentalist forms; liberal secularism only requires religion to be removed from any position of power whereas fundamentalist secularism is the removal of religion from society altogether’.¹⁰² Gibson further argues that this is an important distinction in that requiring the ‘government to be devoid of religious affiliation does not necessarily require that society be secular as well’.¹⁰³

A number of countries, including France, Turkey and Switzerland, have a system of government and a constitution based on secularism, while in other countries, such as the United Kingdom and Ireland, there is a strong connection between the state and church. France is unequivocally a secular state as stated in the French Constitution of 1958: ‘France is an indivisible, secular, democratic and social republic’.¹⁰⁴ The consequence of this is the acknowledgement of religious pluralism and state neutrality towards religion. It does not imply, nor does it have the effect, of the removal of religion from society, In *Dogru v France* it is noted that the basis for secularism is:

the Act of 9 December 1905, known as the Law on the Separation between Church and State, which marked the end of a long conflict between the republicans, borne out by the French Revolution, and the Catholic Church. Section 1 provides: “The Republic shall ensure the freedom of conscience. It shall guarantee free participation in religious worship, subject only to the restrictions laid down hereinafter in the interest of public order”. The principle of secularism is affirmed in section 2 of the Act: “the Republic may not recognise, pay stipends to or subsidise any religious denomination”.¹⁰⁵

Likewise in Turkey, secularism and state neutrality are a fundamental Constitutional principle but religious activity is not expunged from society. Article 2 of the Constitution of the Republic of Turkey states ‘the Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble’.¹⁰⁶ The Constitution provides that ‘[e]veryone possesses inherent fundamental rights and freedoms which are inviolable and inalienable’.¹⁰⁷ This includes the right

not to be discriminated against¹⁰⁸ and freedom of religion and conscience; however, none of these rights may be exercised in a manner that would endanger ‘the existence of the democratic and secular order of the Turkish Republic based upon human rights’.¹⁰⁹ The ECHR has to this end recognised that

secularism in Turkey was the guarantor of democratic values and the principle the freedom of religion is inviolable and the principle that citizens are equal, that is also served to protect the individual not only against arbitrary interference from the State but also from external pressure from extremist movements and that freedom to manifest one’s religion could be restricted to defend those values.¹¹⁰

Therefore, public schools in France and Turkey are strictly secular and non-denominational, and are generally prohibited from engaging in religious activities. Religion is viewed primarily as a private matter; a matter for parents and the church.¹¹¹ Although controversial, the French law banning overt religious clothing and symbols in public schools gives effect to the fundamental principle of secularism or religious neutrality (*Laïcité*) in the public sphere, which is considered a cornerstone of French democracy. Vaïsse¹¹² argues that *Laïcité* is a principle of neutrality that is intended to ‘create conditions for religious freedom’. He notes that this has been an important historical development in French public schools, which have been places ‘where a new civic identity could be nurtured, free from anti-democratic influences of the Catholic Church’.

In the cases of *Dahlab v Switzerland*, *Şahin v Turkey* and *Dogru v France*, secularism and the right to education that is religiously neutral was upheld and validated by the court as a legitimate basis for limiting the exercise of religious freedom in public educational institutions. In *Dahlab v Switzerland* the court accepted the government’s position that it was necessary to prohibit the teacher from wearing the headscarf in the interests of protecting the rights and freedoms of others.¹¹³ The court held that it ‘appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance and respect for others’. In *Şahin*, the court noted, with reference to other cases, that ‘in a democratic society the state was entitled to place restrictions on the wearing of the Islamic headscarf if it was incompatible with the pursued aim of protecting the rights and freedoms of others, public order and safety’.¹¹⁴ The court further expressed the view that ‘[i]t is the principle of secularism which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where values of pluralism, respect for the rights of others, and in particular, equality before the law of men and women, are being applied and taught in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire ...’.¹¹⁵

