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Dr Karen Jochelson
Director, Economy and Employment programme
Equality and Human Rights Commission
Fleetbank House
2-6 Salisbury Square
London EC4Y 8JX

25 Red Lion Square
London WC1R 4RL
TEL: 020 7404 3126
FAX: 0870 762 8971
EMAIL: enquiries@secularism.org.uk
WEB: www.secularism.org.uk

Religious advertising: a response to the Equality and Human Rights Commission

We welcome this opportunity to respond to the wider questions now being asked by the Commission following the attempts made by the Church of England to require Digital Cinema Media (DCM) to accept its Lord's Prayer advertisement against its wishes. Our comments have been prepared with the assistance of Gavin Millar QC, a noted specialist in media law. Our response should be read alongside his legal opinion in the matter of the Lord's Prayer advert and the EHRC's public statements, included here as an appendix to our response.

Q1) What are your views about the law in England and Wales and in Scotland in relation to religious advertising in the public sphere, particularly in cinemas, on buses and other forms of public transport, and on billboards? Does the law allow sufficient freedom of expression?

We believe the law as it stands allows sufficient freedom of expression. As the Commission has itself noted, public concern about advertising, freedom of expression and freedom of religion or belief did not emerge in its own call for evidence or technical review of the legal framework.

Religion and belief organisations should, like anyone else, be free to say whatever they like from their own platforms – websites, publications, social media etc. but free speech does not imply that there is a positive obligation on private bodies to provide a platform for such speech or expression.

The EHRC's own [guidance](#) on freedom of expression makes clear that free speech considerations do not apply to decisions taken by private companies. Any attempt to change the law to give religion and belief organisations the "right to buy" – in effect impose – commercial advertising would, in our view, be an unacceptable interference with private bodies' commercial freedom.

Freedom of expression concerns are normally only engaged when the state bans religious advertising on television/radio for example a broadcaster wanting to broadcast an advert but the state's measure prevents it from doing so.

In this area it is accepted that the state can regulate content including advertising to achieve a public good. Thus there has always been an offensiveness standard which content should not cross. There have also been strict restrictive rules on political advertising (Party Political Broadcasts and Party Election Broadcasts) and religious advertising.

In Europe, states are given a wide margin of appreciation to ban religious advertising in the sphere of morals and religion. They are entitled to take the position that any religious advertising could be considered offensive by a section of the public and amount to proselytising.

In *Murphy v Ireland*¹ the ECtHR rejected the suggestion that the statutory ban in Ireland violated the right to manifest religion under Article 9. This was on the basis that the state allows all religions to preach and practise freely including on the internet, by handing out materials at tube stations etc. So there is sufficient freedom of religion. This is obviously correct.

The scope for religious advertising on TV and radio is also severely restricted by Ofcom using its statutory powers. It is within its rights to do this and this should also obviously remain the position in a pluralistic society.

For non-broadcast media the media outlet is allowed to refuse any advert it wishes to. The CAP Code sets out what unacceptable content is. It does not preclude religious advertising *per se*. The rules here are more *laissez-faire*, reflecting traditional freedom of contract principles and the fact that these media are less powerful. But there have still always been limits relating to decency (offensiveness), truthfulness, legality etc.

We are not aware of any general prohibition on religious advertising on public transport, but if bus or train operating companies sought to maintain an image of neutrality by not accepting political or religious advertising we would not find that problematic.

Any adverts will naturally be subject to regulation. One recent controversy involved the banning of a bus advertisement from a Christian charity which suggested that people could be 'cured' of homosexuality.

Transport for London accepts religious advertising but banned these specific adverts arguing that they did not reflect the companies' "commitment to a tolerant and inclusive London". Section 404 of the GLA Act provides that when exercising its functions, the Authority, including the Mayor, have a duty to have regard to the need

¹ CASE OF MURPHY v. IRELAND

[http://hudoc.echr.coe.int/eng#{\"dmdocnumber\":\"699084\", \"itemid\":\"001-61207\"}](http://hudoc.echr.coe.int/eng#{\)

- (a) 'to promote equality of opportunity for all persons irrespective of their race, sex, disability, age, sexual orientation or religion;
- (b) to eliminate unlawful discrimination; and
- (c) to promote good relations between persons of different racial groups, religious beliefs and sexual orientation.'

It for this reason the mayor of London was judged to have acted lawfully, and we would argue reasonably, in banning these advertisements².

