BACKGROUND PAPER ADL1

RELIGIOUS EDUCATIONAL INSTITUTIONS AND ANTI-DISCRIMINATION LAWS

International Comparisons

November 2023

This summary of laws in foreign jurisdictions is a Background Paper released by the Australian Law Reform Commission ('ALRC') as part of its Inquiry into Religious Educational Institutions and Anti-Discrimination Laws ('the Inquiry'). **View the Inquiry webpage.**

Background papers are intended to provide a high-level overview of topics of relevance to the Inquiry, including key principles and areas of research that underpin the development of recommendations.

The call for formal submissions to this Inquiry has closed. The Final Report is due to be submitted to government by the end of 2023.

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The ALRC acknowledges the Traditional Owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past and present. We value Aboriginal and Torres Strait Islander histories, cultures, and knowledges.

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Introduction

1. This Background Paper contains research that has informed the development of recommendations by the ALRC in its Inquiry into Anti-Discrimination Laws and Religious Educational Institutions.[1] In particular, this Background Paper summarises relevant aspects of the law in five foreign jurisdictions. Examining how the law is formulated in other jurisdictions, keeping in mind the context in which the law applies, can be instructive when assessing options for reform in Australia.

2. The Australian Government has set out its policy position in the Terms of Reference for this Inquiry, and has asked the ALRC to make recommendations as to how that policy position might be implemented, consistent with Australia's international obligations. The Government's policy position is that religious educational institutions:

- must not discriminate against a student on the basis of sexual orientation, gender identity, marital or relationship status or pregnancy;
- must not discriminate against a member of staff on the basis of sex, sexual orientation, gender identity, marital or relationship status or pregnancy; and
- can continue to build a community of faith by giving preference, in good faith, to persons of the same religion as the educational institution in the selection of staff.[2]

3. Around the world, jurisdictions have grappled with the problem of how best to maximise realisation of all human rights in the context of religious educational institutions. Different jurisdictions have dealt with this problem in different ways, which has led to a variety of legal approaches.

4. As Marcel Maussen and Floris Vermeulen have explained:

> All states with liberal-democratic constitutions leave room for religion in education, but the modalities and degrees in which they do vary, for example when it comes to religious instruction and teaching in schools, expressions of religion and religious identity in the school context (prayer, rituals, religious feasts, wearing symbols, and dress), and opportunities for faith-based educational institutions (including primary and secondary schools).[3]

5. Gaining a comprehensive comparative view of the religious education sector across different countries is made challenging by a lack of cross-national data (especially in relation to non-government religious schools).[4] Furthermore, there are significant variations between jurisdictions in, for example, the proportion of educational institutions that have a religious affiliation, their funding arrangements, and the level of regulation to which they are subject. Common ways in which state authorities regulate religious educational institutions include setting a national curriculum, conducting national examinations, and conducting school monitoring and visits.[5] Authorities also commonly regulate employment and admissions to some extent.

6. The international comparisons in this Background Paper are provided in order to understand better the manner in which other countries have dealt with issues relevant to the current ALRC inquiry. Ultimately, each jurisdiction has a unique culture, including legal and democratic traditions, that renders it different from other jurisdictions. The educational structure in Australia has similarities with some aspects of other jurisdictions, but is also unique.

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1 ALRC, 'Religious Educational Institutions and Anti-Discrimination Laws' <www.alrc.gov.au/inquiry/anti-discrimination-laws/>.
2 The Terms of Reference for this Inquiry are found here.
3 Marcel Maussen and Floris Vermeulen, 'Liberal Equality and Toleration for Conservative Religious Minorities. Decreasing Opportunities for Religious Schools in the Netherlands?' (2015) 51(1) *Comparative Education* 87, 87 (citations omitted).
4 Jaap Dronkers and Silvia Avram, 'What Can International Comparisons Teach Us about School Choice and Non-Governmental Schools in Europe?' (2015) 51(1) *Comparative Education* 118, 119.
5 Ibid 121.

That 'uniqueness' of culture and educational structure is a factor that has informed the development of recommendations by the ALRC.

Jurisdictions considered in this Background Paper

7. This Background Paper examines anti-discrimination law applicable to religious educational institutions in the European Union ('EU'), England and Wales, Ireland, New Zealand, and Canada.

8. The EU, England and Wales, Ireland, and New Zealand have been chosen because their anti-discrimination laws are generally in line with the policy positions outlined in the Terms of Reference for this Inquiry. Specifically, the law in each of those four jurisdictions prohibits discrimination on grounds equivalent to those contained in the (Australian) *Sex Discrimination Act 1984* (Cth) ('*Sex Discrimination Act*'), as well as on the ground of religion, and any exceptions applicable to religious educational institutions are generally narrow. These countries have been chosen for comparison because they have similar legal traditions to Australia and because of the accessibility of legal materials in English.

9. Canada has been included by way of contrast with these countries as its laws are closer to Australia's current legal position in respect of exceptions to anti-discrimination legislation. Canada's legal context and history are different from Australia's in a number of respects. For example, the foundations of religious freedom in Canada were established as a result of political arrangements reached after Great Britain's conquest of New France in 1759.[6] Canadian law also includes constitutional and legislative protections for human rights (see further below).

10. Comparative analysis of the law in these countries reveals eight key themes that will be explored further throughout this Background Paper:

Staff

- In all five jurisdictions, discrimination on grounds similar to those contained in the *Sex Discrimination Act*, as well as the ground of religion or belief, is prohibited in the context of employment (including employment by religious educational institutions). These prohibitions on discrimination are subject to various exceptions, as outlined below.
- In all five jurisdictions, the law includes an 'occupational requirement' exception which generally applies to all grounds (see **Table 1**). While the content and nature of this exception differs between jurisdictions, broadly it provides that difference of treatment does not contravene prohibitions on discrimination if it relates to a genuine occupational requirement. In Canada, the occupational requirement exception has been interpreted by courts and tribunals as permitting religious educational institutions to treat employees and prospective employees differently, including on the grounds of marital status and sexual orientation. In the other four jurisdictions, however, it is less clear whether the equivalent exception permits differential treatment on grounds similar to those contained in the *Sex Discrimination Act*. Some commentators have suggested that the exception is more likely to permit religious educational institutions to treat employees or prospective employees differently on the ground of religion or belief.
- The law in all five jurisdictions includes a broader exception that permits, to some extent, differential treatment of staff on the ground of religion or belief in the context of educational institutions (see **Table 2** for a graphical representation of these exceptions).[7] However, differences exist in relation to the nature and content of the exceptions. For example, some exceptions apply to any religious educational institution within the country, while others apply only to particular types of school. Some exceptions apply to all staff within the institution, while

6 Rosalie Jukier and Jose Woehrling, *Religion and the Secular State in Canada* (McGill University, 2015) 159.

7 Different pieces of legislation use different terminology, including, for example, discrimination, giving preference, and difference of treatment. This Background Paper does not seek to address any potential substantive difference between the terms used.

others apply only to certain positions. Some exceptions explicitly prohibit discrimination on other protected grounds, while others may potentially allow direct or indirect discrimination. Generally, religious educational institutions that receive more funding from government have less latitude to treat employees and prospective employees differently on the ground of religion. However, this is not the case in Canada, largely due to protections for public Catholic schools contained in the Canadian Constitution.

- In none of the five jurisdictions does the law contain specific exceptions from prohibitions on discrimination on grounds equivalent to those contained in the *Sex Discrimination Act*, in relation to staff at religious educational institutions (see **Table 2**).[8]

Students

- In four of the jurisdictions, discrimination in relation to students (including students at religious educational institutions) on grounds equivalent to those contained in the *Sex Discrimination Act*, as well as the ground of religion or belief, is prohibited.[9] There are generally fewer exceptions available in relation to students compared to staff.
- The law in New Zealand and Canada provides that differential treatment of a person (including students) on any ground is not prohibited where there is a genuine (New Zealand) or bona fide (Canada) justification.
- The law in all five jurisdictions provides that religious educational institutions do not contravene prohibitions on discrimination against students if they treat students differently on the ground of religion (including in relation to admissions) (see **Table 3** for a graphical representation of these exceptions). In some of these jurisdictions, it has been made explicitly clear that this does not allow direct or indirect discrimination on grounds similar to those contained in the *Sex Discrimination Act*.
- In none of the five jurisdictions does the law contain any specific exceptions from prohibitions on discrimination on grounds equivalent to those contained in the *Sex Discrimination Act*, in relation to students at religious educational institutions (see **Table 3**).[10]

11. While the phrase 'religious educational institutions' can encompass many different types of institutions, the focus of this Background Paper is on the law applicable to primary and secondary schools. Prohibitions on discrimination generally apply to all types of religious educational institutions, as do the occupational requirement exception (for staff) and genuine or bona fide justification exception (for students). In relation to more specific exceptions, however, this Background Paper focuses on those exceptions applicable to primary and secondary schools (although some exceptions relevant to tertiary institutions are also discussed).

A wide spectrum of other approaches

12. The legal approaches discussed in this Background Paper are by no means the only approaches taken globally. In some jurisdictions the law is much more permissive for religious educational institutions, and in other jurisdictions the law is much more restrictive. Given the policy position set out in the Terms of Reference for this Inquiry, the ALRC considers these jurisdictions to be less instructive when considering reforms. The following examples illustrate the breadth of the global spectrum.

8 Although note the 'special interest organisations' exceptions available in British Colombia and Ontario, discussed below at [141]–[147] and [159]–[162], could operate in this way.

9 In the EU, there is no instrument that prohibits discrimination against students at educational institutions: see further below at [33].

10 Although note the 'special interest organisations' exceptions available in British Colombia and Ontario, discussed below at [141]–[147] and [159]–[162], could operate in this way.

13. In the United States of America ('United States'), private schools (which include those conducted in accordance with particular religious beliefs) have historically not received public funding, although this is now subject to some limited exceptions.[11] Such schools — which make up approximately 8.7% of student enrolments[12] — are the subject of a number of exceptions to the prohibition on discrimination in employment found in *Title VII of the Civil Rights Act of 1964*.[13]

14. For example, the 'ministerial exception' provides that the prohibition on discrimination in employment (on grounds including sex, race, colour, national origin, and disability) does not apply to the employment of 'ministerial employees'.[14] Lower courts in the United States have defined 'ministerial employees' as employees whose 'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship'.[15] In 2012, the Supreme Court of the United States unanimously held that the ministerial exception applies to selection of religious leaders by a religious organisation.[16] More recently, the Supreme Court affirmed that the ministerial exception could apply to employees not holding a recognised religious title, and to those who have little formal training as religious leaders.[17]

15. In addition, *Title VII* includes several exceptions to the prohibition on discrimination in employment on the ground of religion that are relevant to religious educational institutions.[18]

16. Furthermore, the prohibition on discrimination on the ground of sex does not apply to educational institutions controlled by religious organisations if applying the prohibition 'would not be consistent with the religious tenets of such [an] organisation' (even if the institution receives public funding).[19] In relation to the admission of students, the prohibition applies only to 'institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education'.[20]

17. Accordingly, existing exceptions in United States' law are broader than those contemplated by the ALRC's Terms of Reference and apply to a much smaller proportion of educational institutions than in Australia. In addition, the High Court of Australia has commented on the differences between the constitutional and legal context in each of Australia and the United States.[21] The persecution that minority religious groups had experienced was an important part of the context of

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11 In some instances, students receive public funding for things such as transportation to private school, school vouchers, scholarship programs or tax credits for tuition: see, eg, *Everson v Board of Education*, 330 US 1 (1947); *Zelma v Simmons Harris*, 536 US 639 (2002); *Espinoza v Montana*, 140 S Ct 2246 (2020). In 2022, the Supreme Court of the United States found that restricting provision of funding to 'nonsectarian' schools (that is, schools that are not affiliated with any particular religious belief) was unconstitutional: *Carson v Makin*, 142 S Ct 1987 (2022). See also Robert Kim, 'Under the Law: Public Schools, Religion, and Equality after Carson v. Makin' (2022) 104(1) *Phi Delta Kappan* 60. Proposed government funding for a religious school has caused controversy on grounds including religious freedom: see, eg, 'Plaintiff and Organizational Quotes: *OKPLAC, Inc v Statewide Virtual Charter School Board*' <www.edlawcenter.org/assets/uploads/Plaintiffs_Organizational_Quotes_OKPLAC_v._Statewide_Virtual_Charter_School_Board.pdf>.

12 In 2019, approximately 4.7 million students were enrolled in private schools, and 49.2 million were enrolled in public schools: National Centre for Education Statistics, 'Public and Private School Comparison' <nces.ed.gov/fastfacts/display.asp?id=55>.

13 *Title VII of the Civil Rights Act of 1964,* 42 USC § 2000e-2(a). This provision prohibits discrimination in employment on the grounds of race, colour, religion, sex, and national origin.

14 The ministerial exception was created by the Fifth Circuit Court in *McClure v Salvation Army*, 460 F.2d 553 (5th Cir, 1972) as a means of protecting religion clauses of the First Amendment: Caroline Corbin, 'Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law' (2007) 75(4) *Fordham Law Review* 1965, 1973–4.

15 *Rayburn v General Conference of Seventh-Day Adventists,* 772 F2d 1164 (4th Cir, 1985) 1169.

16 *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission,* 132 S Ct 694 (2012).

17 *Our Lady of Guadalupe School v Morrissey-Berru*, 140 S Ct 2049 (2020).

18 *Title VII of the Civil Rights Act of 1964,* 42 USC §§ 2000e-1(a), 2000e-2(e).

19 *Title IX of the Education Amendments of 1972,* 20 USC § 1681(a)(3).

20 Ibid § 1681(a)(1).

21 In relation to the freedom of expression, see *Coleman v Power* (2004) 220 CLR 1 [188]; *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 [113]–[114]; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [201]–[202]. The freedom of expression and religious freedom are both protected by the First Amendment to the Constitution of the United States.

the founding of the United States.[22] The First Amendment to the Constitution of the United States has been described as erecting 'a wall between church and state [that] must be kept high and impregnable'.[23]

18. In France, the vast majority of private schools (which enrol approximately 16% of students) have a religious denomination.[24] Most religious schools in France have a contractual relationship with the state to receive public funding (in some cases comparable to that of state schools).[25] These contracts place conditions on how the institutions are run, reflecting the French constitutional principle of secularism in education.[26] There are no specific exceptions in anti-discrimination law for religious institutions (including religious educational institutions) in France.[27]

19. In other countries, the religious education sector is small and is subject to significant restrictions on how education is delivered. For example, in Sweden, there are only 60 faith-based schools and faith-based teaching is not permitted in any school.[28] However, faith-based schools may host religious practice and activities outside of lessons, provided that participation is voluntary.[29]

22 For an illustrative example, see Library of Congress, 'America as a Religious Refuge: The Seventeenth Century, Part 1', *Religion and the Founding of the American Republic* <https://www.loc.gov/exhibits/religion/rel01.html>.