The principles set out in *Şahin* were also applied in *Dogru*. The court accepted that the state’s purpose for restricting the manifestation of one’s religious freedom ‘was to adhere to the requirements of secularism in state schools’.¹¹⁶ However, the court noted that wearing religious cloths and symbols is not ‘inherently incompatible with the principle of secularism in schools, but became so according to conditions in which they were worn and the consequences that the wearing of a sign might have’.¹¹⁷ This is an important statement but one that was not developed by the court. The banning of religious clothing and symbols, and the consequences that flow from this, needs to be viewed within the context in which such decisions are made, and not in a vacuum. The impact, or potential impact, of overt religious dress and symbols on the rights and freedoms of others, and public safety, needs to be assessed with due regard to the particular circumstances in which the matter arises. In *Lautsi v Italy* the court dismissed the applicant’s

appeal that the crucifix had become one of the State's secular symbols and values, and held that as a religious sign it had no place in state schools.¹¹⁸

As noted in all the cases discussed, religious freedom can be limited in the interests of public safety, which one would expect would require a consideration of factors that would support such decisions. Judge Tulkens, for instance, notes that in the *Şahin* case no concrete examples were provided to show that the applicant had contravened the principle of secularism through her attitude, conduct or actions.¹¹⁹

III THE AUSTRALIAN CONTEXT: LESSONS FROM STRASBOURG?

Unlike many countries with a bill of rights, in Australia the right to religious freedom is not enshrined in human rights legalisation¹²⁰ but s 116 of the *Constitution* does provide that '[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 ...'.¹²¹ This recognises religious diversity in Australian society and prohibits the formation of a state religion and limits the legislative power of the Commonwealth to make laws on religion. However, s 116 only applies to the Commonwealth.¹²² Whether or not the right to religious freedom is enshrined in Australian law, it is recognised as a fundamental value in a free and democratic country. Australia is now a highly diverse society and has a long tradition of religious diversity and practice.¹²³

The value of and respect for religious diversity is also recognised and protected in anti-discrimination legislation in Australia. Generally it is unlawful to discriminate against a person on the ground of religious conviction. In the context of education, it is generally unlawful for education providers to discriminate against a person on the ground of the person's religious beliefs and convictions by refusing or failing to accept the person's application for admission as a student; or in the terms or conditions on which it is prepared to admit the person as a student. It is also unlawful for an educational authority to discriminate against a student on the ground of the student's religious convictions by denying the student access, or limiting the student's access, to any benefit provided by the educational authority; or by expelling the student or subjecting the student to any other detriment.¹²⁴

Moreover, Australia, unlike France, does not have a wall of separation between church and the state. Therefore, religious education and practices are provided for in public schools subject to limitations and prescribed regulations. Nonetheless since the 1870s education in state schools in Australia has been secular.¹²⁵ In some states and territories it is specifically legislated that education is secular. For example, section 30 of the New South Wales *Education Act 1990* states that 'in government schools the education is to consist of strictly non-sectarian and secular instruction' and section 2.2.10(1) of the Victorian *Education and Training Reform Act 2006* states 'education in Government school must be secular and not promote any particular religious practice or domination sect'. Similarly, section 28 of the ACT *Education Act 2004* requires that 'education in government schools is to be non-sectarian, secular education'. In Western Australia, the Department of Education and Training policy on '*Religious Education*' (2005) states that 'Western Australian government schools provide a secular education to students and families from many different cultural backgrounds and faiths. It is therefore important to ensure that, as part of the general curriculum, schools respect the background and beliefs of all students by not promoting any particular set of beliefs in preference to another'. However, such provisions do not mean that religious instruction and activities in government schools are barred. Schools may offer religious instruction and allow religious activities provided they do not amount to

proselytising, and they do not promote any particular religious practice, denomination or sect. Moreover, neutrality and secular education are preserved by allowing parents to withdraw their children from religious education classes and religious activities.¹²⁶ Whilst many schools are religiously active, schools do have a choice not to offer religious instruction and to remain strictly non-sectarian. In preserving the secular nature of education and the school, this inevitably flows through to school policy and rules on religious clothing and symbols.

A School Uniform Policies

Generally all schools have some rules dealing with school uniforms and appearance. In some states and territories school uniforms are mandatory in government schools, for example, Western Australia,¹²⁷ and Northern Territory¹²⁸. In other jurisdictions school governing councils are encouraged to adopt a school uniform policy or dress code, for example in Queensland,¹²⁹ Victoria,¹³⁰ South Australia¹³¹ and New South Wales¹³². In practice, a large number of schools do have some form of dress code. It is generally the responsibility of the school principal in consultation with the school governing council and school community to determine the school uniform policy. A school's uniform policy and rules must be consistent with occupational health and safety, equal opportunity and non-discrimination legislation. Schools are also expected to reasonably accommodate and be sensitive to the religious, cultural, political and gender status of students.