Some outlets may choose not to accept religious advertising because of the risk of a particular advertisement causing offence to a particular section of the public. This should also remain the position for essentially the same reasons as the state is free to achieve this objective in relation to television and radio. It would be odd in a free market system if non-public bodies were not allowed the same freedom (for the same reasons) as the state has in this area.

Q2) Should religion or belief organisations be protected from discrimination as individuals are on the basis of their religion or belief?

No. The law prevents discrimination against individuals only in certain areas. These areas are covered in various parts of the Equality Act – services offered to the public and public functions; work, education and membership associations/political parties, for example.

Domestic and European law has identified important societal objectives in preventing discrimination against individuals in these areas. It has therefore sought to balance the freedom to discriminate against the harm done to the individual's dignity, autonomy, self-esteem, freedom to develop/realise potential etc. and decided that the rights of the individual with the protected characteristic must prevail.

The same harm does not exist in the cases of entities and abstract ideas (churches and religious convictions). These of course have to be free to compete for hearts and minds on a level playing field in a pluralistic democracy. But human rights law and protection for individuals against religious discrimination is generally regarded as sufficient to achieve this.

In cases where a group linked to a protected characteristic has been denied a service, it has been possible to take cases as there is usually an individual acting for the organisation who has been refused.

It has not generally been considered that there is a societal problem that needs addressing which is not addressed through these means. If there is one, we cannot see it. We therefore believe the onus is on those who say there is one to make out the case for it.

² http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/22_03_13_busadverts.pdf

Q3) To what extent should those commercial organisations, which control a very large portion of the market, be permitted to choose advertisements based on their own ideas of acceptable content, rather than based on regulation (such as Codes of Practice, e.g. the Committee of Advertising Practice's UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing)?

Privately run commercial endeavours should be free, subject to regulation and Codes of Practice etc. to decide for themselves which adverts they decide to accept. We reiterate that the right to free speech does not imply a positive duty on third parties to facilitate that speech.

As the Advertising Standards Authority has said: "In terms of an advertiser being refused space to run its ad, that decision is entirely at the discretion of the owner of the media space in which the ad is due to run..... While advertisers and, indeed, the wider public may disagree with a media owner's policy, the initial decision whether to accept or reject an ad (or ads) rests with them."³

The EHRC, in its support of the Church of England, has been vocal in its opposition to this current position, but we consider the current position to be perfectly reasonable.

If it is felt that organisations controlling a large portion of the market are unreasonably restricting advertising of any nature they are of course answerable to their customers and whatever civil society response such a stance generates. That said, we believe the Church of England's manipulation of the media on this issue and the EHRC's intervention has placed unwarranted pressure on a commercial company operating within the law, and we believe, in good faith.

Cinemas are entertainment providers and as such should be entitled to satisfy themselves that the adverts they show theatres aren't going to offend, upset, annoy, anger – or importantly, even bore their paying customers. There may be further sensitivities such as not wishing being to be perceived as endorsing a particular religion, given the religious/belief diversity of audiences.

We are left wondering whether the EHRC's reaction would have been as enthusiastically interventionist if the advert had been one with less E/establishment support. We hope you can reassure us on that.

Obligating privately owned commercial organisations to take religious advertising without them being able to give regard to the suitability or appropriateness of such adverts to their audiences would, in our view, would be a draconian response to a 'non-problem' and represent an unjustifiable encroachment on commercial freedom.

We believe that the EHRC's stated concern that the DCM policy represents a "slippery slope towards increasing censorship" is misplaced. In this instance, DCM exert control over 80% of cinema screens around the country – but this still

³ Religious advertising and the rules, 24 November 2015 <https://www.asa.org.uk/News-resources/Media-Centre/2015/Religious-advertising-and-the-rules.aspx#.VrSNOOrKLSUk>

represents a tiny proportion of advertising space available in the overall 'marketplace of ideas'.

The Lord's Prayer advert was freely available on the internet. Indeed, the way in which the Church used the media to present itself as a victim ensured the film was given not a blanket ban but almost blanket coverage on mainstream TV, the websites of news outlets and heard across radio stations. The ensuing and largely manufactured 'controversy' resulted in the online version being viewed around half a million times in the 24 hours since the story broke, compared with minimal viewings since.

Some may well feel uncomfortable with a commercial organisation restricting religious and political advertising, particularly where an organisation controls a significant portion of the market, but that in itself does not justify the state dictating to commercial organisations what adverts they must screen in their cinemas.

Ultimately, the decision to accept or reject religious advertising should be that of the commercial organisation and this is not an area in which the law should intervene.

