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Employment Rights of Teachers in Faith Schools: Maximising the Religious Rights of Schools and Staff

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Abstract: This paper considers the legacy of the historic contribution of faith communities to education for the employment rights of teachers in schools with a religious character. The contribution of faith communities to state education was originally reflected in a settlement by which staffing could reflect the religious foundations of the school. This paper traces the development of the legal framework covering employment by religious ethos employers, in particular the introduction of more generous protection for religious equality at work. As a result, the position of teachers in faith schools in England has diverged significantly from that of staff employed by other religious ethos organisations. The anomalous position of teachers in faith schools arises because the legal position is dependent on the historical foundations of the school rather than on the current religious practice of the school. This situation is at odds with the wider legal framework in which protection against religious discrimination and the protection for freedom of religion must be justified with reference to the genuine and current religious needs of the organisation. The paper concludes with proposals for reform that maximise the rights of both teachers and communities of faith, without unduly restricting the rights of either.

Keywords: faith schools; freedom of religion; equality; religious ethos employers; School Standards and Framework Act 1998



Citation: Vickers, Lucy. 2024. Employment Rights of Teachers in Faith Schools: Maximising the Religious Rights of Schools and Staff. *Religions* 15: 1277. <https://doi.org/10.3390/rel15101277>

Academic Editor: Stephen G. Parker

Received: 17 September 2024

Revised: 14 October 2024

Accepted: 15 October 2024

Published: 17 October 2024



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1. Introduction

This paper explores the uneasy relationship between religious freedom, as reflected in the involvement of religious organisations in education, and the protection against religious discrimination in employment in these organisations. In the process, this paper explores the legacy of the 1944 Education Act with regard to the impact on teachers in faith schools¹ in England.² This involves the consideration of the legal framework for protecting teachers against religious discrimination, established in 1944, and the way in which the legal framework has developed in other faith-based employment sectors.

The context is set through an exploration of why religion is protected in any workplace, educational or otherwise, before moving to consider the legal framework as it has applied to schools from 1944 to the present. In 1944, the protection against religious discrimination provided to teachers was greater than that available to general employment, and the position of teachers in faith schools was no worse than that of the general population. Since 2003, however, the legal framework in England has changed, with the introduction of extensive protection against religious discrimination for employees in all sectors, including those employed by organisations with a religious ethos. The result has been that teachers in faith schools are currently in a substantially less favourable position in terms of religious equality compared to staff in other forms of religious employment.

This paper develops a critique of the current position. A level of differential treatment of staff in religiously affiliated employment is warranted, with the aim of reflecting the religious autonomy of the employing religious organisation and its interests in maintaining a community of faith. Nonetheless, the protection provided for teachers in faith schools bears a poor relationship with that aim, as its focus is more on the legacy of the 1944 Education Act governance structures than on the current needs of schools and staff.

2. The Role of Religion at Work

The need to protect religious freedom is well established in human rights law. It is underpinned by a foundational understanding that all people share an essential dignity, and are of equal moral worth (Dworkin 1977, 1985) such that they should be able to develop their own ideas of the good, including religious views. The right to freedom of religion and belief is protected both as an individual right and as a right that can be enjoyed in community with others.³ Human rights protection for religion includes respect for parents' religious and philosophical convictions in respect of education and teaching.⁴

Religious freedom rights include rights for religious organisations to enjoy religious autonomy and to be free to express their religion collectively, including by building communities of faith. This means the ability not just to worship together, but to participate together in activities beyond worship, including communal and economic activities (Evans 2001). This broad understanding of collective religious freedom as including the protection of communities of faith means that religion will play a role in some employment relationships (Vickers 2016).

This raises questions about the extent to which employment relationships between staff and religious employers should be governed by the general laws governing the employment relationship, in particular the rules which prohibit religious discrimination. Non-discrimination rules can create difficulty for religious employers who wish to limit employment to those who share their religion, and as a result, exceptions have been created to ensure religious employers have the ability to maintain their freedom to appoint in accordance with religious precepts. But religious employment includes a range of roles, from highly religious roles such as priests, rabbis, and imams,⁵ to more tangentially religious roles such as cleaners in a religious care home. The extent to which it may be reasonable to expect staff to share the faith of the employer will vary according to where on the spectrum the role sits (Vickers 2016; Fahlbeck 2004).