The dilemma facing schools is the issue of how far they can reasonably be expected to accommodate diverse personal and individual rights, freedoms and expectations within the school context and school uniform rules, especially where a school is strictly secular. Schools are challenged by the extensive range, diversity and complexity of faiths, religions and religious symbols; it becomes an issue where to draw the line. This is vividly illustrated in *Dogru v France* in which it was noted that 639 religious signs fell within the ambit of the law.¹³³ Also as noted by Baroness Hale of Richmond in *Begum* case: 'in deciding how far to go in accommodating religious requirements with its dress code, such a school has to accommodate complex considerations'.¹³⁴

Various factors and legal principles are likely to be taken into account when developing school uniform policies including financial factors, health and safety legislation, climate and equity. Certain clothing may be required or prohibited for certain school activities for health and safety reasons, and clothing that bears insignia that are racially or politically inflammatory may be prohibited. Equity considerations should ensure that schools do not directly discriminate against students based on categories such as gender or race, where one group is treated less favourably than another group. However, a school uniform policy for public secular schools that is neutral and secular and that does not endorse any one religion, practice or belief over another, is not necessarily discriminatory on the basis of gender or religion, or a violation of religious freedom. This is evident from the UK and ECHR decisions discussed in the preceding sections. The right to religious freedom is not an absolute right.

Moreover, it is evident from these decisions that schools' uniform policies and rules that regulate dress code and limit or restrict overt religious clothing and symbols may well be permissible and enforceable, provided they are justifiable, reasonable, fair and consistently applied. Echoing the test applied in the above ECHR cases, for school uniform rules to be upheld they should serve a 'legitimate purpose and be proportionate in scope and effect'. Lord Scott of Foscote noted that '[w]earing the proper school uniform can only be attacked as an unlawful direction under domestic law if the school uniform rules that she [the student] was required to obey were themselves so unreasonable as to be unlawful ...'.¹³⁵ In this case it was significant that

the school had followed a consultative process with parents and the community on the school uniform policy, including obtaining advice from local Muslim leaders. The school had adopted a uniform policy that accommodated Muslim dress and which had been approved by the school community. The school had sought to adopt a balanced school uniform policy that suited the 'social conditions in the school' and in so doing was 'a thoughtful and proportionate response to reconciling the complexities of the situation'.¹³⁶

Moreover, weight is given to the autonomy and expertise of schools to determine school policy that is lawful, appropriate and valid for their school community. To this end, the collective culture, values, educational goals and discipline of a school community should at times weigh more favourable against the rights and expectations of an individual, without totally disregarding or unlawfully trumping individual rights. In *Begum*, Lord Scott of Foscote opined that the school's refusal to relax uniform rules to allow the jilbab was 'well within the margin of discretion that must be allowed to the school's manager' and that there is not much 'point in having a school uniform policy if individual pupils can decide for themselves what they will wear'.¹³⁷ That said, in exercising such discretion and balancing collective and individual rights, consideration is given to such factors as the nature and purpose of the rules in question, the nature and extent of the possible infringement of rights, the reasons for the limitation of rights and whether there are less restrictive means to achieve the purpose of the school policy and rules.

