

15 September 2011

LADELE AND MCFARLANE

v.

UNITED KINGDOM

APPLICATION NOS. 51671/10 AND 36516/10

**WRITTEN SUBMISSION ON BEHALF OF THE INTERNATIONAL COMMISSION OF JURISTS,
PROFESSOR ROBERT WINTEMUTE, FIDH, AND ILGA-EUROPE**

1. These written comments are submitted on behalf of the International Commission of Jurists (ICJ), Professor Robert Wintemute, FIDH, and ILGA-Europe pursuant to leave granted by the Court in accordance with Rule 44 § 2 of the Rules of Court. For their interest and expertise see "Application for leave to submit written comments" (5 July 2011), granted 5 August 2011.

INTRODUCTION

2. These cases present the issue of whether there is a state duty to protect the right to manifest one's religion by creating an exception or exemption from compliance with generally applicable equality laws. The applicants complain that their rights under Articles 9 and 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms have been violated by the refusal of their employers to accommodate their religious beliefs. The first case involves a town registrar who refused to perform civil partnership ceremonies for same-sex couples. The second case involves a counsellor working for a national therapeutic organisation who expressed concerns about providing psycho-sexual therapy for same-sex couples. Thus in both cases the issue is the denial of services to members of the public because of their sexual orientation by a religiously-motivated individual. This is an issue that has arisen in a number of states within and outside the Council of Europe.
3. This Submission is limited to a review of comparative law on the granting of religious exemptions to individuals in the provision of non-religious goods and services to gays and lesbians. The scope here is narrow. This Submission is not directly concerned with the formal recognition of same-sex couples by religious organizations or entities. Nor does this Submission deal with the interaction of Articles 9 and 14. Rather it seeks to present a summary of laws and litigation concerning the provision of non-religious goods and services to members of the public.
4. The Interveners submit that individuals providing goods and services or offering facilities to members of the public are not entitled to accommodation for their religious beliefs where those religious beliefs require that they exclude segments of society on the basis of personal identity characteristics such as sexual orientation. The Interveners further submit that any distinction between same-sex sexual orientation and same-sex sexual conduct is artificial, such that granting individual exemptions for religious views about the morality of same-sex relationships is equivalent to granting exemptions for religious views about gay and lesbian people generally. In these circumstances, protecting the right of others to be free from

discrimination is sufficient to overcome the right to manifest one's religion in the public sphere.

5. The freedom to manifest one's religion or belief may be subject to limitations that are prescribed by law and necessary in a democratic society for the protection of the rights of others, including the right to be free from discrimination under Article 14. The Interveners submit that denying religious employees exemptions or accommodations concerning the performance of work-related duties in order to ensure that public goods and services are available to everyone regardless of sexual orientation, to the extent that it constitutes an interference with their Article 9 rights, is a legitimate limitation on religious freedom. The interference is necessary in a democratic society because the elimination of sexual orientation discrimination corresponds to a pressing social need and is moreover proportionate to that aim. The interference is relatively minor because it concerns the offering of non-religious goods and services to members of the public for a secular state or private employer.
6. This analysis is borne out by national law and practice which commonly deny such exemptions, in order to ensure the equal provision of goods and services to people regardless of sexual orientation. Around the world, domestic laws and judicial decisions demonstrate that religious exemptions are limited to religious organizations, most typically performing religious activities. Individual employees engaged in commercial or public activities are not engaged in religious functions. Their right to manifest their religious beliefs may thus be limited by laws that further the goal of equality for all members of society.

RELIGIOUS EXEMPTIONS IN DOMESTIC LAWS

7. The question whether there should be statutory exemptions on religious grounds has arisen in two contexts: laws recognising same-sex marriage or partnerships and laws prohibiting discrimination on the basis of sexual orientation. Many but far from all States and individual jurisdictions with laws that provide for same-sex marriage include exemptions for religious organisations.¹ Such exemptions provide that clergy members or other religious officials are not required to officiate any marriage that would be contrary to their religious doctrine. In some cases, religious institutions and organizations are also exempted from providing goods and services related to the celebration or solemnisation of a marriage if doing so would violate the religious principles of the organization.² Outside the marriage context, religious exemptions