23 *Everson v Board of Education*, 330 US 1 (1947) 18.

24 Xavier Pons, Agnès van Zanten and Sylvie Da Costa, 'The National Management of Public and Catholic Schools in France: Moving from a Loosely Coupled towards an Integrated System?' (2015) 51(1) *Comparative Education* 57, 60.

25 Ibid 62.

26 Ibid 60.

27 Under art L1132–1 of the *Code Du Travail* (France) and arts 225–1 to 225–4 of the *Code Pénal* (France), protected attributes in France include origin, sex, mores (morals), sexual orientation, gender identity, age, family situation or pregnancy, genetic characteristics, particular vulnerability resulting from economic hardship, true or supposed belonging or non-belonging to an ethnic group, a nation or an alleged race, political opinions, trade union activities, religion, last name, physical appearance, place of residence, ability to speak in a language other than French, and role as whistle blower or person linked to a whistle blower.

28 Swedish School Inspectorate, *Annual Report 2022: Experiences from Inspection* (March 2023) 8.

29 Lotta Lerwall, 'Ban on Faith-Based Schools?' in Hedvig Bernitz and Victoria Enkvist (eds), *Freedom of Religion: An Ambiguous Right in the Contemporary European Legal Order* (Hart Publishing, 2020) 141, 142.

European Union

20. This part summarises relevant laws of the EU in relation to discrimination against staff and students in religious educational institutions.

Staff

21. In the EU, two directives are relevant to anti-discrimination law in the context of this Inquiry.[30] The two directives are the Equal Treatment of Men and Women Directive[31] and the Equal Treatment in Employment Directive.[32] Discrimination on the grounds of sex, pregnancy, gender reassignment, sexual orientation, and religion or belief is prohibited in relation to 'access to employment' and 'employment and working conditions, including dismissals and pay'.[33] The prohibition includes direct and indirect discrimination and harassment,[34] and applies to the employment of staff at primary, secondary, and tertiary educational institutions (including religious educational institutions).

22. However, difference of treatment on these grounds does not constitute discrimination in certain circumstances, as summarised in the following sections.

Genuine and determining occupational requirement exception

23. First, difference of treatment of employees and prospective employees based on a characteristic related to any prohibited ground is not discrimination where, by reason of the nature of the occupational activities concerned or the context in which they are carried out, it is a 'genuine and determining occupational requirement'.[35] Additionally, the objective of the differential treatment must be legitimate and the requirement must be proportionate.[36] Professor Vickers has considered that this exception could be relevant to religious organisations, but its application would be narrow:

> Under this narrow exception, religious discrimination is only really likely to be lawful in the cases of those employed in religious service, whose job involves teaching or promoting the religion, or being involved in religious observance. The fact that under the EU [Equal Treatment in Employment] Directive the religious requirement has to be 'determining' means that the religious nature of the job must be a defining aspect of the job.[37]

24. Martijn van den Brink has suggested that, because of this, difference of treatment on the ground of religious belief 'is most likely only permissible when sharing the religious beliefs of the organisation is strictly necessary for the exercise of the occupational activity in question'.[38] He has explained that if this interpretation is correct, then

30 For a discussion of the legal status of directives under EU law, see: European Union, 'European Union Directives' <www.eur-lex.europa.eu/EN/legal-content/summary/european-union-directives.html>.

31 *Council Directive 2006/54/EC of the European Parliament and of the General Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)* [2006] OJ L 204/23 ('*Equal Treatment of Men and Women Directive*').

32 *Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation* [2000] OJ L 303/16 ('*Equal Treatment in Employment Directive*').

33 *Equal Treatment of Men and Women Directive* (n 31) Preamble [3], [23], arts 1–2, 14(1)(a), 14(1)(c); *Equal Treatment in Employment Directive* (n 32) arts 1, 3(1)(a), 3(1)(c). EU law uses the term 'gender reassignment' instead of 'gender identity'.

34 *Equal Treatment of Men and Women Directive* (n 31) arts 14(1), 2(2)(a); *Equal Treatment in Employment Directive* (n 32) art 2.

35 *Equal Treatment of Men and Women Directive* (n 31) art 14(2); *Equal Treatment in Employment Directive* (n 32) art 4(1).

36 *Equal Treatment of Men and Women Directive* (n 31) art 14(2); *Equal Treatment in Employment Directive* (n 32) art 4(1).

37 Lucy Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016) 175.

38 Martijn van den Brink, 'When Can Religious Employers Discriminate? The Scope of the Religious Ethos Exemption in EU Law' (2022) 1(1) *European Law Open* 89, 97.

faith-based schools may use Article 4(1) to justify the expectation that religion teachers share their religious ethos, but they cannot invoke this provision to require that physics or maths teachers do so.[39]

25. The ALRC is not aware of any cases that discuss whether the 'genuine and determining occupational requirement' exception under either Directive might permit differential treatment of employees of religious educational institutions on the grounds of sex, pregnancy, gender reassignment, or sexual orientation.

Religion or belief (or 'Art 4(2)') exception

26. The second, broader exception, available solely under the Equal Treatment in Employment Directive, applies only to the ground of religion or belief and arises only in relation to 'occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief'.[40] Specifically, it provides that difference of treatment based on a person's religion or belief is not discrimination where, by reason of the nature of the occupational activities concerned or of the context in which they are carried out, having a particular religion or belief is a 'genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos'.[41] In addition, the exception does 'not justify discrimination on another ground'.[42] Subject to those restrictions, this exception permits such organisations 'to require individuals working for them to act in good faith and with loyalty to the organisation's ethos'.[43]

27. For this exception, the occupational requirement does not have to be a determining aspect of the job, although it must be 'genuine, legitimate and justified'. The Court of Justice of the European Union ('CJEU') has provided guidance as to the meaning of these terms. Specifically, it has held that requiring a person to profess a particular religion or belief is 'genuine' if it appears 'necessary because of the importance of the occupational activity in question for the manifestation of' the institution's ethos or 'the exercise by the church or organisation of its right of autonomy'.[44] Such religious requirements are 'legitimate' when they are 'not used to pursue an aim that has no connection with' the institution's ethos or the exercise of its autonomy rights.[45] Lastly, religious requirements are 'justified' if the organisation is capable of showing that 'the supposed risk of causing harm to its ethos or to its right of autonomy is probable and substantial, so that imposing such a requirement is indeed necessary'.[46] Van den Brink has noted that the interpretation of these terms 'bears a striking resemblance to the CJEU's understanding of the principle of proportionality' in that they must be 'appropriate and necessary'.[47]

28. Despite this, van den Brink has cautioned that although 'this interpretation seems reasonable, it leaves plenty of uncertainty as to its application in concrete and specific cases'.[48] Indeed, Vickers has suggested that the exception allows 'religious requirements to be imposed on all staff, even if their jobs are not inherently religious in nature (such as doctors in a religious

39 Ibid 98.
40 *Equal Treatment in Employment Directive* (n 32) art 4(2). However, note that provisions on religion or belief do not apply to the recruitment of teachers in Northern Ireland: at art 15(2).
41 Ibid.
42 Ibid.
43 Ibid. The Equal Treatment in Employment Directive does not specify what the consequences of breach of the 'good faith and loyalty' term might be. Accordingly, this would ordinarily be a matter for member states' domestic law: at Preamble [35].
44 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) [65]; *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018) [51].
45 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) [66]; *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018) [52].
46 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018) [67]; *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018) [53].
47 van den Brink (n 38) 98.
48 Ibid.

hospital)'.[49] However, the CJEU has clarified in two recent cases that this does not allow an employer to rely on its self-perception alone in determining whether a religious requirement is justified.[50] As summarised by Vickers:

> The Court concluded that the self-perception test [applicable under German law] did not adequately protect the equality rights of employees. Instead, whether a religious requirement was justified must be subject to some external proportionality review.[51]

29. In *Egenberger*,[52] the claimant applied for a position associated with a German Protestant church where the main task was to produce a parallel report on the United Nations Convention on the Elimination of All Forms of Racial Discrimination (as well as being required to represent the diaconate of Germany and coordinate the opinion-forming process internally). Although she had the necessary experience, she was not of a religious faith, which was explicitly required in the job advertisement. While the CJEU held that it is not for national courts to rule on an organisation's ethos, such courts must decide on a case-by-case basis whether the requirement is a 'genuine, legitimate and justified occupational requirement'. In doing so, national courts must ascertain whether the requirement is necessary and objectively dictated (having regard to the organisation's ethos) by the nature of the occupational activity or the circumstances in which it is carried out. The CJEU also held that the requirement must comply with the principle of proportionality. This case indicates that, under the Art 4(2) exception, whether the religious requirement is genuine, legitimate, and justified must be subject to an external proportionality review.[53]

30. In *IR v JQ*,[54] the claimant was dismissed from his role as the head of the department of internal medicine at a hospital owned by the Catholic Church after he divorced his wife and remarried without obtaining an annulment for his first marriage. As with *Egenberger*, the CJEU held that whether the religious requirement was genuine, legitimate, and justified was not just a matter for self-determination by the employer but must be subject to an objective external proportionality review. In giving guidance to the referring court as to whether the requirement was proportionate, the CJEU noted that adherence to the 'sacred and indissoluble nature of religious marriage' did not appear to be a genuine requirement for the position in question, considering the relevant occupational activities and the fact that similar positions were entrusted to other employees who were not of Roman Catholic faith.[55]

31. The qualification that difference of treatment based on religion or belief must 'not justify discrimination on another ground' means that a religious requirement ostensibly permitted by this exception must not directly or indirectly discriminate on the basis of other prohibited grounds, such as sex or sexual orientation.[56] However, concerns have been raised that member states have not adequately implemented this qualification. For instance, the Commission of European Communities expressed concerns that the exception under the *Equality Act 2010* (UK), which provides that a person does not contravene the prohibition on discrimination in employment on grounds of sex, gender identity, marriage or civil partnership, or sexual orientation where the

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49 Lucy Vickers, 'Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: The Need for Proportionality' (2019) 5(1) *International Labor Rights Case Law Journal* 75, 76.

50 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018); *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).

51 Vickers, 'Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: The Need for Proportionality' (n 49) 76.

52 *Vera Egenberger v Evangelisches Werk für Diakonie und Entwicklung eV* (Court of Justice of the European Union, Grand Chamber, C-414/16, ECLI:EU:C:2018:257, 17 April 2018).

53 Vickers, 'Religious Ethos, Employers and Genuine Occupational Requirements Related to Religion: The Need for Proportionality' (n 49) 76.

54 *IR v JQ* (Court of Justice of the European Union, Grand Chamber, C-68/17, ECLI:EU:C:2018:696, 11 September 2018).

55 Ibid [57]–[59].

56 European Commission, *A Comparative Analysis of Non-Discrimination Law in Europe 2021* (December 2021) 71. However, note that marital or relationship status is not a protected attribute under EU law.

employment is for the purposes of organised religion (see below at [**40**]), contradicted Art 4(2) of the Equal Treatment in Employment Directive.[57]

32. Similarly, the UK Equality and Human Rights Commission raised concerns that some of the UK's *School Standards and Framework Act 1998* (UK) provisions (see below at [**49**]–[**58**]) 'appear to permit discrimination because of other protected characteristics' and, as such, 'appear to be too broad to comply with the requirement in Article 4(2)'.[58]

Students

33. Under EU law, there is no prohibition on discrimination in relation to the admission, removal, or treatment of students at educational institutions.[59] As such, there is no obligation on member states under EU law to prohibit discrimination in the context of education. However, member states of the EU may have relevant obligations under other instruments such as the European Convention on Human Rights[60] and relevant United Nations treaties.

57 Commission of the European Communities, *Reasoned Opinion on Infringement No 2006/2450* (2009) [18].

58 Equality and Human Rights Commission (UK), *Religion or Belief: Is the Law Working?* (December 2016) 27.

59 See, eg, the 'Equal Treatment in Goods and Services Directive' which does not apply to education: *Council Directive 2004/113/EC of 13 December 2004 Implementing the Principles of Equal Treatment between Men and Women in the Access to and Supply of Goods and Services* [2004] OJ L 373/37 Preamble [13], art 3(3).

60 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

England and Wales

34. This part summarises relevant laws applicable in England and Wales.

Schools in England and Wales

There are six types of primary and secondary schools in England:

- *Foundation schools* are a type of state school that is funded by the local authority (or council), but is controlled by an elected governing body that employs staff and controls admissions.
- *Voluntary controlled schools* are a type of state school. The land and buildings are controlled by a religious body, but the local authority provides funding, employs staff, and controls admissions.
- *Voluntary aided schools* are a type of state school. The land and buildings are controlled by a religious body and the governing body employs staff and controls admission, but the school is funded by the local authority.
- *Free schools* are a type of state school that is controlled by a governing body, which employs staff and controls admissions. The governing body may be religious in nature. The land and buildings are leased from the local authority or owned by the school, and the school is funded by government (but not the local authority).
- *Academies* are a type of state school that is controlled by an academy trust, which employs staff and controls admissions. The academy trust may be religious in nature. The land and buildings are leased from the local authority or owned by the school, and the school is funded by government (but not the local authority).
- *Independent or private schools*, many of which are controlled by religious bodies, do not receive funding from the state (although they have tax-deductible status). Seven percent of schools in England are private schools.[61]

Ninety-three percent of schools in England are state funded.[62] Of those, 37% of primary and 19% of secondary schools are religiously designated.[63] One percent of religiously designated state schools are foundation schools, 34% are voluntary controlled, 54% are voluntarily aided, and 11% are academies or free schools.[64]

All of the above types of school exist in Wales, except for academies and free schools.[65] In addition, Wales has *community schools*, which are a type of state school that is owned and run by the local authority.[66] The local authority also controls admissions and employs staff.[67]

Staff

35. In England and Wales, the *Equality Act 2010* (UK) prohibits direct discrimination, indirect discrimination, and harassment against prospective employees, current employees, and contract workers[68] on grounds including sex, gender reassignment, sexual orientation, marriage or civil

61 Megan Pearson, *Proportionality, Equality Laws, and Religion: Conflicts in England, Canada, and the USA* (Routledge, 2017) 124; Richy Thompson, 'Religion, Belief, Education and Discrimination' (2015) 14 *Equal Rights Review* 71, 72–7.
62 Thompson (n 61) 72.
63 Ibid.
64 Ibid.
65 Law Wales, 'Schools Maintained by Local Authorities' <law.gov.wales/schools-maintained-local-authorities>.
66 Ibid.
67 Ibid.
68 *Equality Act 2010* (UK) ss 39, 40, 41.

partnership, pregnancy, maternity, and religion or belief.[69] These provisions apply to employment at primary, secondary, and higher educational institutions.

36. Several relevant exceptions to the general prohibition on direct and indirect discrimination are provided for, as discussed below. These exceptions include an 'occupational requirement' exception, an exception in the context of organised religion, and various exceptions relating to the ground of 'religion or belief'.