Where schools adopt a school uniform policy that prohibits or restricts religious clothing and symbols, it is still within their scope to provide for exemptions that take into account the religious beliefs and practices of the students and their families.¹³⁸ However, such exemptions must be explicitly stated and be consistent, equitable and justifiable in order to avoid confusion, uncertainty and potential discrimination. Selective, arbitrary or inconsistent inclusion or exemption of some religious clothing or symbols would in all likelihood give rise to a successful claim for discrimination. The importance of sound school policy was addressed and emphasised in the South African constitutional case *MEC for Education KwaZulu Natal v Pillay*¹³⁹ in which Langa CJ noted that '[a] properly drafted code [of conduct] which sets realistic boundaries and provides a procedure to be followed in applying for and the granting of exemptions, is the proper way to foster a spirit of reasonable accommodation in our schools and to avoid acrimonious disputes'.¹⁴⁰ O'Regan J further noted that 'the unfairness I have identified in this case lies in the school's failure to be consistent with regard to the grant of exemptions. It is clear that the school has established no clear rules for determining when exemptions should be granted from the Code of Conduct and when not. Nor is any clear procedure established for processing applications for exemption'.¹⁴¹ The School was admonished for failing to establish proper and consistent procedures: 'An exemption procedure was established in an ad hoc fashion which allowed certain exemptions to be made but which did not establish the principles for the granting of an exemption, nor the process that had to be followed to obtain one'.¹⁴² The courts will recognise the responsibility and authority of school managers and governors to develop policy, including policy on school uniforms, which is clearly provided for in education legislation and regulations. However, school policy needs to be clear, well written and accessible to the school community. Where school policy imposes limitations on rights, the courts are more likely to bring the policy under greater judicial scrutiny to ensure there is a legitimate basis for the limitations.

IV CONCLUSION

The prohibition or restriction of religious clothing in public schools is an emotive and controversial issue. On the face of it, it seems simple: schools should not prevent students or

teachers from wearing the religious clothing and symbols of their choice. To do so violates their fundamental rights to religious freedom. However, the issue is far from simple, especially within a diverse context of competing rights. Critics of the banning of religious clothing and symbols in public schools, in particular the more recent French law, have argued that it is a violation of human rights and that it is discriminatory to ban or restrict religious clothing. But, internationally, courts have recognised that human rights are not absolute and in certain situations and contexts it may be reasonable and justifiable to limit rights. The ECHR has consistently recognised and upheld the principle of secularism and religious-neutrality in public schools as a legitimate basis for limiting the right to religious freedom. Based on the analysis of ECHR cases public secular schools, that are religious-neutral, have the right to develop reasonable school uniform rules that uphold and give effect to the principle of secularism and neutrality in the interest of harmony, discipline and fairness. This implies the right to set uniform polices that prohibit or limit religious clothing and symbols without legal censure, provided they are reasonable and serve a legitimate purpose. In the absence of Australian authority or precedence the legal principles and position emerging from the ECHR is instructive and provides a legal framework within which to address similar issues that may arise in Australian public secular schools. Public secular schools in Australia may well choose to pursue a more restrictive approach to school uniform polices because of the complexities of trying to accommodate the wide range of religious and cultural practices. It may be unreasonable and ambitious to expect secular schools to accommodate each and every religious and cultural expectation of a diverse school community. Difficulties might also arise if schools promote or accommodate the rights and expectations of one group at the expense of another; or allow the rights of a few individuals to trump the collective rights of the broader school community, in their endeavour to recognise and accommodate religious diversity in all its manifestations. Thus for some countries, such as Turkey and France, the preferred option has been to impose a total ban on overt religious clothing and symbols in schools and to give effect to the Constitutional principles of secularity and neutrality. In other countries, for example the UK and Australia, the option remains open to pursue a multi-faith policy that accommodates religious diversity and the reasonable accommodation of religious clothing, symbols and practices in schools. This option presents far greater challenges to school policy-makers in determining the limits of religious diversity in schools. For many schools the secular approach may be more attractive, and public schools in Australia that are secular may choose to be religious-neutral and to determine policy accordingly.¹⁴³

Keywords: Religious symbols; religious freedom; secularism; school policy; human rights; religious diversity.

ENDNOTES

- 1 *Lautsi v Italy* (30814/06) Eur Court HR, Chamber (3 November 2009) (The judgment is in French only). The matter has been referred to the Grand Chamber.
- 2 *Lautsi v Italy* (30814/06) Eur Court HR, Chamber (3 November 2009). Press Release. <cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=42600938&skin=hudoc-pr-en&action=request> at 7 December 2009. In March 2010 the matter was referred to the Grand Chamber and was heard on the 30 June 2010. The decision is pending.
- 3 Law No 2004-228 of March 3, 2004, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], March 17, 2004, 5190 [Art L 141-5-1. — In the public schools, and colleges, the wearing of signs or behaviours by which the pupils express openly a religious membership is prohibited].

4 *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 2006 SCC 6 (in which the Superior Court struck down the School Board's decision to prohibit the kirpan).