¹ States providing for religious exemptions in marriage equality laws: South Africa (Civil Union Act 2006, section 6); Norway (The Marriage Act, Part I. Chapter I. Section 1 Section 13); individual states within the USA: New York (New York Marriage Equality Act 2011, section 3 and 5, amending section 10-b and 11 of the domestic relations law), New Hampshire (HB 437, Chapter 457-A on Civil Unions: 457-A:5), Vermont (H.275, § 5144), Connecticut (Substitute Senate Bill 899 para 2, Sec. 7), District of Columbia (Religious Freedom And Civil Marriage Equality Amendment Act 2009, (b) Section 1288), Rhode Island (H6103, January 2011, amending Title 15 (Domestic Relations) of the General Laws). Other States have marriage equality laws with no religious exemptions: Belgium (Article 143 of the Belgian Civil Code (amended by L 2003-02-13/36, art. 3)); Netherlands (Act of 21 December 2000 amending Book 1 of the Civil Code, concerning the opening up of marriage for persons of the same sex (Act on the Opening up of Marriage); Spain (Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, amending Article 44 of the Spanish Civil Code).

² Connecticut: An Act Implementing the Guarantee of Equal Protection under the Constitution of the State for Same Sex Couples, 2009 Conn. Pub. Acts No. 09-13, § 17.

are less common. Some States and some jurisdictions within the United States include exemptions for religious organizations and institutions in their general laws prohibiting discrimination but most do not.³

8. Within the European Union, Council Directive 2000/78/EC of 27 November 2000, which prohibits discrimination on the grounds of sexual orientation in the field of employment and occupation, includes a provision permitting the continuation of national legislation exempting compliance by churches and organizations “the ethos of which is based on religion or belief.”⁴ Article 4(2) permits such organisations to impose requirements relating to their employees’ religious beliefs if such beliefs are a genuine occupational requirement. In implementing the Employment Equality Directive, France, Portugal, Romania and Sweden, however, did not adopt any exception clause for employers with an ethos based on religion or belief.⁵ In the Netherlands, churches and other religious organisations may apply differences in treatment provided that distinctions are not based exclusively on political opinion, race, gender, nationality, sexual orientation, or civil status.⁶ The EU proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation contains no exemption clauses.⁷
9. Where they are granted, statutory exemptions are for religious institutions and organizations. This stems from the belief that religious communities should not be obliged by the State to celebrate marriages that do not conform to their tenets.⁸ Exemptions for religious individuals, however, are extremely rare. For example, within the United States no individual jurisdiction has granted public officials or commercial providers of goods and services exemptions from state non-discrimination laws that protect sexual orientation.⁹ The only law the Interveners

³ Examples of states whose anti-discrimination laws contain religious exemptions: Indiana (Ind. Code Ann. § 22-9-1-3(q)(3) (1998)); New Mexico, (N.M. Stat. § 28-1-9(B) (2006), City of Louisville Code of Ordinances, § 92.07 (“The provisions of § 92.07 in regard to sexual orientation or gender identity shall not apply to a religious institution, or to an organization operated for charitable or educational purposes, which is operated, supervised, or controlled by a religious corporation, association or society.”); Australia (Equal Opportunity Act 2010, No 16 of 2010, section 84). Most anti-discrimination legislation however, does not contain any religious exemption: France (articles 225-1 and 225-2 of the French Penal Code); Canada (Saskatchewan Human Rights Code (Chapter S-24.1 of the Statutes of Saskatchewan, 1979), Part II); Finland (Non-Discrimination Act (21/2004), section 6), and the majority of US states (Delaware (DEL. CODE ANN. tit. 6, § 4502 (1999)), District of Columbia (D.C. CODE § 2-1402.31 (Supp. 2006)), Florida (FLA. STAT. § 760.07 (2006)), Hawaii (HAW. REV. STAT. § 489-2 (1993)), Illinois (775 ILL. COMP. STAT. 5/5-103 (2004)).

⁴ Article 4(2), Council Directive 2000/78/EC.