General occupational requirement exception

37. The general occupational requirement exception provides that employers do not contravene the prohibition on discrimination in employment if they require employees to possess or not possess a protected characteristic, but only if, having regard to the nature or context of the work, it is an occupational requirement and application of the requirement is a 'proportionate means of achieving a legitimate aim'.[70] In relation to religious requirements, Vickers has suggested that, although

> religious people may argue that they bring a specifically religious approach to their work, it cannot realistically be claimed that being of a particular religion is an occupational requirement for many jobs. Under [the general occupational requirement exception], religious discrimination is only really likely to be lawful in cases of those employed in religious service, whose job involves teaching or promoting the religion, or being involved in religious observance.[71]

38. Richy Thompson has suggested that this exception would 'certainly' apply to the head of the religious education department in a religious educational institution, and 'might' apply to the headteacher and other senior teaching posts.[72] Experts consulted by the ALRC suggest that for such positions, institutions might be permitted to have the employee sign a 'statement of belief' or 'declaration of faith', so long as this meets the requirements of the exception (which might only be possible in the context of small, private, deeply religious schools).[73] Thompson has further suggested that the exception would not permit a religious educational institution to require every single teacher to share the faith of the institution.[74]

39. The ALRC is not aware of any case that has discussed whether the general occupational requirement exception applies to requirements imposed on staff by religious educational institutions in relation to the grounds of sex, sexual orientation, gender reassignment, marriage or civil partnership, or maternity.

Exception for purposes of 'organised religion'

40. This exception provides that employers do not contravene the prohibition on discrimination in employment by imposing requirements in relation to sex, transsexuality, marriage or civil partnership, or sexual orientation, but only if the employment is for the purposes of 'organised religion'.[75] According to the Explanatory Notes to the *Equality Act 2010* (UK), the exception

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69 Ibid s 4. Gender reassignment is used instead of gender identity. Note that some provisions of this Act apply more broadly to, for example, Scotland and Northern Ireland.

70 Ibid sch 9 [1].

71 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 176.

72 Thompson (n 61) 89. See also Lucy Vickers, 'Protection against Religion or Belief Discrimination in the UK' in *Religious Freedom, Religious Discrimination and the Workplace* (Hart Publishing, 2016) 159, 215. There, Vickers discusses the case of *Glasgow City Council v McNab* UKEAT/0037/06 and argues that the case shows that 'it will usually be difficult to convince a tribunal that being of a particular religion or belief is an occupational requirement even in faith schools, as it is rare (apart from where religious instruction is given) for religion to be a defining element of such a role'.

73 Experts consulted by the ALRC include Professor Lucy Vickers and Dr Jane Norton.

74 Thompson (n 61) 89.

75 *Equality Act 2010* (UK) sch 9 [2]. Application of the requirement must engage either the compliance principle (the requirement is applied so as to comply with the doctrines of the religion: at sch 9 [2(5)]), or the non-conflict principle (because of the nature or context of the employment, the requirement is applied to avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers: at sch 9 [2(6)]).

> is intended to cover a very narrow range of employment: ministers of religion and a small number of lay posts, including those that exist to promote and represent religion.[76]

41. It has been clarified in case law that this exception does not apply to employment at religious educational institutions.[77] As Jane Norton has explained, in a school, employment is to provide education, not 'for the purposes of organised religion'.[78]

Exception on ground of 'religion or belief'

42. An exception exists under the *Equality Act 2010* (UK) which provides that a person does not contravene the prohibition on discrimination in employment by imposing a requirement to be of a particular 'religion or belief'. This exception only applies if, having regard to the religious ethos of the institution or the nature or context of the work, it is an occupational requirement and application of this requirement is a proportionate means of achieving a legitimate aim.[79] This is similar to the general occupational requirement exception described above, but applies more narrowly to the ground of religion or belief (rather than to any protected characteristic).

43. There is some uncertainty as to the breadth of this exception.[80] Vickers has argued that it

> allows greater latitude to employers to create religiously homogeneous workplaces without a need to show that the religion requires workers to work in a religious environment, or clients to receive religious goods or services. … as long as there is some religious element to the staff role, even where the work is not inherently religious in nature, the court may find religious requirements are proportionate.[81]

44. However, any religious element must be linked to the job in question, so the exception is unlikely to apply to all staff unless religion and belief permeate every level of the organisation, such as where all staff provide religious support to each other or participate in prayers or religious observances.[82]

45. Vickers has suggested that, under this exception

> it is hard to see that being of a particular religion or belief would be an occupational requirement of the job [at a religious educational institution], unless the school was very religious in its ethos, such that religion permeated the organisation and it was important to retain a religiously homogeneous staff. This might be the case in a small minority faith school; it is much less likely to be the case in a large multi-cultural comprehensive school.[83]

No defence to discrimination on other grounds

46. The 'fact that a religious requirement may be allowed as an occupational requirement does not act as a defence to any claim on other grounds of discrimination'.[84] This means that certain religious requirements may not be covered by the exception if they amount to direct or indirect discrimination on other grounds such as marriage or civil status, sexual orientation, or gender reassignment.

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76 Explanatory Notes, *Equality Act 2010* (UK) [790].

77 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 219; *R (on the Application of Amicus) v Secretary of State for Trade and Industry* [2004] EWHC 860. See also *Pemberton v Inwood* [2018] EWCA Civ 564; Jane Calderwood Norton, 'Employment' in *Freedom of Religious Organizations* (Oxford University Press, 2016).

78 Norton (n 77) 77.

79 *Equality Act 2010* (UK) sch 9 [3].

80 Pearson (n 61) 126.

81 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 176–7.

82 Ibid 177. See also Explanatory Notes, *Equality Act 2010* (UK) [796]. The Explanatory Notes suggest that the exception applies, for example, to applicants for the post of the head of a religious organisation (as they must have an in-depth understanding of the religion's doctrine), but not to other posts that would not require such understanding, such as administrative posts. See further *Muhammed v The Leprosy Mission International* ET/2303459/09.

83 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 219–220.

84 Ibid 177–8.

47. Under the *Equality Act 2010* (UK), a requirement does not amount to indirect discrimination if it can be shown to be 'a proportionate means of achieving a legitimate aim'.[85] Vickers has argued:

> Any attempt to justify such treatment will need to meet the high standards required to justify indirect sex or sexual orientation discrimination, and it is rarely going to be proportionate.[86]

48. In *O'Neill v Governors of St Thomas More RCVA Upper School*,[87] a teacher at a Catholic school became pregnant and was dismissed when it was discovered that the father of the child was a priest. Although the school argued that the dismissal was because of the teacher's failure to comply with religious standards, the court held that it was discriminatory on the ground of sex because the pregnancy precipitated the decision to dismiss.[88]

School-specific exceptions

49. The *Equality Act 2010* (UK) is subject to provisions of the *School Standards and Frameworks Act 1998* (UK), which allow religious considerations to be taken into account in relation to certain staff appointments, conditions, and termination at primary and secondary schools with a religious character.[89] On its face, the *School Standards and Frameworks Act 1998* (UK) may allow wider scope for differential treatment of staff and prospective staff than provided for under the exceptions to the prohibition on discrimination in employment in the *Equality Act 2010* (UK).[90]

50. The nature of the school-specific exceptions under the *School Standards and Frameworks Act 1998* (UK) depends on the type of school concerned. At foundation or voluntary controlled schools with a religious character, exceptions only apply to specific positions within the school. For example, when appointing the head teacher, consideration can be given to a candidate's ability to preserve and develop the religious character of the school.[91] Additionally, such schools can appoint up to one-fifth of teachers on the basis of whether they are suitable and competent to give religious education (in England),[92] or whether they are fit and competent to provide teaching and learning in Religion, Values, and Ethics that accords with provisions of the school's trust deed or tenets of religion (in Wales).[93] In both England and Wales, such teachers can be dismissed if they fail to give religious education efficiently and suitably.[94] No other religious exceptions apply to remaining staff.

51. In England and Wales, at voluntary aided and independent schools with a religious character, employers can apply a religious test to preference in the appointment, remuneration, promotion, and dismissal of all teaching staff.[95] Specifically, employers can give preference in connection with appointment, remuneration, or promotion to persons whose beliefs accord with the school's tenets of religion or religious denomination, who attend religious worship in accordance with those tenets, and who are willing to give religious education at the school in accordance with those

85 *Equality Act 2010* (UK) s 19(2)(d).
86 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 178.
87 *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School* [1996] ICR 33. This case was decided before enactment of the *Equality Act 2010* (UK), but concerned equivalent provisions previously found in the *Sex Discrimination Act 1975* (UK) (namely, s 1(1)(a) of that Act).
88 Ibid [47].
89 *Equality Act 2010* (UK) sch 22 [4].
90 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 220.
91 *Equality Act 2010* (UK) sch 22 [4]; *Schools Standards and Frameworks Act 1998* (UK) s 60(4).
92 *Schools Standards and Frameworks Act 1998* (UK) sub-ss 58(2)–(3).
93 Ibid ss 58A(5)(b), 58A(11).
94 *Equality Act 2010* (UK) sch 22 [4]; *Schools Standards and Frameworks Act 1998* (UK) ss 58(6), 58A(6)–(7).
95 *Equality Act 2010* (UK) sch 22 [4]; *Schools Standards and Frameworks Act 1998* (UK) ss 60(5), 124A(2)–(3).

tenets.[96] Additionally, in regards to the termination or engagement of teachers, such schools can consider whether the person's conduct is incompatible with the precepts or tenets of the religion.[97]

52. The *School Standards and Frameworks Act 1998* (UK) provides that, in Wales, no person can 'be disqualified by reason of their religious opinions, or of his attending or omitting to attend religious worship, from being employed or engaged for the purposes of the school otherwise than as a teacher'.[98] That is, schools must not discriminate against non-teaching staff on religious grounds.

Criticism of school-specific exceptions

53. It has been suggested that existing exceptions that apply only to religious schools, and not to other employers, may be seen to depart from the general position under the *Equality Act 2010* (UK) (and under EU law that applied to England and Wales before those jurisdictions left the EU) in two ways.

54. First, the school-specific exceptions do not contain a 'genuine occupational requirements' restriction on imposing religious requirements for voluntary aided and independent schools, or a proportionality assessment of the requirements imposed.[99] The Equality and Human Rights Commission has suggested that, in this way, the existing school-specific exceptions do not comply with the (then applicable) requirement in Art 4(2) of the Equal Treatment in Employment Directive that 'exceptions to the prohibition on discrimination be legitimate and proportionate'.[100]

55. Secondly, on their face the existing school-specific exceptions could be read as permitting discrimination on grounds other than religion or belief. As Megan Pearson has noted, these provisions

> may suggest that a teacher could be dismissed for, for example, being in a same sex relationship if this was forbidden by the religion, although not for her sexual orientation per se, even if she otherwise were a member of the religion and compliant with its religious ethos.[101]

56. The Equality and Human Rights Commission has expressed similar concerns.[102]

57. In this respect, however, Vickers has argued that the *Equality Act 2010* (UK) would prevent such an interpretation because it

> does not create any special exceptions with regard to other grounds of discrimination such as sex or sexual orientation. Thus, although the Act may allow discrimination on religious grounds, such discrimination will be unlawful if it results in indirect sex or sexual orientation discrimination.[103]

58. Because the school-specific exceptions do not contain a 'genuine occupational requirements' restriction and because they could be interpreted as permitting discrimination on other grounds, the provisions have been criticised by the Equality and Human Rights Commission for being too broad.[104] In 2016, the Commission recommended that these provisions be reviewed for compliance with the then applicable EU Law, and recommended that 'the provisions [in the *School Standards and Frameworks Act 1998* (UK)] regulating the appointment of teachers to schools with a religious

96 Ibid.
97 Ibid.
98 *Schools Standards and Frameworks Act 1998* (UK) s 60(6).
99 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 219–20.
100 Equality and Human Rights Commission (UK) (n 58) 26.
101 Pearson (n 61) 125.
102 Equality and Human Rights Commission (UK) (n 58) 27.
103 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 219.
104 Equality and Human Rights Commission (UK) (n 58) 26.

character could be modelled on the current occupational requirement exception set out in the *Equality Act*'.[105]

Students

59. In England and Wales, direct discrimination, indirect discrimination, and harassment in the admission and treatment of students at schools and higher education institutions[106] on the basis of sex, gender reassignment, sexual orientation, pregnancy and maternity, and religion or belief[107] are prohibited. These provisions apply to both state funded and independent (or private) institutions (that do not receive any state funding). However, certain exceptions exist.

60. First, the prohibition on discrimination on the ground of religion or belief (but not on other grounds) does not apply to the admission and treatment of students (except for the exclusion of students) from schools with a religious character.[108] Similarly, higher education institutions do not contravene the prohibition on discrimination on the same ground by giving preference in relation to admission if they do so to preserve the institution's religious ethos.[109] However, it has been suggested that the provisions concerning schools do not permit less favourable treatment of a student because the student does not (or does not any longer) share the same faith as the school — for example, if a Catholic school was to treat a student less favourably because he or she rejected the Catholic faith and converted to a different faith.[110] Moreover, the Explanatory Notes to the *Equality Act 2010* (UK) explain that the provisions concerning schools do not allow discrimination on other grounds (such as sexual orientation).[111] However, the prohibition on discrimination on the ground of religion or belief does not apply to acts of worship or other religious observances organised by or on behalf of a school.[112]

61. Secondly, the prohibition on discrimination in the provision of services[113] on the ground of religion or belief does not apply to anything done in connection with the curriculum of a school, admissions to schools with a religious ethos, acts of worship or other religious observances organised by a school, transport to or from schools, and the establishment, alteration, or closure of schools.[114]

62. Thirdly, prohibitions on discrimination (on all grounds) do not apply to the content of the curriculum at schools or higher education institutions.[115] Despite this, the way the curriculum is delivered is not exempt.[116] Fourthly, the prohibition on discrimination in the admission and treatment of students on the ground of sex does not apply to single sex schools and higher education institutions.[117] Lastly, the prohibition on harassment of students[118] does not apply in relation to the grounds of religion or belief, sexual orientation, or gender reassignment.[119]

105 Ibid 27–8.
106 *Equality Act 2010* (UK) ss 85, 91.
107 Ibid ss 4, 84, 90.
108 Ibid sch 11 [5](a).
109 Ibid sch 12 [5].
110 Department for Education (UK), *The Equality Act 2010 and Schools: Departmental Advice for School Leaders, School Staff, Governing Bodies and Local Authorities* (May 2014) [2.6].
111 Explanatory Notes, *Equality Act 2010* (UK) [868]; Department for Education (UK) (n 110) [2.7].
112 *Equality Act 2010* (UK) sch 11 [6].
113 Ibid s 29.
114 Ibid sch 3 [11].
115 Ibid ss 89(2), 94(2).
116 Department for Education (UK) (n 110) 14–15.
117 *Equality Act 2010* (UK) schs 11 [1], 12 [1].
118 Ibid ss 85(3), 26(1).
119 Ibid s 85(10).