5 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL.

6 Jane Conway, 'School Suspends Burka-Clad Students' 2006 <<http://www.dw-world.de/dw/article/0,2144,1985601,00.html>> at 13 July 2007.

7 In the Netherlands the Commission on Equal Treatment ruled that a ban to wear a niqaab to school was lawful and justified because the niqaab, a garment that covers the face, hampered communication that is essential in a pedagogical relationship. Cited in S Saharso, 'Headscarves: A Comparison of Public Thought and Public Policy in Germany and the Netherlands' (2005) <http://www.essex.ac.uk/ECpR/events/generalconference/budapest/papers/4/8/saharso.pdf>> at 16 July 2007.

8 *MEC for Education: Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC).

9 UK cases are discussed as they are generally based on the European Convention on Human Rights.

10 To date there is no reported case law in Australia dealing with this issue in schools.

11 The *United Nations Covenant on Civil and Political Rights* (1966) art 18(1).

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

13 *R v Drug Mart Ltd* (1984) 5 DLR (4th) 121 (in which the Lord's Day Act and Sunday observances was an issue).

14 *Christian Education South Africa v Minister of Education* [2001] 1 LRC 441, 36.

15 Jim Murdoch, *Freedom of Thought, Conscience and Religion. A Guide to the Implementation of Article 9 of the European Convention on Human Rights* (2007), 9.

16 *Kokkinakis v Greece*, 14307/88 Eur Court HR (25 May 1993), 31.

17 Murdoch, above n 15, 12.

18 Ibid.

19 See, eg, *X v Austria*, (8652/79) Eur Court HR (15 October 1981) DR 26 (concerning the Moon Sect), *X v United Kingdom* (7291/75) Eur Court HR (4 October 1977) DR11 (concerning the Wicca faith).

20 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005) (Tulkens J, dissenting opinion), 1.

21 Murdoch, above n 15.

22 See, eg, *Arrowsmith v the United Kingdom* (1978) DR 19 page 5. For example belief in assisted suicide does not fall within art 9 as demonstrated in *Pretty v the United Kingdom* (2346/02) ECHR Reports 2002-III.

23 *Dogru v France* (27058/05) ECHR, Chamber (4 December 2008), 47.

24 Murdoch, above n 15, 10.

25 *Ahmad v United Kingdom* (1981) 4 European Human Rights Reports 126, 11, in which a schoolteacher employed by a local authority claimed that he was forced to resign from his full-time post because he was refused permission to attend a mosque for the purposes of worship during hours of employment.

26 *Kalaç v Turkey* (1997) IV Eur Court HR 1199, 27.

27 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 105-106.

28 See, *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, 26; Murdoch, above n 15.

29 See examples cited in Murdoch, above n 15, 20-30.

30 *Karaduman v Turkey* (1993) 74 DR 93 (Eur Comm HR); *Kalaç v Turkey* (1997) 27 European Human Rights Reports 552.

31 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.

32 It should be noted that the Grand Chamber judgment in *Şahin v Turkey* had not been decided at the time of the Court of Appeal decision in the *Begum* case.

33 *The Queen on the application of Shabina Begum (through her litigation friend Mr Sherwas Rahman) v The Headteacher and Governors of Denbigh High School* [2004] EWHC 1389 (Admin).

34 *The Queen on the application of SB v Headteacher and Governors of Denbigh High School* [2005] EWCA Civ 199.