⁵ “Developing Anti-Discrimination Law in Europe”, a report prepared by Isabelle Chopin and Thien Uyen Do for the European Network of Legal Experts in the non-discrimination field, November 2010, accessible at <http://www.non-discrimination.net/content/media/Comparative%20EN%2017052011.pdf>

⁶ Article 5(2)(a) GETA, Netherlands Country Report 2009 on measures to combat discrimination, Directives 2000/43/EC and 2000/78/EC, drafted for the European Network of Legal Experts in the Non-discrimination Field, p. 83 (reports are available at <http://www.non-discrimination.net/en/law/NationalLegislation/country-reportsEN.jsp>)

⁷ COM(2008) 426 final, Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

⁸ See, e.g., *Minister of Home Affairs and Another v. Fourie and Another*, Constitutional Court of South Africa, 1 December 2009 at para. 97.

⁹ Ira C. Lupu & Robert W. Tuttle, Same-Sex Family Equality and Religious Freedom, 5 *Northwestern Journal of Law & Social Policy* 274 (November 2010); see also Law Professor Letter to State of New York dated 17 May 2011 (arguing for creation of an individual exemption), available at

have discovered that grants an individual religious exemption is the Equal Opportunity Act 2010 of the State of Victoria in Australia.¹⁰ However, the exception is apparently unique in Australian human rights law and has been soundly criticized.¹¹ In a recent case, a Victorian court found it inapplicable where an employee of a Christian organization refused to accept a reservation by a gay and lesbian youth group for a forum at the resort owned and operated by the organization.¹²

ACCOMMODATION FOR RELIGIOUS BELIEFS IN JURISPRUDENCE

10. National courts within Council of Europe member states have heard cases concerning religious objections to compliance with equality and non-discrimination laws, as well as requests for religious accommodation more generally. For example, in the Netherlands a building contractor refused to provide construction services for a client whom he thought was living with another man. He cited his personal religious beliefs about homosexuality as the reason for his refusal. The Cantonal Court fined him under a criminal law provision prohibiting discrimination in the course of one's professional activities. The Court reasoned that freedom of religion was restricted by the right not to be discriminated against on the basis of sexual orientation.¹³ In France in a case involving a butcher who objected for religious reasons to handling pork meat, the Court of Cassation reasoned that the employer was not required to accommodate an employee's religious beliefs where there had not been an express provision in the work contract.¹⁴ The Court of Cassation also held that pharmacists who refuse to provide contraceptives on religious grounds commit an offence under French consumer law. The French court ruled that there is no religious exemption under French law to the prohibition on refusal to sell.¹⁵
11. The issue of religious exemptions for "conscientious objectors" to same-sex marriage laws has been litigated in the Netherlands and in Spain. In 2008 the Dutch Equal Treatment Commission ruled in favour of a municipality that had rejected an applicant for the position of registrar because he refused to marry same-sex couples on the grounds of his religious belief. The Commission found that the interference with religion was justified because the aim pursued, protecting the rights of others and

<http://mirrorofjustice.blogspot.com/2009/08/memosletters-on-religious-liberty-and-samesex-marriage.html>.

¹⁰ Section 84 provides: "Nothing in Part 4 applies to discrimination by a person against another person on the basis of that person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity if the discrimination is reasonably necessary for the first person to comply with the doctrines, beliefs or principles of their religion."

¹¹ Human Rights Law Centre, Briefing paper on removal of the religious exemptions from the Equal Opportunity Act (Vic) (July 2009) available at <http://www.hrlrc.org.au/content/topics/equality/equality-briefing-paper-on-religious-exemptions-under-the-equal-opportunity-act-1995-vic-july-2009/>

¹² *Cobaw Community Health Services Ltd. V. Christian Youth Camps and Mark Rowe*, [2010] VCAT 1613, Victorian Civil and Administrative Tribunal, Australia – Victoria, 8th October, 2010.

¹³ LJN BN8113, Rechtbank Arnhem, 05/720597-10, September 2010.

¹⁴ Cour de Cassation, Ch. soc., 24 mars 1998, n°95-44.738, Bull 98 V N° 171 p.125.