Republic of Ireland

63. This part summarises relevant laws applicable in the Republic of Ireland.

Schools in the Republic of Ireland

Ireland has two types of primary school:

- *National primary schools* are funded by the state, but many are owned and supported by churches.[120] The majority of primary students attend national primary schools.[121] In 2020, 89.6% of national primary school students attended Catholic schools, 7.2% attended multidenominational schools, and 2.9% attended Church of Ireland schools. Enrolments at national primary schools of other faiths made up 0.3%.[122]
- *Private or independent primary schools* are not funded by the state.[123] In 2021, there were 38 private primary schools in Ireland.[124]

Ireland has three types of secondary school:

- *Community and comprehensive schools* are funded entirely by government. In 2019–20, these made up 13% of secondary schools.[125]
- *Vocational schools* are largely funded by government. In 2019–20, these made up 34% of secondary schools.[126]
- *Voluntary secondary schools* are privately owned and managed. Some are non-fee charging and others are fee-charging[127] (commonly referred to as 'private'), but all receive some level of government funding.[128] In 2019–20, Christian voluntary secondary schools made up 49% of secondary schools and other voluntary secondary schools made up 3.4%.[129]
- *Independent schools* are privately owned and managed. They receive no public funding and are not required to follow a set curriculum. These make up a very small proportion of the school population (less than 1% in 2012).[130]

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120 Citizens Information, 'Choosing a Primary School' <www.citizensinformation.ie/en/education/primary_and_post_primary_education/going_to_primary_school/types_primary_school.html>.
121 Ibid.
122 Statistics Section, Department of Education (Ireland), *Statistical Bulletin: Enrolments September 2020 – Preliminary Results* (2021) 3.
123 Citizens Information (n 120).
124 Carl O'Brien and Jenna Clarke-Molloy, 'Rise of Private Primary Schools: "Children Are in Charge of Their Learning"', *The Irish Times* (8 March 2021) <www.irishtimes.com/news/education/rise-of-private-primary-schools-children-are-in-charge-of-their-learning-1.4503684>; Statistics Section, Department of Education (Ireland), *Statistical Bulletin – July 2022: Overview of Education 2001 – 2021* (2022) 4.
125 Amalee Meehan and Derek A Laffan, 'Inclusive Second Level Religious Education in Ireland Today: What Do Teachers Say?' (2021) 69(3) *Journal of Religious Education* 439, 442.
126 Ibid.
127 In 2021, 7.8% of boys and 5.8% of girls were enrolled in fee-charging schools: Statistics Section, Department of Education (Ireland) (n 124) 18.
128 OECD, 'A Brief History of Public and Private Involvement in Schools in Ireland' in *Public and Private Schools: How Management and Funding Relate to Their Socio-Economic Profile* (OECD Publishing, 2012) 49, 49.
129 Meehan and Laffan (n 125) 442.
130 OECD (n 128) 50.

64. In the Republic of Ireland, prohibitions on discrimination are governed by two statutes: the *Employment Equality Act 1998* (Ireland) (which deals with discrimination in employment) and the *Equal Status Act 2000* (Ireland) (which deals with discrimination against students, amongst other things).

Staff

65. In the Republic of Ireland, the *Employment Equality Act 1998* (Ireland) prohibits discrimination in employment (including accessing employment, employment conditions, training, promotions, and the classification of posts)[131] on the grounds of gender,[132] marital or civil status, family status, sexual orientation, and religious belief (amongst others).[133] This extends to employment at primary, secondary, and tertiary religious educational institutions. However, exceptions to this general prohibition exist.

Genuine and determining occupational requirement exception

66. The 'genuine and determining occupational requirement' exception in the *Employment Equality Act 1998* (Ireland) is almost identical to the equivalent exception under EU law.[134] It provides that difference of treatment on all grounds (except gender) is not discrimination where, by reason of the occupational activities concerned or the context in which they are carried out, the characteristic constitutes a 'genuine and determining occupational requirement'.[135] Additionally, the objective must be legitimate and the requirement must be proportionate.[136]

67. To date, this exception has only been considered in a limited number of cases, so its ambit is still unclear (including in its application to religious educational institutions that seek to impose religious requirements).[137] However, it is likely that it would apply in similar circumstances to the equivalent exception under EU law — that is, to those employed in religious service where the religious nature of the job is a defining aspect (and not more broadly to all staff at religious educational institutions).[138]

Exceptions for religious educational institutions

68. There are two specific exceptions for religious educational institutions under the *Employment Equality Act 1998* (Ireland). Both exceptions apply to a 'religious, educational or medical institution which is under the direction of a body established for religious purposes or whose objectives include' the promotion of religious values.[139]

131 *Employment Equality Act 1998* (Ireland) s 8(1).

132 The gender ground has been defined as arising between two people where 'one is a woman and the other is a man': Ibid s 6(2)(a). However, the Irish Human Rights and Equality Commission has noted that the *Employment Equality Act 1998* (Ireland) must be interpreted in accordance with the *EU Equal Treatment in Employment* and *Equal Treatment of Men and Women Directives* and, as such, gender would include transgender people: Irish Human Rights and Equality Commission, Submission on the Review of the Equality Acts (December 2021) 17. The Commission recommended that the provisions be amended to explicitly prohibit discrimination against transgender, non-binary, and intersex people: at 19. The gender ground also includes pregnancy and maternity leave: *Employment Equality Act 1998* (Ireland) s 6(2A).

133 Including age, disability, race, and being a member of the Traveller community: *Employment Equality Act 1998* (Ireland) s 6.

134 See above at [23]–[25].

135 *Employment Equality Act 1998* (Ireland) s 37(2)(a). Similar provisions exist in relation to the gender ground: at s 25.

136 Ibid s 37(2)(b).

137 European Commission, *Country Report: Non-Discrimination Ireland* (2022) 59. However, the High Court of Ireland has considered whether it was unfair (under s 6 of the *Unfair Dismissals Act 1977* (Ireland)) to dismiss a teacher at a Roman Catholic school who had a child with a married man with whom she was living: *Flynn v Power* [1985] IEHC 1. In that case, the High Court held that the dismissal was not unfair because there were 'substantial grounds which justified the dismissal', including that the appellant 'openly rejected the norms of behaviour and the ideals which the school existed to promote': at [15]–[18]. Furthermore, the Court held that the dismissal did not result 'wholly or mainly' from the appellant's pregnancy (and therefore was not unfair) because her dismissal did not result from her pregnancy but rather her refusal to terminate her relationship with the married man, in respect of which the school had complained before becoming aware of her pregnancy: at [10].

138 See above at [23]–[25].

139 *Employment Equality Act 1998* (Ireland) s 37(1).

69. First, such institutions are not taken to discriminate against a person if they give more favourable treatment to employees or prospective employees on the ground of religion where it is 'reasonable to do so in order to maintain the religious ethos of the institution'.[140] However, this section was amended in 2015 to introduce further restrictions for institutions that receive government funding.[141] For such institutions:

- the favourable treatment must not constitute discrimination on other grounds;[142] and
- by reason of the nature of the institution's activities or the context in which they are carried out, the religion or belief of the employee must constitute a 'genuine, legitimate and justified occupational requirement having regard to the institution's ethos'.[143]

70. The requirement that the employee's religion or belief be a 'genuine, legitimate and justified occupational requirement' is similar to that found in the Art 4(2) religion or belief exception under EU law.[144] According to EU case law, whether a religious requirement is genuine, legitimate, and justified cannot be determined by the institution alone, but must be subject to an external proportionality review.[145]

71. If the religious educational institution does not receive government funding, then the institution may give more favourable treatment to staff on the ground of religion if it is reasonable to maintain the institution's religious ethos. As such, in giving more favourable treatment to staff on the ground of religion, there is scope for such institutions to discriminate on the grounds of gender, sexual orientation, and marital or civil status.

72. The second exception that exists for religious educational institutions provides that taking action that is 'reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution' is not discrimination.[146] As with the first exception, this exception was amended in 2015 to be further qualified if the institution is government funded.[147]

73. Specifically, government funded institutions can only take action if, by reason of the nature of the employment or the context in which it is carried out, the action is 'objectively justified by the institution's aim of preventing the undermining of the religious ethos of the institution'.[148] Additionally, the means of achieving that aim must be appropriate and necessary.[149]

74. The *Employment Equality Act 1998* (Ireland) provides that an action will only be 'objectively justified' or 'appropriate and necessary' if it is:

- rationally and strictly related to the institution's religious ethos;
- a response to the conduct of the employee undermining the institution's religious ethos, rather than to the employee's gender, marital or civil status, family status, or sexual orientation; and
- proportionate to the employee's conduct, having regard to other actions the employer may take, the consequences of that action for the employee, the employee's right to privacy, and actual damage to the institution's religious ethos.[150]

140 Ibid s 37(1)(a).
141 See *Equality (Miscellaneous Provisions) Act 2015* (Ireland) s 11; *Employment Equality Act 1998* (Ireland) ss 37(1A), (1B), (1C).
142 *Employment Equality Act 1998* (Ireland) s 37(1A)(a).
143 Ibid s 37(1A)(b).
144 See above at [26]–[32].
145 See above at [28]–[30].
146 *Employment Equality Act 1998* (Ireland) s 37(1)(b).
147 See *Equality (Miscellaneous Provisions) Act 2015* (Ireland) s 11; *Employment Equality Act 1998* (Ireland) ss 1A, 1B, 1C.
148 *Employment Equality Act 1998* (Ireland) s 37(1B)(a).
149 Ibid s 37(1B)(b).
150 Ibid s 37(1C).

75. These exceptions have not yet been considered in case law,[151] but appear to give both private and government funded religious educational institutions scope to treat employees differently on the ground of religion. However, as noted above, prior to the 2015 amendments government funded religious educational institutions were subject to the same (broader) test for the exceptions to which private institutions are currently subject.[152] This broader test (in relation to the more favourable treatment exception) was considered by the Labour Court of Ireland in *A National School v A Worker*.[153] In that case, a Deputy Principal at a Catholic primary school argued that she had been discriminated against on the ground of religious belief (amongst other grounds) when she was not promoted to Principal. During her job interview, she was asked about her views on matters relating to religious patronage and pluralism.

76. The Labour Court found that these questions amounted to discrimination on the ground of religious belief. The Court held that the more favourable treatment exception (as it then applied to government funded schools) 'should be ascribed a narrow ambit' and

> whether the preferment of candidates by reference to their religious belief is justified in a particular case is a matter of evidence to be adduced by the person seeking to rely on the exception.[154]

77. In this case, the school

> did not adduce any evidence on which it could be held that the canvassing of the private views of candidates for the post in issue on the question of religious patronage and pluralism was reasonable or necessary in order to maintain the religious ethos of the school. Nor was there any evidence to suggest that whatever views the Complainant had on that topic would impact on her capacity to act in good faith and with loyalty to the school's Catholic ethos.[155]

78. This case suggests that the broader test for the exceptions for religious educational institutions (which now only applies to institutions that do not receive government funding) will likely be interpreted narrowly. However, while government funded institutions must now satisfy stricter legislative requirements (including by ensuring any action they take is not a response to the employee's gender, marital or civil status, family status, or sexual orientation), fully privately-funded institutions are not bound by such requirements.[156]

79. The Irish Human Rights and Equality Commission has expressed concerns that the exceptions for religious educational institutions may 'not be sufficiently narrow to ensure [they do] not permit unlawful discrimination' and, further, that they might not comply with Art 4(2) of the Equal Treatment in Employment Directive.[157] To narrow the provisions further, the Commission recommended that a definition of 'religious ethos' be included in the legislation (along with a list of institutions that could rely on the sections) and that the legislation be amended so that any 'undermining' by employees must be 'active and significant'.[158]

151 European Commission (n 137) 61.
152 See *Equality (Miscellaneous Provisions) Act 2015* (Ireland) s 11.
153 *A National School v A Worker* [2015] EDA1515.
154 Ibid.
155 Ibid.
156 Previous versions of these exceptions were controversial as they appeared to impact on lesbian, gay, and bisexual staff: European Commission (n 137) 61.
157 Irish Human Rights and Equality Commission (n 132) 40; Irish Human Rights and Equality Commission, Submission to the Human Rights Committee on Ireland's Fifth Periodic Report, *Ireland and the International Covenant on Civil and Political Rights* (June 2022) 81.
158 Irish Human Rights and Equality Commission (n 132) 40; Irish Human Rights and Equality Commission (n 157) 81.

Students

80. In Ireland, the *Equal Status Act 2000* (Ireland) prohibits discrimination against students at primary, secondary, and tertiary educational institutions[159] on the grounds of gender,[160] marital or civil status, family status,[161] sexual orientation, and religious belief (amongst others).[162] This prohibition applies to admissions, access to courses, facilities and benefits, the terms or conditions of admission or participation, and expulsion and other sanctions.[163]

81. There are several exceptions to this general prohibition. First, primary and secondary schools that have an objective of providing education in an environment that promotes certain religious values do not discriminate if they refuse admission of a student who is not of a particular religious denomination if this is 'essential to maintain the ethos of the school'.[164]

82. In addition, secondary schools and a small number of primary schools[165] that have an objective of providing education in an environment that promotes certain religious values do not discriminate if they admit students of a particular religious denomination in preference to others.[166]

83. This exception does not apply to publicly funded primary schools (nearly 90% of which are Catholic). However, where such schools are oversubscribed, they do not discriminate if they give priority in admission to a student who is a member of a minority religion[167] if the school provides a programme of religious instruction or education which is of the same or similar religious ethos as that of the minority religion.[168] In practice, this means that Catholic schools cannot preference students in enrolment on religious grounds, but schools with a religious ethos from minority religions can preference on religious grounds where they are oversubscribed.

84. None of these exceptions specifically provide that difference of treatment on the ground of religion must not result in discrimination on other discriminatory grounds, such as gender or sexual orientation; but neither do they explicitly provide a defence to such claims.

85. The Irish Human Rights and Equality Commission has acknowledged that the exceptions were intended 'not to infringe on the constitutionally protected right to free practice of religion'.[169] However, the Commission

> believes that the paramount concern in balancing the rights of individual children with the rights of institutions, such as religious patrons, must be the right of children to an education under reasonable conditions and without discrimination.[170]

86. On this basis, the Commission recommended that the provisions be reviewed to ensure there is an appropriate balance between the right to equal treatment and the right to free practice

159 *Equal Status Act 2000* (Ireland) s 7(2).