The case of education is something of a special case in this regard:⁶ it is clearly not as fundamentally religious as being a religious celebrant, but equally, the right to teach religion is closely tied to religious practice. Many religious individuals will understand work to be an outworking of faith (Fahlbeck 2004), and will understand the provision of education as a whole to be a fundamental aspect of building a community of faith (Esau 1993). Such a holistic approach to religion, work, and education means that they will view teaching all subjects, including science and PE, as a religious activity.⁷

Whilst the importance of freedom of religion has long been recognised, legal recognition of the workplace as a space in which human rights need to be protected is more recent. In 2013, the European Court of Human Rights recognised that freedom of religion applied at work,⁸ due to its role as a means of economic support,⁹ as well as because a religion-related dismissal could amount to an interference with the employee's own religious freedom.¹⁰ Freedom of religion and belief protects the religious as well as the non-religious, and it is clear that its protection applies at work as well as to life beyond (Vickers 2016).

Additional underpinning for the protection of religion at work is provided by viewing religion through an equality lens, reflecting the fundamental right to equal concern and respect. Religion and belief (or lack of it) forms a fundamental part of individual identity and as such should not be the cause of any advantage or disadvantage in access to social goods such as employment (Vickers 2015).

There is thus a dual basis for protecting employees' religion and belief at work. At the same time, religious rights are enjoyed by both sides of the employment relationship: religious employers have a right to manifest religion collectively, creating communities of faith through which to provide education for those of the same faith. Yet such practices may involve discriminating against those of different faiths or none. If these potentially conflicting interests are to be protected, it becomes the task of the law to create a framework through which an equilibrium can be found.

The terminology usually used for reconciling conflicting rights is that of balancing, with rights weighed against each other to decide which should prevail. However, while

widespread in human rights literature, this terminology is problematic, most obviously because it is metaphorical, indeterminate, and the elements being balanced are incommensurable (Rivers 2006). Moreover, the balancing metaphor has been criticised for creating a zero-sum logic where one side must lose if another is to gain (Bielefeldt 2020). Instead, the alternative language of maximising rights is used here, whereby, rather than aiming to meet in the middle, the aim is to preserve each of the rights to the maximum degree possible.

A focus on maximising rights is compatible with the legal frameworks protecting both equality and freedom of religion as the separate legal frameworks rely on the legal terminology of proportionality. Whilst clearly very closely aligned to the concept of balancing, the terminology of proportionality avoids the image of one side's gain being the other's loss: instead, it creates space for an understanding of the need for rights protection to be adequate and appropriate to the context.

The fact that freedom of religion and belief, along with non-discrimination on grounds of religion and belief, is protected in the working environment has huge significance for faith schools. It means that not only the religious organisation involved in the provision of education, but also the staff are protected in human rights terms. However, as is explored below, the legislation covering faith schools does not provide this maximal approach to rights protection; instead, priority is given, at times to the extent of an absolute priority, to the right to autonomy of the religious educational provider.

3. The Legal Framework for Protection of Teachers in Faith Schools Against Religious Discrimination

3.1. Development of the Legal Framework

As covered elsewhere in this collection (also Rivers 2010), the Education Act 1944 introduced significant reform of state education, in particular the extension of free secondary state education. In order to achieve this, a significant level of cooperation with faith schools was needed, given the extended history of the churches in providing education to the population (Rivers 2010; Petchey 2008). As was already the case in 1870 with the introduction of shared provision of compulsory state education between the state and religious bodies,¹¹ it remained simply unaffordable for the state to provide education for all without relying on existing church provision. This meant a continuation of the long-established relationship between education and religion, a relationship which was infused by a tension between religious bodies and the state as to the terms on which education would be provided. Through a number of reforms,¹² a settlement was reached in which the churches would continue to provide school premises, with the running costs met by the local education authority. In return for providing school premises, the churches retained control of religious instruction within maintained schools, as well as retaining control over staffing. In effect, a privileged relationship between the churches and the state already existed by 1944, based on pragmatism and financial need. Although the narrative around the relationship has shifted over time to one of providing greater choice for parents in the provision of educational opportunities for their children, at its base, the relationship between church and state as regards education has long been one of pragmatism and affordability rather than principle.