Broader concerns over EHRC's response to this issue

Freedom of expression is a particular area of concern for the NSS. We regard freedom from censorship and the freedom to communicate to be vital in a democracy. The right to free expression is the right which guarantees and defends all others.

As the Commission will be aware, free speech globally is under particularly acute threat from blasphemy laws and fear – a fear that is restricting acceptable limits of free expression in the name of religious sensitivity. We wholeheartedly agree that there is no general right not to be offended *per se* – nor should there be. That said, the law, in particular broadcasting law, does recognise that harm (e.g. defamation) or offence to others may provide a legitimate reason for limitations on free speech,

We do not however regard cinemas' disinclination to screen religious advertising as a free speech issue. Neither do we consider the actions of DCM to be in any way unlawful, unreasonable or discriminatory. We would therefore like to put on record our concern about the public statements the EHRC has made on this matter.

The points we are making are largely ones in principle and have wider application, nevertheless it is worthwhile briefly to examine the context of the advert. The Church created the short film clip featuring the Lord's Prayer as part of its publicity campaign for its launch of a new website and social media initiative to promote 'the renewal of prayer in a digital age'. DCM's refusal to accept the advert, on account of its policy of not accepting any religious or political messages, generated significant media attention.

In its public statements the Church of England threatened to take legal action against DCM. In a letter to DCM, which it released to the media, the Church's chief legal adviser Stephen Slack alleged its decision "not to screen the proposed

advertisement would involve unlawful discrimination” because DCM would be “directly discriminating against the Archbishops’ Council” by failing to provide a service to them on grounds of religion or belief.⁴

During this time the NSS consistently took the position that such grounds were baseless and that DCM had the right to refuse on commercial grounds provided it did not discriminate on protected grounds, which we were adamant it hadn’t.

Public statements from the EHRC, meanwhile, were supportive of the Church’s position. In a public statement dated 11 December the Commission stated:

“The Commission, the national expert in equality and human rights law, has also offered its legal expertise for the purpose of intervening in the case should the Church take legal proceedings against DCM.”

We of course acknowledge the Commission’s legal expertise in equality and human rights law, but it is at some variance from our own view and that of the specialist media QC we commissioned from Matrix. He states in para 23 of his opinion: “There is no legal claim that could be brought with any prospect of success, i.e. in which the EHRC might legitimately intervene.” His rationale is explained in the attached opinion.

The statement issued by the EHRC was seen, we hope incorrectly, as expressing support for the Church to take – completely unspecified – legal action against a commercial organisation.

We hope that this statement did not amount to, as it has been interpreted as doing, a general endorsement of support for the Church, for this would raise legitimate questions of even-handedness.

While we accept that the EHRC’s remit extends beyond legal compliance, we believe it would have been more appropriate for the EHRC when expressing its concern over “any blanket ban on adverts by all religious groups” to have accompanied this with an acknowledgment in the same statement that DCM was operating within its legal rights and in line with EHRC guidance on freedom of expression.

That at least would also have been more considerate to DCM which was at the time the subject of huge public pressure from the Church aided by a sustained media campaign that was at best ill-informed.

In March 2015 the Commission announced that its consultation revealed “widespread confusion over laws protecting religion or belief”. We are therefore keen to understand why the EHRC chose not, on this occasion, to clarify the law in this area.

⁴ <http://www.telegraph.co.uk/news/religion/12010720/Ban-Christmas-ads-if-you-dont-like-religion-Church-tells-cinemas.html>

If, however, it believed at the time that DCM's actions presented a legal difficulty, we would appreciate the Commission sharing with us what this was and what legal recourse it had in mind and whether it still believes this to be tenable.

DCM explained its rationale over religious and political advertisements, citing negative reaction to political advertising it had screened before the Scottish Independence Referendum, and it seems quite plausible that religious adverts could have a similar effect.

As the Advertising Standards Authority acknowledges: "Religion is potentially an extremely sensitive subject. References to religion in marketing communications, even humorous ones, have the capacity to cause serious offence."⁵

Many people do not welcome public discussion of religion and political allegiance because it is so emotive and potentially divisive, and it does not seem unreasonable for a place of entertainment to proscribe it in adverts.

Whilst tolerance of those with different faiths and beliefs should be robustly promoted, widespread public indifference to religion, and even hostility to it, need not be regarded as a problem in need of a solution.

On 23 November the EHRC stated: "We are concerned by any blanket ban on adverts by all religious groups."