160 The gender ground has been defined as arising between two people where 'one is male and the other is female': Ibid s 3(2)(a). However, the Irish Human Rights and Equality Commission has noted that the Act must be interpreted in accordance with the EU *Equal Treatment in Employment* and *Equal Treatment of Men and Women Directives* and, as such, gender would include transgender people: Irish Human Rights and Equality Commission (n 132) 17. The Commission recommended that the provisions be amended to explicitly prohibit discrimination against transgender, non-binary, and intersex people: at 19.

161 Family status means being pregnant or having parental or carer's responsibilities: *Equal Status Act 2000* (Ireland) s 2(1) (definition of 'family status').

162 Ibid s 3(2).

163 Ibid s 7(2).

164 Ibid s 7(3)(ca).

165 This exception does not apply to recognised primary schools, which include publicly funded primary schools: *Education Act 1998* (Ireland) s 10(3).

166 *Equal Status Act 2000* (Ireland) s 7(3)(c).

167 Minority religions are those whose membership comprises less than 10% of the total population of the state: Ibid s 7A(6) (definition of 'minority religion').

168 Ibid ss 7(3)(cb), 7A.

169 Irish Human Rights and Equality Commission (n 132) 36.

170 Ibid.

of religion.[171] It also recommended that the provisions be amended to include a definition of 'ethos' and an explanation of what would be required to prove that a refusal to admit was 'essential' to maintain the school's ethos.[172]

87. In addition to the exceptions for students under the *Equal Status Act 2000* (Ireland), the *Employment Equality Act 1998* (Ireland) also includes an exception to the prohibition on discrimination against students of vocational institutions.[173] Specifically, the prohibition on discrimination on the ground of religion does not apply to the nomination of persons for admission to the School of Nursing or for certain reserved places in vocational training courses.[174] However, the exception only applies to discrimination on the ground of religion that is for 'the purposes of ensuring the availability of nurses to hospitals and teachers to primary schools' that are under the direction or control of a religious body or a body whose objectives include providing services in an environment that promotes religious values, in order to maintain the religious ethos of the hospitals or primary schools.[175]

171 Ibid.
172 Ibid.
173 For the prohibition on discrimination against students of vocational institutions see: *Employment Equality Act 1998* (Ireland) s 12(1).
174 Ibid ss 12(4)–(5).
175 Ibid s 12(4).

New Zealand

88. This part summarises relevant laws applicable in New Zealand.

Schools in New Zealand

The legal framework for New Zealand's educational system is found in the *Education and Training Act 2020* (NZ).[176] That Act covers early childhood education, compulsory schooling, and further education.

New Zealand has three types of school delivering compulsory education:

- *State schools* are owned and funded by the government. Around 85% of students are enrolled in state schools.
- *State-integrated schools* are schools with a 'special character' (they may be run by a particular religious faith or use specialist education methods), but they still teach the national curriculum. They receive the same level of funding per student as state schools, but their buildings and land are privately owned and they may also charge fees to cover property costs. Just over 10% of students are enrolled in state-integrated schools.
- *Private schools* are not government funded. Just under 5% of students are enrolled in private schools. They must meet particular standards to be accredited, but do not need to follow the national curriculum.[177]

89. In New Zealand, prohibitions on discrimination against staff and students at all educational institutions are governed by the *Human Rights Act 1993* (NZ), read alongside the *New Zealand Bill of Rights Act 1990*. The *Education and Training Act 2020* (NZ) also provides that school boards must ensure that state schools take 'all reasonable steps to eliminate racism, stigma, bullying, and any other forms of discrimination within the school'.[178]

90. Section 19 of the *New Zealand Bill of Rights Act 1990* affirms that everyone has the right to freedom from discrimination on the grounds listed in the *Human Rights Act 1993* (NZ), although limitations on that right are permitted if they are 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[179] The *New Zealand Bill of Rights Act 1990* only applies to acts done by the legislative, executive, judiciary, or 'any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law'.[180] However, experts consulted by the ALRC have suggested that some functions exercised by state, state integrated, and private schools are likely to amount to public functions (such as delivery of the state curriculum).[181] Breaches of s 19 (by a person or body exercising a public function) are also treated as breaches of Part 1A of the *Human Rights Act 1993* (NZ).

91. It is uncertain which functions exercised by state integrated and private schools amount to public functions as there is limited case law on this issue. However, any functions exercised by such schools that do not amount to public functions are instead governed by the detailed anti-discrimination regime found in Part 2 of the *Human Rights Act 1993* (NZ). Part 2 also applies to employment by all employers, regardless of whether the employer is exercising a public function.[182]

176 The *Education and Training Act 2020* (NZ) incorporates and replaces the Education Acts 1964 and 1989 (NZ).
177 Joel Hernandez, *The State of Schooling: State, State-Integrated and Private School Performance in New Zealand* (August 2020) 2.
178 *Education and Training Act 2020* (NZ) s 127(1)(b)(iii).
179 *New Zealand Bill of Rights Act 1990* (NZ) s 5.
180 Ibid s 3.
181 Experts consulted by the ALRC include Dr Jane Norton, Sylvia Bell, Professor Claudia Geiringer, and Jenny Ryan.
182 *Human Rights Act 1993* (NZ) s 21A(1)(a).

This means that Part 2 of the *Human Rights Act 1993* (NZ) governs prohibitions on discrimination in the context of the employment of staff at religious educational institutions in New Zealand. In contrast, prohibitions on discrimination against students at such institutions are governed by the *New Zealand Bill of Rights Act 1990* (and Part 1A of the *Human Rights Act 1993* (NZ)) or Part 2 of the *Human Rights Act 1993* (NZ), depending on the nature of the function exercised.

Staff

92. Under Part 2 of the *Human Rights Act 1993* (NZ), it is unlawful to discriminate by reason of the grounds of sex (including pregnancy and childbirth),[183] marital status, family status, sexual orientation, and religious and ethical belief[184] in employment (including in the hiring and termination of employees and terms of employment).[185] This includes employment in primary, secondary, and tertiary educational institutions, including religious educational institutions. However, several exceptions to this general prohibition exist. The exceptions most relevant to this Inquiry are summarised in the following sections.

Genuine occupational qualification exception

93. If a person believes they have been discriminated against, they can make a complaint to the New Zealand Human Rights Commission. The Commission must provide dispute resolution services for the parties (including mediation).[186] If the parties fail to reach an agreement, civil proceedings can be brought before the Human Rights Review Tribunal.[187] If such proceedings are brought, and an application is made by the Human Rights Commission or the person against whom a complaint was made, the Human Rights Review Tribunal then has the power to declare that conduct that would be discriminatory is not unlawful because it constitutes a 'genuine occupational qualification'.[188]

94. Religious educational institutions could potentially rely on this exception to lawfully discriminate against employees or prospective employees by reason of prohibited grounds when it constitutes a 'genuine occupational qualification'. Whether requirements imposed by such institutions concerning grounds equivalent to those contained in the *Sex Discrimination Act* would meet this threshold has not yet been judicially considered. Reasons why there has been little jurisprudence concerning this exception likely include the approach taken by the Tribunal in relation to exceptions generally, which requires exceptions to be narrowly construed and restrictively applied.[189]

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183 Although the issue has not been considered by a court or tribunal, the New Zealand Human Rights Commission interprets sex to include gender identity, gender expression, and sex characteristics: New Zealand Human Rights Commission, *PRISM: Human Rights Issues Relating to Sexual Orientation, Gender Identity and Expression, and Sex Characteristics (SOGIESC) in Aotearoa New Zealand - A Report with Recommendations* (2020) 14. The Commission has recommended the provisions be amended to include gender identity, gender expression, and sex characteristics as specific prohibited grounds of discrimination: at 20. The New Zealand Law Commission is currently examining relevant protections in the *Human Rights Act 1993* (NZ): New Zealand Law Commission, 'Ia Tangata | A Review of the Protections in the Human Rights Act 1993 for People Who Are Transgender, People Who Are Non-Binary and People with Innate Variations of Sex Characteristics' <www.lawcom.govt.nz/our-projects/ia-tangata-review-protections-human-rights-act-1993>.

184 Along with race, colour, ethnic origins, disability, age, and political opinion: *Human Rights Act 1993* (NZ) s 21.

185 Ibid s 22. See also *Employment Relations Act 2000* (NZ) ss 104, 105. It is also unlawful to perform or arrange to perform a conversion practice on any other person: *Human Rights Act 1993* (NZ) s 63A.

186 *Human Rights Act 1993* (NZ) ss 76, 77.

187 Ibid s 92B.

188 Ibid s 97(2).

189 See *Avis Rent A Car Limited v The Proceedings Commissioner* (1998) 5 HRNZ 501, 5–8. In that case, the Tribunal was satisfied that the case fell within the 'exceptional' category for which the exception was designed.

95. Sam Bookman has suggested that New Zealand will likely follow the lead of courts in the United Kingdom when it comes to exceptions for prohibitions on discrimination (given the exceptions are similar in both countries).[190] If this were to be the case, the genuine occupational qualification exception would likely be interpreted very narrowly in the context of educational institutions receiving state funding.

Exception for purposes of 'organised religion'

96. An exception to the prohibition on discrimination in employment under the *Human Rights Act 1993* (NZ) applies to any position that is 'for the purposes of an organised religion' and is 'limited to one sex so as to comply with the doctrines or rules or established customs of the religion'.[191] This is a narrow exception that applies only to different treatment based on sex,[192] not other grounds.[193] Regarding a similar exception that exists in relation to the prohibition on discrimination by qualifying bodies, the Human Rights Review Tribunal has held that the purpose of such an exception is to protect the institutional autonomy of organised religions to make decisions regarding the appointment of clergy and ministers.[194]

97. This is a narrower exception than the exception for the purposes of organised religion found under the law in England and Wales. The English and Welsh exception applies more broadly to sex, gender reassignment, marriage or civil partnership, and sexual orientation, and applies when the objective of an occupational requirement is to 'avoid conflicting with the strongly held religious convictions of a significant number of the religion's followers'.[195]

98. Whether and how the exception under New Zealand law could apply in the context of religious educational institutions has not been judicially considered. However, the exception in England and Wales applies narrowly to religious leaders (and lay posts within religious bodies that exist to promote and represent religion), not to all employees at organisations with a religious ethos.[196] The exception in England and Wales does not apply to religious schools, which are covered by different provisions. As such, and in light of other specific exceptions in New Zealand relating to schools,[197] it is likely that New Zealand's exception would apply in similar circumstances and, therefore, would not be applicable to the employment of staff at religious educational institutions.

Exceptions for 'religious or ethical belief'

99. Section 28(2) of the *Human Rights Act 1993* (NZ) provides three further exceptions to the prohibition on discrimination in employment which permit different treatment based on religious or ethical belief. Two of these are specifically directed to religious schools.

100. First, state integrated schools in which religious instruction forms part of the special character of the school can make it a condition of appointment that the employee be willing and able to take part in religious instruction appropriate to the school.[198] However, this only applies to the positions of principal, director of religious studies, designated teaching positions carrying responsibility for religious instruction, and deputy (or assistant) principal of a primary school if that position has responsibility for supervising junior classes.[199]

190 Sam Bookman, 'Freedom of Religious Organizations' (2017) 23 *Auckland University Law Review* 394, 403.
191 *Human Rights Act 1993* (NZ) s 28(1).
192 See above fn 183.
193 *Human Rights Act 1993* (NZ) s 28(1).
194 *The Gay and Lesbian Clergy Anti-Discrimination Society v The Bishop of Auckland* [2013] NZHRRT 36 [92]–[95].
195 See above at [40].
196 See above at [40].
197 See below at [99]–[104].
198 *Human Rights Act 1993* (NZ) s 28(2)(a); *Education and Training Act 2020* (NZ) sch 6 cl 47.
199 Ibid.

101. Secondly, different treatment based on religious or ethical belief does not contravene the prohibition on discrimination in employment where the sole or principal duties of the position are those of a teacher in a private school (that is, schools that are not government funded).[200] There is no need for the religious or ethical requirement to be a genuine occupational qualification and no restriction on which teaching positions are covered. This exception allows private schools to hire teachers who conform to the institution's system of beliefs.

102. Thirdly, different treatment based on religious or ethical belief does not contravene the prohibition on discrimination in employment if the sole or principal duties of the position are, or are substantially the same as, those of a 'clergyman, priest, pastor, official, or teacher among adherents of that belief or otherwise involve the propagation of that belief'.[201] This is essentially a 'ministerial exception', although its scope has not yet been considered by the courts.[202] On its face, the exception appears to cover relevant positions within tertiary education institutions as well as state integrated and private schools, so long as the position is directly related to the propagation of belief.

103. Professor Rishworth has argued that there is scope for the exception to apply more broadly: 'it may be contentious (but surely not impossible) to claim, say, that a secretarial position involves the propagation of belief'.[203] If the exception were to apply in this way, it could potentially apply to all staff at some religious educational institutions.

104. The employment decisions of some religious institutions in New Zealand have been challenged on the basis that the institution took into account the sexual orientation of applicants or employees, but this has occurred far less frequently than in the United Kingdom and United States.[204]

Students

105. Part 2 of the *Human Rights Act 1993* (NZ) prohibits discrimination against students by reason of the grounds of sex (including pregnancy and childbirth), marital status, family status, sexual orientation, and religious and ethical belief (amongst others)[205] in admission to, and exclusion from, educational institutions as well as in the terms of admission.[206] However, as with staff, certain exceptions to this general position exist, the most relevant of which are summarised in the following sections.

Genuine justification exception

106. For this exception to apply, the Human Rights Review Tribunal must declare that a discriminatory act, omission, practice, requirement, or condition is not unlawful because it constitutes a 'genuine justification'.[207]

107. Religious educational institutions could arguably rely upon this exception to lawfully discriminate against students by reason of any of the prohibited grounds if there is a 'genuine justification'. The circumstances in which there might be a 'genuine justification' for discriminatory treatment of students has not yet been judicially considered and there has been little jurisprudence on this exception generally.

200 *Human Rights Act 1993* (NZ) s 28(2)(b).
201 Ibid s 28(2)(b)(i). See also *Employment Relations Act 2000* (NZ) s 106.
202 Paul Rishworth, 'Review: Human Rights' (2015) 2 *New Zealand Law Review* 259, 273.
203 Ibid.
204 Ibid 272.
205 *Human Rights Act 1993* (NZ) s 21(1).
206 Ibid s 57(1). It is also unlawful to perform or arrange to perform a conversion practice on any person: at s 63A.
207 Ibid s 97(2)(b).

Exceptions for religious belief

108. The *Human Rights Act 1993* (NZ) provides that an educational institution maintained wholly or principally for students of one sex, race, or religious belief will not breach the prohibition on discrimination in education by 'refusing to admit students of a different sex, race, or religious belief'.[208] This provision applies to state-integrated and private schools, allowing relevant schools to treat prospective students differently on the ground of religious belief.