¹⁵ Cour de Cassation, chambre criminelle, 21 oct 1998. JCP 1998.I.10163, note F. Freund ; Bull. Ord. pharm. 1999, n°363, p.299. The European Court of Human Rights held that the pharmacists' application was inadmissible based on its merits (manifestly ill-founded) *Pichon and Sajous v. France*, App. No. 49853/99, Decision of 2 October 2001.

combating discrimination, was legitimate.¹⁶ In Spain, the Supreme Court ruled in 2009 that a judge had no right of conscientious objection to performing same-sex marriages.¹⁷ The Supreme Court held that the right to freedom of religion is not to be understood as necessarily entailing a right to conscientious objection. The Court stated that the function and role of a judge as guarantor of judicial certainty was incompatible with such an exemption. Freedom of religion within the meaning of Article 16 of the Spanish Constitution did not provide for the right to act according to personal religious beliefs in all circumstances. Rather this right could be limited to ensure other constitutional rights such as the respect for public order as guaranteed by the law.¹⁸

12. Outside the Council of Europe, courts have concluded either that the requirement to provide goods and services to the public on a non-discriminatory basis was not an interference with religious freedom or that the goal of eradicating discrimination was a sufficiently important reason to justify the interference.
13. In Canada, courts have specifically considered the issue of whether a marriage commissioner may be granted an individual exemption from the duty to solemnise all civil marriages, including the marriages of same-sex couples. Canadian federal law grants religious officials an exemption from performing same-sex marriages.¹⁹ Two recent decisions are especially on point. In *Nichols v. Saskatchewan Human Rights Commission*, a civil marriage commissioner argued that the requirement that he perform marriages for same-sex couples or risk losing his appointment as a marriage commissioner violated his freedom of religion. He maintained that either a defense based on his religious beliefs should be read into the provincial equality law, the Saskatchewan Human Rights Code, or that the Canadian Charter of Rights and Freedoms required accommodation of his religious beliefs.
14. The Court disagreed. First it declined to read into the Code any defence to a finding of discrimination based on Mr. Nichols' religious beliefs. Second it found that accommodation was not applicable where, in effect, Mr. Nichols' was seeking an accommodation of his religious beliefs from an individual member of the public.²⁰ The Court adopted the views of the Saskatchewan Human Rights Commission that there was a justifiable limitation on Mr. Nichols' religious freedom because the prevention of sexual orientation was a pressing and substantial objective. "The religious and equality rights of a couple wishing to marry prevail over the same rights of the public official who is required to provide a public service without any religious component."²¹

¹⁶ Equal Treatment Commission, Opinion 2008-40, file number: 2007-0476, available at <http://www.cgb.nl/english/publications/opinions>

¹⁷ "El Supremo rechaza que un juez pueda objetar para no celebrar bodas gays", *El Mundo*, 30 May 2009, available at <http://www.elmundo.es/elmundo/2009/05/29/espana/1243596506.html>

¹⁸ Supreme Court of Spain, *Interpuesto por Pablo de la Rubio Comos*, Application No. 69/2007 (11 May 2009).

¹⁹ Civil Marriage Act, SC 2005, c 33 ("It is recognized that officials of religious groups are free to refuse to perform marriages that are not in accordance with their religious beliefs."); Supreme Court of Canada, *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

²⁰ *Nichols v. Saskatchewan Human Rights Commission*, 2009 SKQB 299 (17 July 2009) at para. 57.

²¹ *Id.* at para. 70.

15. Following *Nichols*, the Saskatchewan government referred draft legislation to the Saskatchewan Court of Appeal. The draft legislation proposed two alternatives to permit marriage commissioners to refuse to perform marriages when doing so would be contrary to their religious beliefs. Both in essence provided that a marriage commissioner was not required to solemnize a marriage if to do so would be contrary to his or her religious beliefs and furthermore that the refusal would not be discriminatory under provincial law. In January 2011, the Court of Appeal ruled that the proposals were unconstitutional.²² Although the majority and concurrence offered different analyses, the Court unanimously found that either proposal would breach the right to equality under the Canadian Charter. The draft amendments served the objective of protecting religious freedom but were not proportional to the limit placed on the right to equality. Both options would perpetuate “a brand of discrimination which our national community has only recently begun to successfully overcome.”²³ They would have a harmful impact on gay and lesbian individuals who were denied marriage services as well as members of the public at large. Furthermore, the majority stated, the proposals “would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis.”²⁴
16. The concurring opinion agreed with the conclusions of the majority but wrote separately to emphasize the discriminatory effects of the proposed legislation:

“More important . . . is the affront to dignity, and the perpetuation of social and political prejudice and negative stereo-typing that such refusals would cause. Furthermore, even if the risk of actual refusal were minimal, knowing that legislation would legitimize such discrimination is itself an affront to the dignity and worth of homosexual individuals . . . (I)t is not merely or even primarily the right of same-sex couples to marry that the amendments would infringe. It is the right of this vulnerable group to be free from discrimination and prejudice in the delivery of a public service, available without discrimination to all other members of society.”

17. In *Ontario Human Rights Commission v. Brockie*, the Ontario Superior Court of Justice considered whether an individual could refuse to provide printing services to an LGBT organisation because of his religious objections. The Board of Inquiry of the Ontario Human Rights Commission had found that Brockie’s refusal constituted discrimination on the basis of sexual orientation. Brockie had argued that compelling him to provide services to members of the gay and lesbian community would breach his right to freedom of religion. The Board of Inquiry concluded that the objective of the Ontario Human Rights Code to eradicate discrimination on the basis of sexual orientation was a sufficiently important justification.²⁵ The Board of Inquiry ordered Brockie to provide printing services. On appeal, the Court affirmed the Board’s conclusions regarding discrimination but modified the scope of the remedial order. It expressed concern that an unfettered remedial order might require Brockie to print material that directly conflicted with his core religious beliefs, but noted that

²² Saskatchewan Court of Appeal, *In the Matter of Marriage Commissioners Appointed under the Marriage Act, 1995*, 2011 SKCA 3 (11 January 2011).

²³ Para. 94.

²⁴ *Id.* at para. 97 & 98.

²⁵ Ontario Board of Inquiry, *Brillinger and the Canadian Lesbian and Gay Archives v. Brockie and Imaging Excellence Inc.* (24 February 2000).

providing a commercial service to the public was at the periphery of activities protected by freedom of religion.²⁶

18. In the United States, courts are increasingly hearing cases involving the denial of goods and services to individuals because of their sexual orientation. Since there is no federal anti-discrimination legislation that prohibits discrimination on the basis of sexual orientation, these cases typically arise under state non-discrimination statutes. The cases discussed here concern individuals providing commercial services.
19. A wedding photographer who refused services to a same-sex couple was found to have violated the state human rights act. In *Elane Photography v. Vanessa Willock*, the court ruled against a photographer who refused to photograph a commitment ceremony because of her religious objection to supporting same-sex marriage.²⁷ The New Mexico Human Rights Commission had found that the photographer had violated the state Human Rights Act, which prohibits discrimination in public accommodation on the basis of sexual orientation.²⁸ On appeal, the Court agreed. It held that New Mexico had “a compelling interest in reducing, if not eradicating, acts of discrimination, even assuming that results in a burden upon” the photographer. The Court concluded: “Plaintiff’s religious beliefs, as a matter of law, do not override New Mexico’s compelling interest in combating discrimination.”²⁹
20. In other cases, courts have found no violation of the right to free exercise of religion where there is a discriminatory refusal of services. For example, in *Walden v. Centers for Disease Control and Prevention*, a counsellor who refused to provide counselling services to a woman in a same-sex relationship and was terminated for how she treated her client was found to have no claim of religious discrimination.³⁰
21. In *North Coast Women’s Care Medical Group v. San Diego County Superior Court*, the plaintiff was a lesbian woman who had been refused fertility services by two physicians who had objections to helping same-sex couples conceive. The physicians claimed that their right to free exercise of religion exempted them from compliance with state non-discrimination law. Interpreting the state constitution’s guarantee of free exercise of religion, the Court used a strict scrutiny standard under which a law could not be applied in a manner that substantially burdened a religious belief or practice unless the state showed that the law represented “the least restrictive means of achieving a compelling interest.”³¹ The Court held that even if compliance with the state non-discrimination law substantially burdened their religious beliefs, the burden “is insufficient to allow them to engage in such discrimination. The Act furthers California’s compelling interest in ensuring full and equal access to medical treatment irrespective of sexual orientation, and there are no less restrictive means for the state to achieve that goal.”³²

²⁶ Ontario Superior Court, *Ontario Human Rights Commission v. Brockie* [2002] O.J. No. 2375 (2002).