We are also somewhat concerned about the EHRC's apparent wish that rather than a blanket ban on religious advertising, a more selective, or potentially discriminating approach should be taken.

It should be noted that the subject of the ban was religious content and not "all religious groups". Nevertheless, this statement takes issue with DCM's general policy of not accepting political or religious advertising which it applies even-handedly, regardless of the specific religious or political beliefs involved.

We agree with DCM that this clear, neutral stance is fair and reasonable.

If it were to accept an advert for the Lord's Prayer, the chain would then be risking accusations of discrimination, and subsequent litigation, if it refused similar adverts from Muslim groups wishing to screen adverts featuring Islamic prayer or extolling the virtues of a caliphate; or perhaps an atheist group wishing to screen advertisements extolling the virtues of non-belief and refuting the existence of God – both of which might cause greater consternation. Many more other potentially problematic examples are not hard to envisage.

Another reason why cinema chains may be reluctant to screen adverts for any religion is that this may be seen as endorsing a particular religious position at the expense of others, something that could be guaranteed to alienate audiences.

⁵ <https://www.cap.org.uk/Advice-Training-on-the-rules/Advice-Online-Database/Offence-Religion.aspx#.VrQ1I1LTIU>

We were further perplexed by the statement from EHRC Chief Executive, Rebecca Hilsenrath, in which she said: "We also understand why people were confused that a commercial Christmas can be advertised but the central Christian prayer cannot."

There is however a clear distinction to be drawn. While we accept that EHRC has an educative role, this almost seems to be taking the least informed view and using it as a pretext for a major investigation.

As you will be aware, in addition to being a Christian holy day that marks the birth of Jesus, Christmas in Britain is also a de facto secular festival widely celebrated by people of all faiths and none. Midwinter solstice has been the subject of celebrations, goodwill and gift exchanging since long before being adopted by Christians, and the seasonal imagery including in advertising reflects this.

When referring to "the central Christian prayer" the statement fails to acknowledge that the cinema may also (quite reasonably as we have noted above) be mindful that other religious advert requests may be less widely accepted in our increasingly multi-religious and non-religious country. Whilst many may subjectively regard the Lord's Prayer as relatively benign, if it were to be screened, it would be almost impossible to avoid becoming embroiled in political or religious debate or being accused of bias in the future if it wished to decline other religious advertising promoting other faiths or beliefs. DCM's even-handed and secular stance avoids creating competing demands and potential religion and belief based grievances. We therefore regard the DCM's policy as eminently sensible, but more importantly, absolutely theirs to make. For this reason we find the EHRC conduct in this matter both perplexing and regrettable.

DCM would, in our view, be entitled to feel that they had been unfairly vilified as a result of the media storm and the implicit criticism of them by the EHRC. We hope that such vilification did not cause them harm.

One is left with the impression that the EHRC regards 'secular spaces' as inherently problematic. Religious people have the right to express their beliefs publicly, as do those who oppose or question those beliefs. Religion should be free to compete and flourish in the public marketplace of ideas. However, it should not be regarded as in any way problematic that in some circumstances, such as in cinema theatres, matters of religion or belief are set aside, to create neutral and fully inclusive spaces. The fundamental right to freedom of expression faces many significant challenges. We do not believe DCM's policy prohibiting religious advertising is one of them – and we urge to EHRC to choose its priorities more carefully.

We hope that the opinion below and answer to the questions posed are of help in your deliberations. As always we remain happy to assist in any way we can.

Appendix

IN THE MATTER OF:

THE LORD'S PRAYER ADVERTISEMENT

NOTE OF ADVICE

Introduction

1. Digital Cinema Media Limited ("DCM") is an advertising company, supplying cinema advertisements in advertising reels to the [Cineworld](#), [Odeon](#), and [Vue cinema](#) chains. These run for about 8-12 minutes and are shown before particular feature films. The company was formed in July 2008 and is jointly owned by Cineworld and Odeon.
2. DCM's published Advertising Policy sets out standards with which advertising material must comply in order to be accepted by them for inclusion in one of their advertising reels. Paragraph 2.3.1 of the policy requires that the material must not in the *reasonable opinion of DCM constitute Political or Religious Advertising*. The latter is defined by paragraph 2.2.2 of the policy to mean:

...advertising which wholly or partly advertises any religion, faith or equivalent systems of belief (including any absence of belief) or any part of any religion, faith or such equivalent systems of belief.
3. DCM's published terms and conditions make clear that it is under no obligation to accept requests to buy advertising screentime.
4. Last year the Church of England made a request to buy advertising screentime on DCM reels in cinemas showing the new Star Wars film. The one minute film it submitted to DCM features different people each saying one line of the Lord's Prayer. The first speaker is the Archbishop of Canterbury. The film is available to view on the Church's website [JustPray.uk](#) and on YouTube.
5. DCM withheld approval for and so did not accept the request. Following the decision DCM said publicly:

"...some advertisements - unintentionally or otherwise - could cause offence to those of differing political persuasions, as well as to those of differing faiths and indeed of no faith," ... "in this regard, DCM treats all political or religious beliefs equally".