109. A similar exception is also found in the *Education and Training Act 2020* (NZ) with regards to state-integrated schools alone. That exception requires such schools to preference 'children of parents who have a particular or general philosophical or religious connection with a State integrated school' when choosing which children to enrol.[209]

110. The New Zealand Human Rights Commission has expressed that, even though legislation permits state-integrated schools to give preferential enrolment to students with a religious connection to the school, students have a right to be free from discrimination at school.[210] More specifically, boards of state-integrated schools are subject to certain governance objectives, such as ensuring that the school:

- is a physically and emotionally safe place for all students and staff;
- gives effect to student rights set out in the *Human Rights Act 1993* (NZ), *New Zealand Bill of Rights Act 1990,* and *Education and Training Act 2020* (NZ); and
- takes all reasonable steps to eliminate racism, stigma, bullying, and any other forms of discrimination within the school.[211]

111. Similarly, to be registered as a private school the school must be a 'physically and emotionally safe place for students'.[212]

112. The New Zealand Human Rights Commission has suggested that 'an environment which is unsupportive of students with diverse sexual orientation, gender identity and expression or sex characteristics may be in breach of … the Human Rights Act'.[213]

Exceptions under the New Zealand Bill of Rights Act 1990

113. Some functions exercised by religious educational institutions in relation to students may amount to public functions under the *New Zealand Bill of Rights Act 1990*.[214] In this context, prohibitions on discrimination in education (on the same grounds as under Part 2 of the *Human Rights Act 1993* (NZ)) are governed by the *New Zealand Bill of Rights Act 1990.*[215]

114. The *New Zealand Bill of Rights Act 1990* provides that the right to freedom from discrimination under s 19 of the Act may be subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[216] Religious educational institutions might be able to rely on this exception to justify limiting students' right to freedom from discrimination in the exercise of certain public functions.

208 Ibid s 58(1).
209 *Education and Training Act 2020* (NZ) sch 6 cl 26.
210 Te Kahui Tika Tangata Human Rights Commission, 'Students have Right to be Free from Discrimination at School' (Media Release, 28 June 2022).
211 *Education and Training Act 2020* (NZ) s 127(1)(b).
212 Ibid sch 7 cl 2(h).
213 New Zealand Human Rights Commission (n 183) 48.
214 *New Zealand Bill of Rights Act 1990* (NZ) s 3(b).
215 Ibid s 19.
216 Ibid s 5.

Canada

115. This part summarises the relevant laws applicable in Canada. Canada has a federal legal system, with a national government and several provincial governments. The analysis below focuses on national laws as well as laws in two provinces, Ontario and British Columbia.

Schools in Canada

There are several different types of school in Canada. The types differ between provinces.

For example, in Ontario there are three types of primary and secondary schools:

- English and French *public schools* are government funded. In 2019–20, over 1.4 million students (approximately 63%) were enrolled in primary and secondary public schools.
- English and French *Catholic schools* (also called *separate or denominational schools*) are funded and operated by government, and are state actors subject to the *Canadian Charter of Rights and Freedoms*. While they integrate religious education into the curriculum, they are constitutionally protected and are not the same as private and other religious schools. In 2019–20, over 650,000 students (approximately 30%) were enrolled in primary and secondary Catholic schools.
- *Private or independent schools* (whether religious or not) are not government funded. They do not receive the same level of protection as denominational schools. In 2019–20, almost 155,000 students (approximately 7%) were enrolled in private primary and secondary schools.[217]

In British Columbia there are two types of school:

- English and French *public schools* are government funded. More than 570,000 students (86.5%) are enrolled in public schools.
- *Private or independent (including Catholic) schools* are not government funded. More than 89,000 students (13.4%) are enrolled in independent schools.[218]

116. Prohibitions on discrimination under both national and provincial law are the subject of both constitutional law (which includes the *Canadian Charter of Rights and Freedoms*) and human rights law (which includes the *Canadian Human Rights Act*[219] at the national level and similar legislation in the provinces). While constitutional law only applies to government actors and bodies discharging government activities, according to an expert consulted by the ALRC, this could extend to the actions of, for example, school boards and colleges.[220]

117. All national and provincial state action (including the enactment of legislation and government decision-making) is subject to the *Canadian Charter of Rights and Freedoms*. *Charter* rights impact how human rights (and other laws, such as administrative law) are interpreted and applied.[221] The *Charter* guarantees fundamental rights and freedoms, including freedom of conscience and religion,[222] and the right to equality before the law.[223] Specifically, the *Charter* provides that every

217 Ontario Ministry of Education, 'Facts about Elementary and Secondary Education' <www.ontario.ca/page/facts-about-elementary-and-secondary-education>; Ontario Data Catalogue, 'Quick Facts: Ontario Schools' <data.ontario.ca/en/dataset/quick-facts-ontario-schools>; *Constitution Act 1867* (Can). Denominational schools are protected under s 93(1) of the *Constitution Act 1867* (Can). They exist in Ontario, Saskatchewan, and Alberta.

218 Province of British Columbia, 'Ministry of Education and Child Care' <https://www2.gov.bc.ca/gov/content/governments/organizational-structure/ministries-organizations/ministries/education>.

219 *Canadian Human Rights Act 1985*.

220 The expert consulted by the ALRC was Professor Benjamin Berger.

221 See the discussion below at [166]–[175] concerning the Trinity Western University cases, where the *Canada Act 1982* (UK) c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*') extended through administrative law.

222 *Canadian Charter of Rights and Freedoms* s 2.

223 Ibid s 15.

individual 'is equal before and under law and has the right to the equal protection and equal benefit of the law … without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability'.[224]

118. Importantly, one of the key cases discussed below was decided before equality rights under the *Charter* came into effect, so it is possible that courts could decide cases involving the intersection of religious freedom and the right to non-discrimination differently today.[225] This is an issue that will be considered further below.[226]

Staff

119. The *Canadian Human Rights Act* prohibits direct and indirect discrimination and harassment in employment (including refusing to employ, dismissal, and adverse differentiation during employment) on numerous grounds.[227] These include the ground of religion as well as grounds equivalent to those contained in the *Sex Discrimination Act*.[228]

120. Similarly, the *Ontario Human Rights Code*[229] prohibits discrimination and harassment with respect to employment[230] because of the same grounds.[231] British Columbia's *Human Rights Code 1996* also prohibits discrimination because of those same grounds[232] in refusing to employ, employment, and the terms of employment.[233] These prohibitions on discrimination apply to employment at primary, secondary, and tertiary educational institutions.

121. Unlike the law in the EU, England and Wales, in Canada the internal operations of religious employers are insulated from anti-discrimination requirements in order to uphold their religious needs. Vickers explains that the

> religious interests of employers appear to be given broad protection, in that discrimination on other grounds can be allowed in order to enable the religious needs of the employer to be met. Moreover, the Canadian courts seem prepared to take an 'organic' view of the workplace, allowing for the fact that groups of workers may view the workplace as a form of church where they worship together through the performance of their jobs, and so allowing bona fide occupational requirements to apply even where religion is not integral to the job function. In the religious sphere, groups can operate in an exclusive manner, without offending against the human rights norms upheld by the Supreme Court.[234]

122. The internal operations of religious institutions are insulated from anti-discrimination requirements through two general exceptions to the prohibition on discrimination in employment — a bona fide occupational requirement exception and specific exceptions for such institutions (and other 'special interests' institutions).

224 Ibid.

225 Bethany Hastie and Margot Young, 'The Legal Conflict between Equality Rights and Freedom of Religion', *The Conversation* (online, 4 April 2019) <www.theconversation.com/the-legal-conflict-between-equality-rights-and-freedom-of-religion-113645>. The *Canadian Charter of Rights and Freedoms* came into effect on 17 April 1982, except for s 15 (concerning equality rights) which came into effect on 17 April 1985.

226 See below at [165]–[180].

227 *Canadian Human Rights Act 1985* ss 7, 14. The Act also prohibits advertisements for employment that include any limitation, specification, or preference based on prohibited grounds: at s 8.

228 *Canadian Human Rights Act 1985* s 3; *Sex Discrimination Act 1984* (Cth) ss 5–7A.

229 *Human Rights Code 1990* (Ontario).

230 Ibid ss 5, 7(2). The Code also prohibits discrimination in advertisements and applications for employment: at ss 23(1), 23(2).

231 Ibid ss 5, 10. In Ontario, the term 'creed' is used instead of 'religion': at s 5. However, creed has been held to include religion and belief as well as non-religious belief systems that substantially influence a person's identity, worldview, and way of life: Ontario Human Rights Commission, *Policy on Preventing Discrimination Based on Creed* (2015) 1–2 <www.ohrc.on.ca/en/book/export/html/16276>.

232 *Human Rights Code 1996* (British Columbia) ss 11, 13.

233 Ibid s 13(1). The Code also prohibits advertisements with a limitation, specification, or preference on a prohibited ground: at s 11.

234 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 260.

Bona fide occupational requirement exception

123. The wording of this exception differs slightly across jurisdictions. However, Vickers has suggested that 'it is arguable that this makes little difference to the outcome of cases'.[235]

124. At the national level, the *Canadian Human Rights Act* provides that it 'is not a discriminatory practice if any refusal, exclusion, suspension, limitation, specification, or preference in relation to any employment is … based on a bona fide occupational requirement'.[236] For a practice to be considered a bona fide occupational requirement, it must be shown that accommodating the person's needs would 'impose undue hardship on the person who would have to accommodate those needs, considering health, safety, and cost'.[237] That is, an employer must accommodate employees up to the point of undue hardship.

125. British Columbia has a similar exception to that at the national level. Specifically, the *Human Rights Code 1996* provides that the prohibition on discrimination in employment does not apply to a refusal, limitation, specification, or preference based on a bona fide occupational requirement.[238]

126. Ontario does not have a general bona fide occupational requirement exception that applies to all grounds of discrimination. However, the *Ontario Human Rights Code* provides that the right to equal treatment with respect to employment is not infringed where the discrimination is for reasons of age, sex, record of offences, or marital status if this is 'a reasonable and bona fide qualification because of the nature of the employment'.[239] As with the exception at the national level, the Code further provides that a qualification will only be reasonable and bona fide if accommodating the person's needs would cause undue hardship for the employer.[240] In addition to this narrow exception, Ontario has also incorporated elements of the bona fide occupational requirement exception into its exception for religious (and other special interest) organisations. This exception is discussed in more detail below.[241]

127. Vickers has noted that the bona fide occupational requirement exception provides a defence to a claim of discrimination

> where an employer imposes a prima facie discriminatory rule or standard for a purpose rationally connected to the purpose of the job, in good faith, in the belief that it was necessary [for] a legitimate work-based purpose, and that the rule or standard is reasonably necessary to accomplish the work-based purpose. In order to show that the rule or standard is necessary, it must be shown that the employer cannot accommodate the employee without undue hardship.[242]

128. Whether the rule was made in good faith and in the belief that it was necessary for a legitimate work-based purpose is a subjective inquiry that requires 'assessing the religious employer's own view of the nature of the employment and religious qualifications'.[243] The remainder of the test — whether the rule is rationally connected to the purpose of the job and is reasonably necessary to accomplish the work-based purpose — is an objective test that is narrowly interpreted.[244] It requires an examination of the actual job function and duties, including in relation to broader goals and activities provided by the organisation.[245] As such, application of the test is case specific.[246] The

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235 Ibid 249.
236 *Canadian Human Rights Act 1985* s 15(1)(a).
237 Ibid s 15(2).
238 *Human Rights Code 1996* (British Columbia) s 13(4). A similar exception exists for advertisements: at s 11.
239 *Human Rights Code 1990* (Ontario) s 24(1)(b).
240 Ibid s 24(2).
241 See below at [141]–[147].
242 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 251. See also Pearson (n 61) 130–2.
243 Ontario Human Rights Commission (n 231) 51.
244 Ibid.
245 Ibid. The Ontario Human Rights Commission suggests that it may be difficult to satisfy the objective part of the test if religious requirements have been imposed inconsistently without explanation: at 52.
246 Alvin J Esau, 'Islands of Exclusivity: Religious Organizations and Employment Discrimination' (2000) 33(3) *University of British Columbia Law Review* 719, 750.

test also requires consideration of whether the employer cannot accommodate the employee's needs without undue hardship. An expert consulted by the ALRC suggested that few cases have been brought claiming bona fide occupational requirements because of challenges associated with establishing undue hardship.[247]

129. The bona fide occupational requirement exception could apply in the context of imposing a religious requirement for employment at religious educational institutions. Vickers has argued that for an employer, such as a religious educational institution, to show that being of a certain religion or belief is a bona fide occupational requirement, the employer would need to demonstrate that:

- 'there is a legitimate reason for imposing a religious requirement, in terms of the effect of religion on the ability of a person to perform the job';
- the requirement was 'imposed honestly and in good faith in the belief that it was necessary'; and
- it would impose undue hardship on the employer to be forced to employ those who do not meet the requirement.[248]

130. Courts have upheld the use of religious requirements for roles where religion is a defining aspect, as well as roles for which it is not (for example, support jobs such as administrators and ancillary staff).[249] In 2000, Alvin Esau argued that there remained

> a high degree of uncertainty as to the scope for religious institutions to hire only co-religionists or enforce religious lifestyle norms on some or all employees.[250]

131. Subsequent changes in the law may have reduced the level of uncertainty in relation to some issues.[251]

132. Policy from the Ontario Human Rights Commission suggests that such requirements must be tied to performing the job in question and not simply be inferred from the organisation's religious ethos.[252] Pearson has suggested that for religious educational institutions, whether or not a religious rule is a bona fide occupational requirement will involve consideration of, for example, the pervasive religiousness of the school, how strong the school's links are with the church, the religiousness of the post, whether the religious rule has been brought to the attention of teachers, and whether the rule has been applied consistently.[253]

133. Consistent with Pearson's view, Vickers has argued that if an employer has no link to a religious group, it will be very difficult to meet the bona fide occupational requirement standard (unless the job is clearly of a religious nature).[254] However, Vickers has implied that the standard will be easier to establish if the employer has a religious ethos, such as a religious organisation, or an organisation owned and run by a religious individual.[255]

134. In the respective opinions of Vickers and Pearson, it would be open to many religious educational institutions to rely on the bona fide occupational requirement exception to justify treating employees and prospective employees differently on the ground of religion, although it is not clear whether (and what kinds of) religious requirements could be applied to all staff.

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247 The expert consulted by the ALRC was Associate Professor Faisal Bhabha.
248 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 255–6.
249 Ibid 256–7; Esau (n 246) 720.
250 Esau (n 246) 720.
251 For example, Ontario's *Human Rights Code 1990* now includes various exceptions, including exceptions for religious institutions: *Human Rights Code 1990* (Ontario) ss 18–23.
252 Ontario Human Rights Commission (n 231) 51.
253 Pearson (n 61) 130–1.
254 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 256.
255 Ibid.