By the time of the 1944 Act, the state education landscape consisted of local education authority-provided schools and state-maintained church schools. The 1944 Act introduced the distinction between 'voluntary-aided' and 'voluntary-controlled' schools, in order to address the fact that some of the church schools were not in a strong financial position. In effect, the churches gave up some control of their schools in return for additional funding from the state (Petchey 2008). Voluntary-aided schools retained greater independence, with two thirds of the school governors being linked to the religious denomination, and with all staff able to be appointed or dismissed in accordance with adherence to the faith of the school. In return, the church would meet the maintenance costs of buildings (with state support eventually providing for up to 90% of the costs¹³). In contrast, voluntary-controlled schools were provided with full financial support from the local education

authority, but were given less independence: one third of school governors were from the religious foundation, and only one fifth of staff (along with the head teacher) could be expected to adhere to the faith of the relevant school. At this stage, the religious schools were overwhelmingly either Church of England or Catholic.¹⁴ Most Catholic schools opted for voluntary-aided status, having raised the considerable funds needed to provide for the increased maintenance costs required, while Church of England schools were split between voluntary-aided and voluntary-controlled, often based on the wealth of the parish in which the school was situated. The distinction between voluntary-aided and voluntary-controlled schools was thus based on the financial position of the local school and local church rather than the intensity of the religious practice of the school.

The differences between the different types of school had a significant effect on the employment conditions of teaching staff. Teachers in non-denominational schools were protected against discrimination on grounds of religion. However, all teachers in voluntary-aided schools and up to a fifth ('reserved teachers') in voluntary-controlled schools were not so protected. They could be refused a job, deprived of promotion, or paid less on religious grounds.¹⁵

Given that at the time there was no right to non-discrimination on grounds of religion the Education Act 1944 effectively created greater protection against religious discrimination for many teachers compared to employees more generally. Whilst funding the staffing in church schools privileged Christianity in the maintained education sector,¹⁶ this privilege was thus tempered by the provision on non-discrimination rights for many teaching staff. However, reserved teachers in voluntary-controlled schools and all teachers in voluntary-aided schools remained unprotected against discrimination on grounds of religion. In effect, the Churches preserved their position when it came to faith schools, and retained the ability to impose religious restrictions in terms of their staffing.

The position was next considered in legislation in 1998 with the introduction of the School Standards and Framework Act, the provisions which apply today.

School Standards and Framework Act 1998

Under the School Standards and Framework Act 1998 (SSFA) the position of the Education Act 1944 was continued. In religious voluntary-controlled or foundation schools, religion can be taken into account in appointing the head teacher, and regard may be had to his or her 'ability and fitness to preserve and develop the religious character of the school'.¹⁷ In addition, the school can 'reserve' up to a fifth of its teaching staff who can be 'selected for their fitness and competence' to give religious education in accordance with the tenets of the faith of the school.¹⁸ A breach of any religious requirements can give grounds for dismissal. The SSFA protects other (non-reserved) teachers and support staff from discrimination on grounds of religious opinion, failure to attend religious worship, or refusal to give religious education at the school.