- 35 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15.
- 36 Ibid 50 (Lord Hoffman).
- 37 Ibid 32.
- 38 Ibid 94.
- 39 Ibid 34.
- 40 Ibid 89.
- 41 Ibid 41.
- 42 Ibid 23.
- 43 See, eg, Howard Gilbert, ‘Redefining Manifestation of Belief in *Leyla Şahin v Turkey*’ (2006) 3 *European Human Rights Law Review* 307; Anastasia Vakulenko, ‘Islamic Dress in Human Rights Jurisprudence: A Critique of Current Trends’ (2007) 7(4) *Human Rights Law Review* 717.
- 44 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, 24.
- 45 *Dahlab v Switzerland* (2001) V Eur Court HR 449.
- 46 Ibid 1.
- 47 Ibid 13.
- 48 Ibid 14.
- 49 Ibid 14.
- 50 *Kokkinakis v Greece* (14307/88) Eur Court HR (25 May 1993), in which the court 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 an offence prohibited under the Greek Constitution.
- 51 *Dahlab v Switzerland* (2001) V Eur Court HR, 449, 15.
- 52 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 104, 106.
- 53 See also *Karaduram v Turkey* (1993) 74 DR 93, which has similar facts. 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 court found no interference with Article 9 and therefore Article 9(2) did not arise.
- 54 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 71, 79, 99.
- 55 Ibid 106.
- 56 Ibid 98.
- 57 Ibid 111.
- 58 Ibid 111.
- 59 Ibid 10 (Tulkens J, dissenting opinion).
- 60 *Dogru v France* (27058/05) Eur Court HR, Chamber (4 December 2008), 8–10.
- 61 See, eg, *X v United Kingdom* (7992/77) Eur Comm HR (12 July 1978) DR 14, in which public safety was considered a legitimate aim when applying a legal requirement that all motorcycle drivers, including Sikhs, must wear a crash helmet.
- 62 *Kokkinakis v Greece* (14307/88) Eur Court HR (25 May 1993), 32.
- 63 *Şahin v Turkey* no (44774/98) Eur Court HR, Grand Chamber (10 November 2005) (Tulkens J), 8.
- 64 Murdoch, above n 15, 30.
- 65 Ibid 32.
- 66 *Handyside v the United Kingdom*, 7 December 1976 cited in Murdoch, above n 15, 32.
- 67 See, eg, *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 122.
- 68 *Dahlab v Switzerland* (2001) V Eur Court HR 449, 14.
- 69 Murdoch, above n 15, 55.
- 70 Ibid 54.
- 71 *Dahlab v Switzerland* (2001) V Eur Court HR 449, 16.
- 72 Article 14 was not raised in *Dogru v France*.
- 73 Murdoch, above n 15, 55

- 74 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 165.
- 75 *Azmi v Kirkless Metropolitan Borough Council* Employment Appeal Tribunal, Appeal No. UKEAT/0009/07/MAA 30 March 2007.
- 76 Discrimination is generally defined in terms of direct or indirect discrimination. Direct discrimination may be defined as a person being treated less favourably on the ground of that person's particular status or attribute than a person without that status or attribute in the same or similar circumstances. Indirect discrimination occurs when a condition or requirement is imposed that on the face of it appears neutral but conversely impacts on a particular group of which the complainant is a member. Ibid 41.
- 77 *Azmi v Kirkless Metropolitan Borough Council* Employment Appeal Tribunal, Appeal No. UKEAT/0009/07/MAA 30 March 2007, 56.
- 78 Ibid 63.
- 79 Ibid 52.
- 80 Ibid 40.
- 81 *Mandla V Dowell Lee* [1983] 2 AC 548.
- 82 'School Bans Catholic Girl From Wearing Crucifix', *Catholic News Agency*, 15 January 2007, <catholicnewsagency.com/new.php?n=8388> at 3 June 2007.
- 83 An iron bracelet commonly worn on the right arm as a symbol of humility and eternity. See also *R (on the application of Watkins-Singh) v Aberdare Girls High School* [2008] EWHR 1868 (Admin).
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- 86 *Dogru v France* (27058/05) Eur Court HR, Chamber (4 December 2008), 31.
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- 89 Elaine Thomas, 'Keeping Identity as a Distance: Explaining France's New Legal Restrictions on the Islamic Headscarf' (2006) 29 *Ethnic and Racial Studies* 2, 237.
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- 92 *Dahlab v Switzerland* (2001) V Eur Court HR 449, 15.
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- 97 *Dogru v France* (27058/05) Eur Court HR, Chamber (4 December 2008), 62.
- 98 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 114
- 99 *Dogru v France* (27058/05) Eur Court HR, Chamber (4 December 2008), 72.
- 100 M Todd Parker, 'The Freedom to Manifest Religious Belief: An Analysis of the ICCPR and the ECHR' (2006) 17 *Duke Journal of Comparative and International Law* 91, 91.
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- 102 Nicholas Gibson, 'An Unwelcome Trend: Religious Dress and Human Rights Following *Leyla Sahin v Turkey*' (2007) 25(4) *Netherlands Quarterly of Human Rights* 616.