In other words in its reasonable opinion the advertisement constituted religious advertising given the definition in paragraph 2.2.2 of the policy.

Applying its policy, and the reasoning underlying it, DCM had refused to accept the advertisement.

6. The Church has questioned DCM's decision in strong terms.
7. The Equality and Human Rights Commission ("EHRC") has expressed its concern about the DCM decision on the basis that it was taken because the advert might "offend" people. It has made a public statement referring to freedom of expression and asserting that there is no right *in Britain not to be offended*. It has offered its "legal expertise for the purpose of intervening should the Church take legal proceedings against DCM".
8. I am asked to advise the National Secular Society ("NSS") whether the DCM could be successfully challenged as unlawful. Statements in the media have referred to possible claims for religious discrimination or violation of the free speech right under Article 10 of the European Convention. I will consider these possibilities in turn.

Religion

The Equality Act 2010

9. Religion or belief is a *protected characteristic* under the Equality Act 2010 ("the EA"). EA s.10(3) provides that:

(3) *In relation to the protected characteristic of religion or belief—*

(a) *a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief;*

(b) *a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.*

10. Section 13(1) of the EA prohibits direct discrimination by one person against another person (A against B). There are two requirements for direct discrimination, namely that:

- a. A treats B less favourably than A treats or would treat others. EA s.23 requires that when the comparison of cases required by EA s.13(1) is carried out by court *there must be no material difference between the circumstances relating to each case*. The "comparator" (the other person) may be a real or a hypothetical person.
- b. The less favourable treatment complained of was *because of a protected characteristic*. This is often referred to as the "causation" requirement.

11. Section 19(1) of the EA prohibits indirect discrimination in relation to the protected characteristic of religion or belief. It provides that:

(1) *A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.*

(2) *For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—*

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Again EA s.23 requires that when the comparison of cases required by EA s.19 is carried out by court *there must be no material difference between the circumstances relating to each case.*

12. Discrimination in the provision of a service to the public or a section of the public by a *service provider* is unlawful by virtue of EA s.29. The County Court has jurisdiction to determine a claim of unlawful discrimination under s.29 (see EA s.114).

13. DCM is a service provider and could be a defendant in a discrimination claim under EA s.29.

14. But it is not clear who the proposed claimant would be in a claim for religious discrimination. The *less favourable treatment* complained of in a direct discrimination claim would be the refusal of the screentime by DCM. The *particular disadvantage* complained of in an indirect discrimination claim would be a disadvantage in getting a contract for screentime from DCM. The Church of England is not a legal entity. The other party to the desired contract for services would presumably have been a company or other legal entity (capable of entering into contractual relations) under the control of the Church of England. It is not clear what entity this would have been. If a company it is difficult to see how it could have the protected characteristic of religion or belief. I will assume, however, for the sake of argument that a person can be identified as a proper claimant (ie B).

A direct discrimination claim under s.29?

15. B would not be able to make out a claim under EA section 29. Neither of the two requirements for direct discrimination could be made out.

16. Assuming DCM applies paragraph 2.3.1 of its Advertising Policy consistently, the less favourable treatment condition could not be made out. This is because B would have to be compared with a person:

- a. requesting to buy advertising screentime on DCM reels;
- b. whose advertisement wholly or partly advertised *any religion, faith or equivalent systems of belief (including any absence of belief) or any part of any religion, faith or such equivalent systems of belief* (as per para 2.2.2 of the policy);
- c. but whose request for the screentime was accepted by DCM.

Requirements a. and b. are necessary to ensure a comparison in accordance with EA s.23. Any such person would, similarly, be refused the screentime. So there would not be a hypothetical comparator, let alone an actual one, receiving more favourable treatment. It follows B would not be able to make out less favourable treatment.

17. The causation requirement would not be made out either. DCM would say that it did not refuse the request because of a protected characteristic (*a particular religion*). It would say that it refused the request because of the nature of the content of the advertising material. This fell outside of the policy. The evidence, I assume, would show this to be the case.