The SSFA goes further in the case of teaching staff in voluntary-aided schools and some faith-based academies.¹⁹ Not only can schools in this category take account of religion in deciding who to employ, but their consideration of religious practice in deciding on promotion, remuneration, dismissal, and other staffing decisions applies to all staff. Further, the freedom to take account of any conduct which is 'incompatible with the precepts, or with the upholding of the tenets of the religion' in deciding to terminate employment applies to all staff.²⁰

Schools outside the maintained sector, independent and private schools, are governed by special provisions which give them similar powers to discriminate on grounds of religion in order to preserve the religious ethos as are given to voluntary-aided religious schools.²¹

It should be noted that these provisions allow only for discrimination on grounds of religion and belief against (some) staff in faith schools. Discrimination on other grounds, such as race, age, disability, sex, and sexual orientation, remains unlawful. For example, in *O'Neill v Governors of St Thomas More RCVA Upper School*²², a teacher in a Catholic school became pregnant and was dismissed when it became known that the father of the child

was a priest. Her dismissal was found to be discriminatory on grounds of sex because it was related to pregnancy.²³

While the legal position regarding religious discrimination against teachers in faith schools has not varied since the SSFA, which effectively confirmed the position in the 1944 Education Act, the education landscape has changed considerably in recent years. Since 1998, there has been an increase in the number of faith schools which are not Christian (Vickers 2009), as well as the creation of ‘free’ schools with a religious character,²⁴ and a significant level of involvement of faith-based organisations in the sponsorship of academy schools.²⁵ This means that the number of faith schools remains high.

Moreover, the level of religiosity of faith schools varies hugely. Some schools will have been designated a faith school due to historical funding arrangements but will not be especially religious in their day-to-day practice. Others are infused with a Christian ethos, with an explicitly evangelical agenda, sometimes sponsored by evangelical Christian funders.²⁶ The religiosity of the school on a practical day-to-day level can depend on the catchment area, the decision of the governing body, the availability of academy chain sponsors, and the history and custom of the school and its linked parish. Faith schools can be multicultural with minority religious dress codes and the accommodation of different religious holidays; faith schools can also have a strong Christian ethos, with Christian prayers said every day and religious symbols displayed prominently in school.²⁷

The difference between schools is not determined by their status as voluntary-controlled or voluntary-aided schools.²⁸ Yet the legal regulation of faith schools, and therefore the availability of protection against religious discrimination for its staff, depends on the governance structure of the school, which in turn is based on a historical settlement, rather than reflecting the lived reality of the religious character of the school. This contrasts substantially with the position in the general law on religious discrimination in employment, discussed below.

In effect then, the position of teachers in faith schools remains unchanged since 1944,²⁹ despite considerable changes in the educational landscape and the religious makeup of the population (The Policy Institute, King’s College London 2023). Meanwhile, the wider legal framework has also changed entirely over this period, with the introduction in 2003 of comprehensive protection against religious discrimination (since incorporated into the Equality Act 2010), including in employment by religious organisations. Since 2003, then, the position of teachers in faith schools has moved from being the same as that of the rest of the population, to having considerably greater vulnerability to religious discrimination.

3.2. *The General Legal Framework in England Protecting Against Religious Discrimination at Work*

3.2.1. Protection in English Law

Protection against religious discrimination in England is provided by the Equality Act 2010. This prohibits direct and indirect discrimination on grounds of religion and belief. The provisions do not apply to faith schools, which continue to be governed by the SSFA.³⁰ However, all other employers, including those with a religious ethos, are governed by provisions which prohibit the use of religion or belief, or lack thereof, in employment decisions. It is thus discriminatory under the Equality Act 2010 to refuse someone a job offer on the basis of their religion, or to refuse promotion, or to dismiss for a religion related reason.³¹ In order to protect the religious freedom of religious employers, an exception exists where religious requirements are an essential and defining aspect of the job.³² For example, it is clearly an essential and defining aspect of the role for a priest in a Roman Catholic church to be Catholic, and for an Imam to be Muslim. Similar exceptions apply to other characteristics protected by the Equality Act, such that it could be lawful for a theatre to employ female actors for female roles as the sex of the employee is a defining aspect of the job.

An additional exception is provided by the Equality Act for occupational requirements imposed by organisations with an ethos based on religion or belief, in recognition of the

fact that such organisations themselves enjoy a right to freedom of religion and belief. As a result, religious employers can impose religious requirements on staff, even if their jobs are not inherently religious in nature, such as doctors in a religious hospital where the job is not, of itself, religious but where the employer may want the staff to reflect its ethos.³³

This additional exception for religious ethos employers recognises their religious autonomy, allowing space for the creation of communities of faith. Yet the result is to limit the protection available to staff who do not share the faith. In order to ensure that those of any faith or none do not have their employment opportunities narrowed unacceptably, this exception has been carefully interpreted, requiring that there be proportionality between the competing interests in play.