- 103 Ibid 617.
- 104 Michel Troper, 'French Secularism or Laïcité' (2000) 2 *Cardozo Law Review* 1269, 500.
- 105 *Dogru v France* (27058/05) Eur Court HR, Chamber (4 December 2008), 18.
- 106 *The Constitution of the Republic of Turkey* <constitution.org/cons/turkey/turk_cons.htm> at 8 December 2009.
- 107 Ibid art 12.
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- 111 For a comprehensive and insightful discussion on secularism in different states, see Aernout Nieuwenhuis, 'State and Religion, Schools and Headscarves, An Analysis of the Margin of Appreciation as Used in the Case of *Leyla Şahin v Turkey*' (2005) 1 *European Constitutional Law Review* 495.
- 112 Justin Vaïsse, *Veiled Meaning: The French Law Banning Religious Symbols in Public Schools* (2004) The Brookings Institution <<http://www.brookings.edu/fp/cusf/analysis/index.htm>> at 7 November 2006.
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- 114 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 111.
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- 117 Ibid 70.
- 118 *Lautsi v Italy* (30814/06) Eur Court HR, Chamber (3 November 2009). Press Release. <cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=42600938&skin=hudoc-pr-en&action=request> at 7 December 2009.
- 119 *Şahin v Turkey* (44774/98) Eur Court HR, Grand Chamber (10 November 2005), 7.
- 120 In September 2009 the National Human Rights Consultation group submitted its report on a Human Rights Act for Australia to the Commonwealth government. A proposed bill of rights includes the right to religious freedom.
- 121 *Commonwealth of Australia Constitution Act 1900*.
- 122 Few states and territories have a bill of rights. The *Charter of Human Rights and Responsibilities Act 2006* (Vic), which applies only to Victoria, provides for the freedom of thought, conscience, religion and belief in s 14, as does s 14 of the *Human Rights Act 2004* (ACT).
- 123 Gary Bouma, 'Social Justice Issues in the Management of Religious Diversity in Australia' in James Richardson (ed), *Regulating Religion Case Studies from Around the Globe* (2004) 333.
- 124 See, eg, *Equal Opportunity Act 1984* (WA), ss 53, 61; *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); *Discrimination Act 1991* (ACT), ss 1(i), 18; *Equal Opportunity Act 1995* (Vic), ss 6(j), 37.
- 125 Ibid.
- 126 *Education Act 1990* (NSW), s 33; *Education (General Provisions) Act 2006* (Qld), s 76; *Education Act 1994* (Tas), s 12; *Education and Training Reform Act 2006* (Vic), s 2.210; *School Education Act 1999* (WA), ss 71-72; *Education Act 2004* (ACT), s 29; *Education Act* (NT), s 23. Note the *Education Act 1972* (SA) is silent on this matter.
- 127 Department of Education and Training (WA), *Dress Requirements for Students* (2007) <http://policies.det.wa.edu.au/Members/e4002033/policy.2006-01_18.3313887027/Dress_Requirements_for_Students_Policy_23_feb_07.pdf> at 8 July 2007.
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- 131 Department of Education and Children Services (SA), *School Dress Code* <http://www.decs.sa.gov.au/policy/pages/OSPP/policy_index> at 26 March 2010.
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- 133 *Dogru v France*, no 27058/05, Eur Court HR, Chamber (4 December 2008), 32.
- 134 *R (on the application of Begum) v Headteacher and Governors of Denbigh High School* [2006] UKHL 15, 98.
- 135 Ibid 83.
- 136 Ibid 98 (per Baroness Hale of Richmond).
- 137 Ibid 84.
- 138 In WA a school principal may (not must) grant exemptions, for example an exemption based on the religious beliefs of the student and students' family as provided for in regs 35 and 36 of the *School Education Act 1999* (WA), and according to processes approved by the School Council as part of the school's dress requirements.
- 139 *MEC for Education KwaZulu Natal v Pillay* (CCT 51/06) [2007] CC 21. In this case a Hindu student was prohibited from wearing a nose stud.
- 140 Ibid 38.
- 141 Ibid 173.
- 142 Ibid 175 (per O'Regan).