135. In addition, Vickers has argued that case law suggests that difference of treatment under this exception is permitted even if this results in discrimination on other grounds, so long as any religious requirement is reasonably necessary to the religious ethos of the organisation.[256]

136. For example, in *Caldwell v Stuart*,[257] a Catholic teacher's contract was not renewed by a Catholic school after she married a divorced man in a civil ceremony, contrary to the tenets of the Catholic church. The teacher argued that this was discrimination on the grounds of religion and marital status, but the school argued that she lacked a bona fide qualification for the job (that of being in good standing in the church) which was imposed in good faith in the belief it was necessary for upholding the special nature of the school in which teachers led students by example. Although the school did hire non-Catholic teachers, these teachers were expected to uphold the tenets of their own religions.

137. While the court acknowledged the case involved conflicting rights, it upheld the faith requirement for Catholic teachers as a bona fide occupational requirement, given the purpose of the school was to impart a Catholic way of life to its students and the religious aspect of the school lay 'at its very heart and colour[ed] all its activities and programs'.[258] The court also held that the school had a constitutional right to determine who to employ.[259] The constitutionally protected rights of denominational schools are discussed further below.[260]

138. Similarly, in *Garrod v Rhema Christian School*,[261] a teacher at a Christian school was dismissed for having an extra-marital affair, against the tenets of the religious group. In that case, the adjudicator held that the requirement not to be in an extra-marital affair was a reasonable bona fide occupational requirement because it was rationally connected to the duties of teachers as role models.[262] Vickers has stated that the Board of Inquiry

> viewed the existence of a genuine occupational qualification as a 'tie-breaker', allowing the religious rights of the employer to require its staff to lead exemplary Christian lives to trump the rights of the employee not to be discriminated against on grounds of marital status.[263]

139. Courts have stressed that religious requirements must be necessary for the particular job and, as such, courts must consider the actual facts in the case (such as whether the tasks carried out by the employee are secular in nature or involve promoting or teaching religion).[264]

140. In British Columbia, few or no cases concerning employment at religious educational institutions have come before the Human Rights Tribunal in recent decades.[265] Associate Professor Hastie and Professor Young have suggested that this is because of the precedent set by *Caldwell v Stuart* which may be discouraging claimants from pursuing a claim of discrimination.[266]

Exceptions for special interest organisations

141. In British Columbia and Ontario, specific exceptions to the prohibition on discrimination in employment exist for religious organisations. British Columbia's *Human Rights Code 1996* includes a 'special interests' exception for any non-profit 'charitable, philanthropic, educational,

256 Ibid 259.
257 *Caldwell v Stuart* [1984] 2 SCR 603.
258 Ibid [34].
259 Ibid [40]. This case was decided before equality rights under the *Charter* came into effect. Consequently, courts may decide cases involving the intersection of religious freedom and the right to non-discrimination differently today.
260 See below at [148]–[152].
261 *Garrod v Rhema Christian School* (1991) 15 CHRR D/447.
262 Ibid [141].
263 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 257.
264 Ibid 257–9; Pearson (n 61) 136–7. See also *Parks v Christian Horizons* (1992) 16 CCHR D/171; *Ontario Human Rights Commission v Christian Horizons* [2010] ONSC 2105.
265 Hastie and Young (n 225).
266 Ibid.

fraternal, religious or social organisation or corporation' that has a 'primary purpose' of promoting the interests and welfare of an identifiable group or class of persons characterised by a common religion.[267] Such organisations do not contravene the prohibition on discrimination in employment if they preference members of the relevant identifiable group.[268]

142. A similar exception is found in the *Ontario Human Rights Code*, although it applies to all organisations (not just those that are non-profit). That exception applies if 'religious, philanthropic, educational, fraternal or social' institutions or organisations that are 'primarily engaged in serving the interests of persons identified by' their religion employ only, or give preference in employment to, persons similarly identified.[269] However, unlike the exception in British Columbia, in Ontario it must also be shown that the difference in treatment is 'a reasonable and bona fide qualification because of the nature of the employment'.[270] In effect, this is the bona fide occupational requirement test applied specifically in the context of religious organisations.

143. Receiving public funds or providing social services to the public does not preclude an organisation, such as a religious school, from qualifying as a religious organisation.[271] Furthermore, to qualify for the exception, organisations do not need to provide their services solely to members of the religious group.[272] Rather, in determining whether the organisation has a primary purpose of promoting or serving the interests of a religious group, a court considers how the organisation sees the activity and the activity's relation to the organisation's underlying purpose.[273]

144. Vickers has noted that the

> varied levels of protection available in different provinces for religious organisations illustrates that there is no uniform Canadian approach to the question of whether a religious group can impose religious requirements on staff.[274]

145. However, she has highlighted that

> it is of significance that where provinces do allow religious bodies to impose religious requirements on staff, they have not been struck down by the Supreme Court as incompatible with the Canada Charter [of Rights and Freedoms], regardless of whether they are limited to non-profit activity. This suggests that it is accepted under the Charter that exceptions of either type can be compatible with human rights norms.[275]

146. The special interest exceptions might arguably justify religious educational institutions giving preference to all employees on the basis of religion or conformance with religious lifestyle requirements. For example, it is arguable that at least some such institutions have the primary purpose of promoting or serving the interests of a religious group or religious educational group. In any event, a religious educational institution would need to demonstrate that the bona fide occupational requirement test is met (in Ontario), or that the institution is non-profit (in British Columbia).[276]

147. Some have suggested that, in relying on the special interest exception, organisations cannot discriminate on other grounds, unless those grounds are implicated by a religious doctrine or practice that characterises the group.[277] However, Esau has argued that unlike the bona fide

267 *Human Rights Code 1996* (British Columbia) s 41(1).
268 Ibid.
269 *Human Rights Code 1990* (Ontario) s 24(1)(a).
270 Ibid.
271 Ontario Human Rights Commission (n 231) 49.
272 Ibid 47.
273 Ibid 49.
274 Vickers, *Religious Freedom, Religious Discrimination and the Workplace* (n 37) 256.
275 Ibid. In addition, s 15(2) of the *Canadian Charter of Rights and Freedoms* expressly permits 'special measures' and 'affirmative action'.
276 In relation to British Columbia, see Esau (n 246) 765–8.
277 Ontario Human Rights Commission (n 231) 52; Esau (n 246) 766.

occupational requirement exception, which is often given a 'strict and limited application so as to advance the purposes of the legislation in upholding the equal dignity of individuals in society', the exception for religious organisations recognises

> the associational rights of groups to advance fundamentally important interests by being able to form special interest communities with integrity and autonomy. Thus, the exemption should not be applied narrowly as an exception to human rights, but as a kind of countervailing human right in itself, even though it may limit the rights of individuals.[278]

Exceptions for denominational schools

148. In addition to the exceptions for special interest organisations, an exception exists specifically for separate or denominational schools (and not other religious schools). This is due to specific aspects of Canadian constitutional law. For example, the *Ontario Human Rights Code* specifies that nothing in the Code shall be construed as adversely affecting any right or privilege in relation to separate schools enjoyed under the *Constitution Act 1867*.[279] The *Constitution Act 1867* provides that provinces have the power to make laws in relation to education.[280] However, it also preserves the rights and privileges of denominational schools that existed at Confederation, stipulating that laws made by the provinces in relation to education cannot prejudicially affect those rights or privileges.[281]

149. Courts have held that only those rights that go to the essential denominational nature of the school are protected.[282] This includes both the denominational aspects of education as well as non-denominational aspects necessary to deliver the denominational aspects.[283] Elichai Shaffir has suggested that the essential denominational nature of constitutionally protected Catholic schools comprises providing 'a Catholic environment in which children are taught to accept Catholic values and are encouraged to lead a lifestyle consistent with Catholic dogma'.[284]

150. Essentially, these provisions mean that government funded Catholic schools in Ontario do not violate the *Ontario Human Rights Code* when undertaking activities consistent with their historical rights (such as choosing teachers, admitting students, and teaching religious doctrine). As such, these schools may have the capacity to select, promote, and dismiss staff on otherwise prohibited grounds (including religion and grounds equivalent to those contained in the *Sex Discrimination Act*) if this is necessary to protect the denominational nature of the school.[285]

151. For example, in *Daly v Ontario*[286] the court held that at Confederation, religious schools in Ontario had an implicit ability to select, employ, and dismiss teachers based on their competence to teach religious education and their religious faith and, as such, this right was preserved under the Constitution. Similarly, in *Caldwell v Stuart*[287] the court accepted that the school had a 'right'

278 Esau (n 246) 768.

279 *Human Rights Code 1990* (Ontario) s 19(1). The rights of separate and denominational schools are also protected by the *Canadian Charter of Rights and Freedoms*: *Canadian Charter of Rights and Freedoms* s 29.

280 *Constitution Act 1867* (Can) s 93.

281 Ibid s 93(1).

282 In relation to the accommodation of lesbian, gay, bisexual, transgender, and queer ('LGBTQ') students in the publicly funded Catholic school system, see *Hall (Litigation Guardian of) v Powers* (2002) 213 DLR (4th) 308 (note this case is over 20 years old).

283 Elichai Shaffir, 'Dancing Like It's 1867: How Can Religious Intolerance Be Supreme Law in 2006?' (2006) 16 *Education and Law Journal* 1, 8. See also *OECTA v Ontario (AG)* [2001] 1 SCR 470 (2001) 1 SCR 470 [32]. The essential denominational nature of constitutionally protected Catholic schools may be different today. For example, legislation has been introduced in some provinces allowing the establishment of gay-straight alliances in Catholic schools: see below at [176]–[180]. However, such legislation has been the subject of a constitutional challenge and aspects have since been repealed: see below at [178]–[180].

284 Shaffir (n 283) 11.

285 Ontario Human Rights Commission (n 231) 52–3; Esau (n 246) 805–6.

286 *Daly v Ontario* (1999) 44 OR (3d) 349 [34]–[36].

287 *Caldwell v Stuart* [1984] 2 SCR 603 [38].

to preserve the religious basis of the school by employing teachers who accepted and practiced the teachings of the church.[288]

152. Despite the broad rights and privileges that exist for denominational schools in Ontario, such schools can be subject to claims of discrimination in policies and conduct under the *Ontario Human Rights Code* or *Canadian Charter of Rights and Freedoms*,[289] and may be subject to the test for special interest organisations described above.[290] However, Canada's historical Constitutional context[291] means that it is primed to adopt an exception-type approach to anti-discrimination law[292] which may be difficult to change.[293] According to an expert consulted by the ALRC, there may be scope for debate around the margins of any school rights, such as whether denominational schools have the power to choose all staff or just teachers, on the basis of their adherence to particular religious teachings.[294]

153. Although the provisions of the *Constitution Act 1867* became applicable in British Columbia when it joined the Confederation, it did not establish a separate denominational school structure.

Students

154. The *Canadian Human Rights Act* prohibits discrimination on the grounds of, for example, religion, sex, pregnancy, childbirth, sexual orientation, gender identity or expression, marital status, and family status[295] in relation to denying access to or differentiating adversely in the provisions of goods, services, or facilities customarily available to the general public.[296] Similar protections are also found in the laws of British Columbia[297] and Ontario.[298] Education has been held to be a service that is 'customarily available to the public'.[299]

155. Exceptions to this prohibition differ across jurisdictions but, as with the exceptions that exist for staff, they can be divided into two general types of exception — a bona fide justification exception, and specific exceptions for religious (and other 'special interest') organisations.

Bona fide justification exception

156. At the national level, the *Canadian Human Rights Act* provides that denial of access to or adverse differentiation in the provision of goods, services, facilities, or accommodation (on any prohibited ground) is not a discriminatory practice if there is a bona fide justification for doing so.[300] For a practice to be a bona fide justification, it must be shown that accommodating the person's needs would impose undue hardship on the person who would have to accommodate those needs, considering health, safety, and cost.[301]

157. Similarly, in British Columbia, denial of access to, or discrimination in the provision of, goods, services, or facilities customarily available to the public (on any prohibited ground) is not

288 Both *Daly v Ontario* and *Caldwell v Stuart* were recently upheld by the Human Rights Tribunal of Ontario, which dismissed an application alleging discrimination against a prospective employee of a Catholic school on the basis that she was not a baptised or practicing Catholic: see *McNeely v Windsor-Essex Catholic District School Board* [2021] HRTO 1058.

289 Ontario Human Rights Commission (n 231) 54.

290 Esau (n 246) 808–11.

291 This includes the strong Constitutional privileges for Catholic schools and the Constitutional recognition and protection of the associational aspects of religious institutions: see *Loyola High School v Quebec AG* [2015] 1 SCR 613.

292 Where prohibitions on discrimination contain exceptions for religious educational institutions.

293 See, eg, the discussion of *Adler v Ontario* [1996] 2 SCR 609 in Benjamin Berger, 'Assessing Adler: The Weight of Constitutional History and the Future of Religious Freedom' (2018) 39(1) *National Journal of Constitutional Law* 35, 6–10.

294 Experts consulted by the ALRC include Professor Benjamin Berger.

295 *Canadian Human Rights Act 1985* s 3.

296 Ibid s 5.

297 *Human Rights Code 1996* (British Columbia) s 8.

298 *Human Rights Code 1990* (Ontario) s 1.

299 See, eg, *North Vancouver School District No 44 v Jubran* (2005) 211 BCAC 161 [59].

300 *Canadian Human Rights Act 1985* s 15(1)(g).

301 Ibid s 15(2).

prohibited if there is a bona fide and reasonable justification for such conduct.[302] An exception in Ontario similarly provides that the right to equal treatment is not infringed where a requirement, qualification, or factor is 'reasonable and bona fide in the circumstances' (which is not shown unless the needs of the group cannot be accommodated without undue hardship).[303] This exception can be applied to any requirement, qualification, or factor that results in the

> exclusion, restriction, or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member.[304]

158. Shaffir has suggested that religious educational institutions might be able to rely on the bona fide justification exception with regards to students.[305] However, he has argued that in doing so, discrimination based on sexual orientation should never be considered justifiable.[306] Whether or not the bona fide justification exception could be used by religious educational institutions to discriminate against students on the basis of grounds equivalent to those contained in the *Sex Discrimination Act* (or on the ground of religion) has not yet been judicially considered.

Exception for special interest organisations

159. In addition to the bona fide justification exception, Ontario law also includes specific exceptions for religious organisations. These are similar to the two exceptions discussed above in relation to staff — exceptions for special interest organisations, and exceptions for denominational schools. This section discusses the special interest organisations exception, while the next section discusses the exception for denominational schools.

160. The exception for special interest organisations in Ontario law provides that the right to equal treatment with respect to services and facilities is not infringed where membership or participation in a 'religious, philanthropic, educational, fraternal or social organisation or institution' that is 'primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination' is restricted to those people.[307] There is no requirement for the organisation to show that there is a bona fide justification for restricting services.