For example, the Leprosy Mission, a small charity, was allowed to maintain its Christian ethos by only employing Christians even in secular roles. The charity refused to employ a Muslim finance administrator on the basis that being a Christian was an occupational requirement of the role. Although the work was not inherently religious in nature, the Employment Tribunal found the religious requirements to be proportionate in particular because Christian beliefs permeated the organisation, with prayers at the start of each day.³⁴ In contrast, where a care home only offered new roles to Christians and failed to promote its existing non-Christian employees, it was found to have discriminated on grounds of religion as it was unable to provide evidence to show that the ethos of the workplace was actually religious on a day-to-day basis.³⁵ The imposition of a religious requirement must thus be genuinely necessary for the purposes of preserving the religious ethos of the organisation.

At times, religious requirements, which may satisfy the exception for genuine occupational requirements, will come into conflict with other rights created under the Equality Act 2010. However, 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.³⁶

Further guidance on the scope of the genuine occupational requirement exception as it applies to religious ethos organisations in England can be found in EU law. This is because UK equality law is derived from the EU Employment Equality Directive 2000/78. Since Brexit, EU law no longer applies in the UK, but EU case law from before 2020 is binding, and later case law can provide guidance on how the law in the UK should be understood.

3.2.2. Guidance from Case Law of the Court of Justice of the European Union (CJEU)

The CJEU has considered two cases on the extent to which religious employers can rely on the occupational requirement exception contained in the EU Directive, *Egenberger*, and *IR v JQ*, both decided prior to 2020, and binding on English courts in their interpretation of the Equality Act 2010.³⁷

The cases involved the German equality law which allowed religious employers to determine for themselves whether a religious requirement was needed. The CJEU found that this right to self-determine the need for a religious requirement to be imposed on staff breached the terms of the Directive. By not providing for an external assessment of the proportionality of a religious job requirement, the German law did not provide adequate protection for the religious equality of staff or job applicants. The Court made it very clear that employers do not have free rein in imposing religious requirements.

In *IR*, the Court provided some further guidance on the factors that should be taken into account in undertaking a proportionality review of the legitimacy of the religious requirement imposed on staff. The case involved a Roman Catholic doctor who worked as Head of the Internal Medicine Department of a Roman Catholic hospital. He was dismissed after he remarried without complying with the teaching of the Catholic Church. The CJEU suggested that the employer's requirement that IR be in good standing with the Catholic Church was unlikely to be proportionate on the facts before it: the requirement related to notions of marriage, which did not seem to be a genuine requirement for his medical job;³⁸ moreover, the hospital employed other doctors as heads of department who were not Catholic, demonstrating that in practical terms the job did not need to be performed by

someone showing loyalty to the employer's religious ethos.³⁹ Thus, the CJEU suggested that the requirement was not proportionate on the particular facts.

The decisions in these two cases are highly significant to the correct understanding of the scope of the general protection for religious ethos organisations and their ability to staff their organisations in a way that allows for the building of a community of faith. In reaching its decision, the CJEU acknowledged the importance of religious freedom and autonomy on the part of the employing organisation, but it was firm that this had to be held in balance with the principle of equality.⁴⁰ Such was its commitment to the principle of proportionality in assessing whether an employer can require its staff to share its religious ethos, that the Court went as far as to read into the Directive a requirement of proportionality which is not actually in the text. In doing so, it challenged the established practice of church autonomy in Germany (van den Brink 2020) in order to protect the interests of employees against religious discrimination.

3.3. Comparing the SSFA and the Provisions of the Equality Act 2010

There is thus a significant difference between the position of teachers in faith schools under the SSFA and that of staff in other religious ethos employment, governed by the terms of the Equality Act, as interpreted in accordance with EU case law.