²⁷ Second Judicial District Court, County of Bernalillo, *Elane Photography LLC v. Vanessa Willock*, CV-2008-06632, (11 December 2009).

²⁸ New Mexico Statutes Annotated 1978, Section 28-2-7(F) (2004).

²⁹ *Id.* at para. 36.

³⁰ U.S. District Court for the Northern District of Georgia, *Walden v. Centers for Disease Control and Prevention*, No. 1:08-CV-2278-JEC (18 March 2010).

³¹ Supreme Court of California, *North Coast Women’s Care Medical Group v. Benitez*, 189 P.3d 959, 968 (2008).

³² *Id.*

22. Similarly, religious organizations are not permitted to discriminate in the provision of non-religious, publicly available goods and services. In *Harriet Bernstein and Luisa Paster v. Ocean Grove Camp Meeting Association*, a lesbian couple was denied permission to rent a seaside pavilion for their civil union ceremony. The pavilion was owned and operated by the Ocean Grove Camp Meeting Association, a religious organization, and was generally available for rent to members of the public for secular purposes. The couple filed a complaint with the state Division on Civil Rights alleging illegal discrimination under state law. The Association claimed that its right to free exercise of religion protected it against claims of discrimination on the basis of sexual orientation. The state ruled in the couple's favour, finding that the Association had violated the public accommodation provisions of the state non-discrimination law and that enforcement of the law against it did not violate the Association's right to free exercise of religion.³³ There was no exception for religious organizations in the state non-discrimination law concerning public accommodations.
23. In South Africa, courts have similarly found that the right to religious freedom can be outweighed by the right to equality. In a case involving the dismissal of a gay music teacher, the Court stated that "the impact on religious freedom of not granting the church an exemption from the anti-discriminatory legislation is minimal in the case of the complainant remaining on his position as a lecturer of music. On the other hand, the fact of being discriminated on the ground of his homosexual orientation had an enormous impact on the complainant's right to equality, protected as one of the foundations of our new constitutional order."³⁴ The Court ordered the church to pay damages.
24. The UN Human Rights Committee has also had occasion to consider limitations on the freedom to manifest one's religion imposed for the purpose of protecting others from discrimination. Article 18(2) of the International Covenant on Civil and Political Rights provides that restrictions may be imposed only if they are prescribed by law and are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others. In *Ross v. Canada*, it heard the communication of a teacher who had been dismissed because of his repeated and public expression of religious views that denigrated Judaism. Considering Article 19, the Human Rights Committee found the restrictions justified. The Committee concluded that "the restrictions imposed on him were for the purpose of protecting the 'rights or reputations' of persons of the Jewish faith, including the right to have an education in the public school system free from bias, prejudice and intolerance."³⁵ The restrictions were also necessary to achieve this purpose. As for the claim under Article 18, the Committee found that the issues were "substantially the same" and that the author's right to manifest his religion had not been violated.³⁶

CONCLUSION

³³ State of New Jersey, Division on Civil Rights, *Bernstein and Paster v. Ocean Grove Camp Meeting Association*, DCR Docet No.: PN34XB-03008 (29 December 2008).

³⁴ *Strydom v. Nederduitse Gereformeerde Gemeente Moreleta Park*, Equality Court of South Africa, No. 26926/05 (27 August 2008) at para. 25

³⁵ UN Human Rights Committee, *Ross v. Canada*, Communication No. 736/1997 (18 October 2000) at para. 11.5.

³⁶ *Id.* at para. 11.8.

25. The Interveners submit that the refusal to accommodate individual religious beliefs for the purpose of ensuring that public facilities, accommodations, goods and services are available to all, without distinction based on sexual orientation, is not a violation of Article 9. Rather the right to manifest one's religion is not absolute and may be appropriately circumscribed in the name of certain compelling objectives. As demonstrated by the comparative law cited above, States have a strong interest in protecting the rights to non-discrimination and equality. This means not only that goods and services are available but that they are available without discrimination.