161. The exception does not require the organisation to provide its services only to members of the religious group.[308] Instead, whether the organisation is 'primarily engaged in serving the interests' of the religious group depends on how the organisation perceives the provision of services and how the provision of those services relates to the organisation's underlying purpose.[309]

162. As such, this exception arguably permits religious educational institutions in Ontario to restrict enrolment of students to those of the same religion as the institution, given it could be argued that such schools are primarily engaged in serving the interests of a particular religious group.

Exception for denominational schools

163. This exception is the same as that described above for staff.[310] Applying those provisions to students, if denominational schools possessed particular rights or privileges regarding the admission, treatment, or removal of students at the time of Confederation, such schools would still possess these rights and privileges today, provided they are necessary to uphold the essential denominational nature of the school.

302 *Human Rights Code 1996* (British Columbia) s 8(1).
303 *Human Rights Code 1990* (Ontario) ss 11(1)(a), 11(2).
304 Ibid s 11(1).
305 Shaffir (n 283) 18.
306 Ibid.
307 *Human Rights Code 1990* (Ontario) s 18.
308 Ontario Human Rights Commission (n 231) 50.
309 Ibid 49.
310 See above at [148]–[152].

164. For example, in *Hall v Powers* the court held that a Catholic public school did not have a right at the time of Confederation to exclude same-sex partners from school dances and, additionally, that controlling who attends school dances (which are not held on school grounds) was not a matter going to the essential nature of the school as Catholic.[311]

Recent legal developments

165. There have been several developments in Canadian law in recent years that have dealt with issues and fact scenarios relevant to this Inquiry. While those developments do not concern application of anti-discrimination law (and, as such, do not directly illustrate application of the anti-discrimination laws and exceptions discussed above), they do shed further light on how Canadian courts today might approach intersecting rights (including freedom of religion and freedom from discrimination) in the context of education now that the *Charter* has been introduced. These developments arose in the Trinity Western University ('TWU') cases as well as legislation and cases concerning gay-straight alliances.

The Trinity Western University cases

166. TWU, a private evangelical Christian university in British Columbia, sought to open a law school. To gain admission to the law school, students would have been required to sign a Community Covenant Agreement that required, amongst other things, abstinence from 'sexual intimacy that violates the sacredness of marriage between a man and a woman' both on and off campus. Breach of the agreement could have resulted in suspension or expulsion.

167. The law societies in Ontario (Law Society of Upper Canada) and British Columbia (Law Society of British Columbia) did not approve accreditation of the law school in light of the Agreement and its potential impact on lesbian, gay, bisexual, transgender, and queer ('LGBTQ') students. TWU sought judicial review of these administrative decisions on the basis that they violated religious rights protected by the *Charter*, and the disputes were ultimately appealed to the Supreme Court of Canada.[312]

168. A majority of the Supreme Court judges held that the law societies' administrative decisions did engage the *Charter* but that these decisions were nevertheless reasonable.[313] While the decisions did infringe religious freedom 'in a way that is more than trivial or insubstantial',[314] the law societies appropriately and proportionately balanced limitations on religious freedom with their statutory objectives.[315] This included considering the overarching objective of protecting the public interest in determining whether to accredit a law school.[316] The majority held that the law societies were entitled to conclude that equal access to the legal profession, diversity within the bar, and preventing harm to LGBTQ students were within the scope of this duty (that is, the law societies have an overarching interest in protecting equality and human rights).[317]

169. The majority reasoned that the law societies' decisions reasonably balanced the severity of the interference with religious freedom with benefits to the public interest, including preventing harm to LGBTQ law students.[318] Specifically, the decisions by the law societies 'did not limit religious freedom to a significant extent', given they only interfered with TWU's ability to operate a law school governed by a mandatory Agreement (as opposed to a voluntary agreement) — something which

311 *Hall (Litigation Guardian of) v Powers* (2002) 213 DLR (4th) 308 [32], [46].

312 *Trinity Western University v Law Society of Upper Canada* [2018] 2 SCR 453; *Law Society of British Columbia v Trinity Western University* [2018] 2 SCR 293. The British Columbia case is the leading decision, with the judges setting out summaries of their position in the Ontario case.

313 *Trinity Western University v Law Society of Upper Canada* [2018] 2 SCR 453 [3], [30]–[31].

314 Ibid [33].

315 Ibid [3].

316 Ibid [14].

317 Ibid [20]–[27].

318 Ibid [20], [38].

was ‘not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary’.[319] However, on the other hand, the decisions

> significantly advanced the statutory objectives [of the law societies] by ensuring equal access to and diversity in the legal profession and preventing the risk of significant harm to LGBTQ people.[320]

170. The majority stressed that religious freedom ‘can be limited where an individual’s beliefs or practices harm or interfere with the rights of others’ and that the decisions by the law societies prevented ‘*concrete*, not abstract, harms to LGBTQ people and to the public in general’.[321]

171. In contrast to the majority, concurring judge McLachlin CJ held that the impact of the law societies’ decisions on TWU was ‘not of minor significance’ as TWU would have to relinquish the mandatory Agreement — that it said is core to its religious beliefs — if it wanted to operate a law school.[322] However, McLachlin CJ also recognised that by allowing the Agreement to stand, the law societies would be condoning unequal treatment of LGBTQ people.[323] The Chief Justice noted that after much struggle the Law Society of Upper Canada

> concluded that the imperative of refusing to condone discrimination and unequal treatment on the basis of sexual orientation outweighed TWU’s claims to freedom of religion.[324]

172. Ultimately, McLachlin CJ concluded that this decision was reasonable.[325]

173. The other concurring judge, Rowe J, also concluded that the decisions were reasonable, but used different reasoning to arrive at this conclusion. Specifically, Rowe J opined that religious freedom is concerned with the voluntary choice of individual believers and aims to protect individuals from interference with their religious beliefs and practices.[326] As such, beliefs or practices that constrain the actions of non-believers (those who have voluntarily chosen not to believe) fall outside the scope of religious freedom under the *Charter*.[327] In this case, as TWU admitted students from all faiths (including non-believers), seeking to enforce the Agreement against all students was outside the scope of religious freedom.[328] Therefore, instead of reviewing the law societies’ decisions under the religious freedom framework, Rowe J applied the usual principles of judicial review to find that the decisions fell within the range of possible, acceptable outcomes and, as such, were reasonable.[329]

174. Two judges, Côté and Brown JJ, dissented, finding that the decisions by the law societies not to accredit the law school were made for an improper purpose and were therefore invalid.[330] They reasoned that the only proper purpose of an accreditation decision was to ensure an individual applicant was fit for licensing, with school accreditation used as a proxy for this purpose.[331] Acts and by-laws relevant to the law societies did not grant them the power to regulate law schools (including their admission policies). Accordingly, ensuring equal access to and diversity in the legal profession fell outside their power to ensure competence in the legal profession.[332]

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319 Ibid [38].
320 Ibid [39]. See also *Law Society of British Columbia v Trinity Western University* [2018] 2 SCR 293 [92].
321 *Trinity Western University v Law Society of Upper Canada* [2018] 2 SCR 453 [40]–[41].
322 *Law Society of British Columbia v Trinity Western University* [2018] 2 SCR 293 [145].
323 Ibid [146].
324 Ibid.
325 Ibid [148].
326 Ibid [213], [217], [219].
327 Ibid [239].
328 Ibid [240]–[242].
329 Ibid [257]–[258].
330 *Trinity Western University v Law Society of Upper Canada* [2018] 2 SCR 453 [58].
331 Ibid [58], [67].
332 Ibid [68], [76].

175. The dissenting judges also reasoned that the law societies' decisions interfered with 'the TWU community's expression of religious belief through the practice of creating and adhering to a biblically grounded covenant' and that this interference was not minor but rather disrupted the 'core character' of the community.[333] Furthermore, the judges held that accrediting the law school would not be inconsistent with the law societies' statutory objectives because in a liberal and pluralist society, the public interest is served (not undermined) by the accommodation of difference and religious freedom.[334] As such, 'only a decision to accredit TWU's proposed law school would reflect a proportionate balancing of *Charter* rights and the statutory objectives'.[335]

Gay-straight alliances

176. The second area in which Canadian law concerning the intersection of rights (including religious freedom and non-discrimination) in the context of education has developed recently involves gay-straight alliances. Gay-straight alliances are student-run clubs that provide a safe space for LGBTQ students to socialise and offer peer support. In the last decade or so, Canadian provinces (including Ontario) have legislated to require schools (including public Catholic and private schools) to support students who wish to establish gay-straight alliances.[336]

177. There has been controversy surrounding this legislation since its enactment. In Alberta, for example, legislation that established protections for gay-straight alliances in 2014[337] was criticised, on the one hand, for infringing on freedom of religion and parental rights and, on the other hand, for not going far enough to protect LGBTQ students.[338] In 2017, Alberta introduced further legislative protections for gay-straight alliances, including by requiring schools to comply 'immediately' with any requests from students to establish a gay-straight alliance, and by prohibiting schools from disclosing to parents that their child was involved in such clubs, without the child's consent.[339]

178. In 2018, a group of parents and faith-based schools filed a constitutional challenge regarding Alberta's 2014 and 2017 amendments, arguing that the amendments infringed religious freedom as well as parents' rights. They also sought an injunction to temporarily suspend operation of the legislation pending a decision about its constitutionality. However, the request for an injunction was dismissed by the Court of the Queen's Bench. The Court reasoned that the

> effect on LGBTQ+ students in granting an injunction, which would result in both the loss of supportive GSAs in their schools and send the message that their diverse identities are less worthy of protection, would be considerably more harmful than temporarily limiting a parents right to know and make decisions about their child's involvement in a GSA.[340]

179. This decision was affirmed by the Court of Appeal.[341]

180. In 2019, however, some of the 2017 amendments (including the secrecy provisions) were repealed by the Alberta government. Subsequently, the constitutional challenge was discontinued by the complainants,[342] so it is unclear whether the provisions did in fact infringe on constitutional protections for religious freedom and parents' rights.

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333 Ibid [80].
334 Ibid [57], [81].
335 Ibid [57].
336 See, eg, Accepting Schools Act, 2012, S.O. 2012, c. 5 - Bill 13. Bill 13 inserted s 303.1 into the *Education Act 1990* (Ontario).
337 See Bill 10, An Act to Amend the Alberta Bill of Rights to Protect Our Children, Third Session, 28th Legislature, 2014 (Alberta).
338 Jessica Murphy, 'Should These School Clubs Be Kept Secret from Parents?', *BBC News* (online, 28 April 2019) <www.bbc.com/news/world-us-canada-47901707>.
339 See Bill 24, An Act to Support Gay-Straight Alliances, Third Session, 29th Legislature, 2017 (Alberta). Bill 24 only permitted principals to disclose that a gay-straight alliance had been formed, and required any notifications in respect of such alliances to comply with legislation governing the disclosure of personal information.
340 *PT v Alberta* [2018] ABQB 496 [41].
341 *PT v Alberta* [2019] ABCA 158 [77].
342 Justice Centre for Constitutional Freedoms, 'Constitutional Challenge to Bill 24 Discontinued Following Repeal of School Act' <www.jccf.ca/constitutional-challenge-to-bill-24-discontinued-following-repeal-of-school-act/>.

Table 1: General Employment Exceptions

This Table sets out grounds on which occupational requirement exceptions apply to all bodies covered under the relevant anti-discrimination law in each jurisdiction. It also sets out whether, to the ALRC's knowledge, these exceptions have been applied in case law in relation to any ground other than religion in the context of religious educational institutions (childcare, schools, or tertiary education).

Jurisdiction	Grounds to which the exception applies	Exception	Applied to grounds other than religion in religious educational institution employment?
EU	All grounds	Genuine and determining occupational requirement + legitimate objective + proportionate	Not tested
England & Wales	All grounds	General occupational requirement + proportionate	Not tested
Ireland	All grounds except gender	Genuine and determining occupational requirement + legitimate objective + proportionate	Not tested
New Zealand	All grounds	Genuine occupational qualification	Not tested
Canada	All grounds	Bona fide occupational requirement + accommodating needs causes undue hardship	*See below under Province legislation*
Ontario	Sex, marital status	Reasonable and bona fide occupational qualification + accommodating needs causes undue hardship	Applied to allow discrimination on ground of marital status (*Garrod v Rhema Christian School* (1991))
British Colombia	All grounds	Bona fide occupational requirement	Applied to allow discrimination on ground of marital status (*Caldwell v Stuart* (1984))

Table 2: Exceptions for Staff

This Table graphically represents key exceptions to prohibited grounds of discrimination for religious educational institutions in relation to staff and prospective staff. The exceptions compared in this Table are those specific to religious educational institutions only (or, in the absence of a specific exception for religious educational institutions, applicable exceptions available to religious bodies or private schools). More limited exceptions, such as those in relation to the provision of accommodation, have not been included in this Table.

= Less restrictive exceptions
= More restrictive exceptions
= No exceptions
= No prohibition

The ALRC has determined whether to categorise particular exceptions as either 'less restrictive' or 'more restrictive' by reference to a range of factors including: whether the exception is limited to specific roles; when the exception applies (for example, at selection or otherwise); whether the exception is qualified in any way; and whether there are additional requirements (such as publication of a policy).

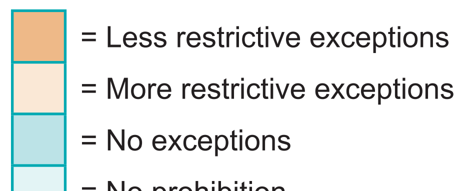
	Sex	Gender Identity	Marital Status	Pregnancy	Sexual Orientation	Religion
EU						
England & Wales						
Ireland						*
New Zealand						*
Canada (Federal)						
Ontario	#	#	#	#	#	#
British Colombia						

* *Less restrictive exceptions on the ground of religion apply to institutions that do not receive government funding.*

Specific Constitutional protection for Catholic schools.

Table 3: Exceptions for Students

This Table graphically represents key exceptions to prohibited grounds of discrimination for religious educational institutions in respect of students and prospective students. This Table includes exceptions specific to religious educational institutions only (or, in the absence of a specific exception for religious educational institutions, applicable exceptions available to religious bodies, or to private schools). Exceptions on the basis of sex for single-sex educational institutions have not been included in the comparison in this table, nor have specific exceptions in relation to the provision of accommodation.



The ALRC has determined whether to categorise particular exceptions as either 'less restrictive' or 'more restrictive' by reference to a range of factors including: whether the exception is limited to specific roles; when the exception applies (for example, at selection or otherwise); whether the exception is qualified in any way; and whether there are additional requirements (such as publication of a policy).

	Sex	Gender Identity	Marital Status	Pregnancy	Sexual Orientation	Religion
EU						
England & Wales		#	*		#	#
Ireland						
New Zealand						
Canada (Federal)						
Ontario						
British Colombia						

* *Marriage or civil partnership is a protected ground for higher education.*

 # There is a specific exception for provisions on harassment in relation to these grounds as they apply to students (but direct and indirect discrimination provisions still apply).