The difference can be illustrated by considering the case of *Glasgow City Council v McNab*.⁴¹ The case arose in Scotland, where the SSFA does not apply. The case illustrates the strict approach of the courts to the application of the general occupational requirement provisions under the Equality Act and serves as an illustration of how they might apply in the education context absent the SSFA. The case involved an atheist teacher in a Catholic school who applied, unsuccessfully, for a post as a pastoral care teacher. The legal question was essentially whether the post of pastoral care teacher was covered by the standard occupational requirement exception in what is now the Equality Act 2010.⁴² The Tribunal found that it was not essential to the post that the holder be Catholic, as the responsibilities of the job involved giving advice on a large number of issues, only a few of which required knowledge of Catholic doctrine, and those could be assigned to a different teacher. Thus, being a Catholic was not a "genuine and determining" requirement of the role.

The case shows that absent the SSFA, it would be difficult to justify a requirement to be of a particular religion or belief, even for a faith school, as it is rare (apart from where religious instruction is given) for religion to be a defining element of the role. However, the standard rules do allow for such requirements where it is proportionate to impose them, and it may be possible to justify such a requirement in the same types of circumstance as was discussed above in relation to religious employers such as the small religious charity the Leprosy Mission.⁴³ Thus, where the school is, in practice, permeated by a religious ethos, and alternative employment options for teachers are not significantly impacted, it may be that restricting teaching posts to those who share the religion of the school could be justified. However, in contrast, where the religious organisation is the employer for a large proportion of schools in a locality or in a small village school,⁴⁴ the restriction of employment opportunities for teachers in the area may be sufficiently impacted to militate against a finding of proportionality. Similarly, where a school is religious in form, but not in practice, restrictions on the religious freedom of staff may not be proportionate.

Outside of the school context then, the legal framework demonstrates a commitment to protecting equality interests alongside the interests in religious freedom and autonomy. The legal method to resolve this tension, or to maximise these rights, is to seek proportionality between the need to uphold religious autonomy and the need to protect equality. Religious employers have the freedom to use employment practices to create communities of faith through the creation of religiously cohesive workplaces, as long as this does not disproportionately disadvantage others on grounds of religion. Such practices are likely to be proportionate where the workplace is permeated by religion, such that it can genuinely be said to be a religious community. This is most likely where staff engage in religious practices at work, where the whole staff share the religion, and where this expectation is

made clear to staff at the time of employment. Where the organisation is small, and so the employment opportunities of those not sharing the religion are not unduly impacted, again, the religious requirement is more likely to be proportionate. Equally, where the employer has a religious ethos, but religion does not permeate the day-to-day culture of the organisation, religious requirements will be harder to justify.

This approach, based on proportionality, means that the importance of protecting religion and belief in the workplace is acknowledged, whilst simultaneously protecting the needs of employees to have fair and equal access to work. The approach stands in fairly stark contrast to the position as it applies to teachers in faith schools in England where the autonomy of the employing organisation is given precedence over the equality rights of staff.

4. The Way Forward: Scrutiny Rather than Status

Between 1944 and 2003, the lack of protection for teachers in faith schools against religious discrimination matched that of most other employees. However, since 2003, the rights of staff in other forms of employment have improved, including staff in religious employment: teachers in faith schools have been left behind. Moreover, since 2003 and the implementation of the EU Equality Directive into English law, there is a very strong argument that the exception in the Equality Act for faith schools provided by the SSFA puts the UK in breach of EU law. This remains the case post Brexit.⁴⁵

The difference in the treatment of teachers in faith schools can, from one perspective, be said to reflect the particular needs of religious groups for autonomy, in particular the need for freedom to create communities of faith as the best means of maximising religious freedom. This is all the more important in the context of education, where the religious needs of staff and students are arguably best served by working and learning in a shared religious community. From this viewpoint, the legal position in England complies with the EU law requirement of proportionality because it will always be proportionate to balance the interests of equality and religious freedom in the way that is carried out in the SSFA, namely by providing additional religious autonomy to faith schools on the basis of their religious foundation. The argument is that the privileging of religious freedom over non-discrimination is inherently proportionate.