An indirect discrimination claim under EAs.29?

18. Nor could this form of discrimination claim succeed. DCM has applied a *provision, criterion or practice* in refusing the screentime for the film, namely its policy of refusing material which in its reasonable opinion constitutes religious advertising. But this does not put Christians or Anglicans at a disadvantage compared with non-Christians or non-Anglicans, as required by EA s.19(2)(b). It disadvantages someone wanting to place religious advertising with DCM (as against someone who does not) but this is not indirect religious discrimination within the meaning of the EA.

Article 9.2 of the European Convention on Human Rights ("ECHR")

19. This gives a qualified right to manifest religious belief. It gives protection against unlawful interference with the right by a public authority. DCM is not a public authority and so it would not be open to the Church to bring a Human Rights Act claim by way of judicial review against DCM, alleging that the refusal was such an unlawful interference.

20. Unsuccessful claimants under the EA (see above) have in the past made applications to the European Court of Human Rights in Strasbourg ("the ECtHR") alleging that the UK courts/tribunals failed to protect their Art 9.2 rights. See for example the applications brought by four applicants who had unsuccessfully pursued religious discrimination claims under the EA in the employment context, ***Eweida and others v United Kingdom*** (2013) 57 EHRR 8. An unsuccessful B in a claim under the EA in this case could try to do the same, once all of the domestic remedies (ie appeal routes had been exhausted). But I doubt very much whether the ECtHR would find an interference with this right. This is because the complaint is essentially about exclusion from advertising. This type of grievance will not be dealt with under ECHR Art 9.2 in Strasbourg. See ***Murphy v Ireland*** (2004) 38 EHRR 4.

Freedom of expression

21. Article 10 of the ECHR gives a qualified right to freedom of expression. Again it gives protection against unlawful interference with the right by a public authority. But since DCM is not a public authority it would not be open to the Church to bring a Human Rights Act claim by way of judicial review against DCM, alleging an unlawful interference with the right. Advertising on television and radio is regulated by public authority, but not advertising in cinemas.⁶

The public position taken by the EHRC

22. For the reasons given above this is misconceived.

23. There is no legal claim that could be brought with any prospect of success, ie in which the EHRC might legitimately intervene.

No right to be offended

24. Care also needs to be taken in making assertions, of the sort made by the EHRC, to the effect that there is no right to be offended. It is true that there is no freestanding legal or human right not to be offended. But many aspects of our law, in particular broadcasting law, recognise that harm or offense to others may provide a legitimate reason for limitations on free speech. See for example the provisions of the Ofcom Broadcasting Code considered in ***Gaunt v Ofcom*** [2011] 1 WLR 235.

⁶ It is interesting to note that even here the only circumstances in which religious advertising is possible is where the editorial content of the television/radio channel is religious and the content of the advertising material is presented clearly as statement of opinion rather than assertion of fact. See section 15 (and especially 15.7) of the UK Code of Broadcast Advertising, compliance with which is mandatory for Ofcom-licensed broadcasters. There has never been any legal challenge to the compatibility of these rules with either ECHR Art 9.2 or 10.

25. This principle is also recognised under ECHR Art 10 which provides that it is a legitimate aim for the state to restrict freedom of speech to protect the rights and freedoms of others. See again **Murphy v Ireland** (above) which concerned the application of statutory ban on religious advertising on commercial radio in Ireland. The applicant argued that the Convention *did not protect an individual from being exposed to a religious view simply because it did not accord with his or her own, noting that his advertisement was innocuous and completely inoffensive* [71]. The court's response to this argument is pertinent.

72 The Court agrees that the concepts of pluralism, tolerance and broadmindedness on which any democratic society is based mean that Art.10 does not, as such, envisage that an individual is to be protected from exposure to a religious view simply because it is not his or her own. However, the Court observes that it is not to be excluded that an expression, which is not on its face offensive, could have an offensive impact in certain circumstances. The question before the Court is therefore whether a prohibition of a certain type (advertising) of expression (religious) through a particular means (the broadcast media) can be justifiably prohibited in the particular circumstances of the case.

The ECtHR held that it could be so justified and declined to find a violation of the applicant's Art 10 right. This principle does not come into play in the present case because DCM is not a public authority. The Art 10 right is not engaged by its decision. But the existence of this clear and settled Strasbourg law does make the public intervention of the EHRC all the more puzzling.

GAVIN MILLAR Q.C.

Matrix

13 January 2016