However, the alternative view, taken here, is that proportionality between religious freedom and non-discrimination should not be pre-judged but should instead be open for scrutiny in each case, by allowing space for review within the legal framework. There are three underpinning reasons for this position: the underpinning principle, the role and scope of the church as a provider of education, and the history of faith school designation.

4.1. Interacting Rights

The first is a matter of principle. Freedom of religion is a fundamental human right, but so too is equality. It is not appropriate for a legal system that respects both of these fundamental rights to privilege one above the other, without scope for an assessment on how those rights should interact. As recognised by the EU case law, it is essential that some space for legal review of the interaction of those rights should be provided. As explored above, the aim of the law should be to find ways to maximise rights, creating space for both to be protected to the greatest extent.

The mechanism for this review is the use of proportionality. This mechanism is used in the general law which applies to all employment, including employment by religious organisations in contexts such as care homes and hospitals. There is no principled reason for the mechanism to be disappplied in faith schools.⁴⁶

4.2. The Role and Scope of Church as a Provider of Education

Second, not only has the wider legal framework changed completely since 1944, but the understanding of churches' role as a provider of education has also undergone significant change. The settlement between the state and the churches in 1944 reflected the

fact that bringing church schools within the state sector was a necessity and one which required compromise.

However, the resulting privileged role of the churches in education cannot be seen merely as historical. The privilege has continued despite changes in the wider law, and both Government and faith groups have actively pursued the increased involvement of faith groups with the provision of state education. After 1997, the state changed its policy with regard to the role of faith schooling, largely driven by the increase in religious diversity in England, as well as reflecting a decline in the membership of churches. This created pressure to revisit the preferential treatment of Christian denominations in terms of education. The state was faced with a choice: to scale back the faith element in schools which are maintained by the state, or to allow other faith groups to provide state-maintained education. The government chose the latter option, although the number of faith schools which are not Christian remains very small ([House of Commons Library 2024](#)).⁴⁷

The removal of the structural privilege of the Christian church in terms of faith schooling meant that the Church of England in particular was freed from the obligation to check its privilege. As the largest provider of faith schooling, this shift has significance for the case for allowing greater scrutiny of the proportionality of imposing faith requirements on staff generally. Since 1997, the policy of the Church of England, as evidenced in its policy documents, suggests a move from viewing the provision of education as part of the Church's service to the community, towards viewing it as an opportunity for Christian witness and evangelism, this latter mission helping to address the reduction in church membership. The Church of England's 2001 document *The Way Ahead* makes this explicit: "The Church has a major problem in attracting young people to its services as a means of discharging its mission. . . This bears directly on the future of the Church. . . In contrast, the Church has some 900,000 young people attending its schools. . . through the children attending its schools, the Church has an opportunity to reach out to parents".⁴⁸

Whilst more recent policy documents are less explicit about the opportunities for evangelism, the vision remains intensely religious in nature. The current version reads 'Our vision for education is deeply Christian, with Jesus' promise of 'life in all its fullness' at its heart'.⁴⁹ This stands in contrast to the vision in earlier years when the emphasis was on the Church's mission of service to the wider community.⁵⁰

Alongside this development of a more evangelising approach to faith schools from the churches has been an expansion in the provision of faith schools, in particular via the creation of 'free' schools and through the academisation programme. There has been a significant level of involvement of faith-based organisations in the sponsorship of academy schools.⁵¹ The scope of church involvement in education thus remains considerable. In terms of current provision, approximately 1 million children attend Church of England schools. A quarter of all primary schools are Church of England, and the Church of England is the biggest provider of academies in England. There are 1540 Church of England academies with 280 Multi-Academy Trusts linked to the Church of England. In addition, over 500 independent schools have a Church of England ethos.⁵² In addition, Catholic schools comprise 10% of the national total of state-funded schools with over 800,000 pupils educated in Catholic schools.⁵³

The size of the faith school sector is sufficient to create disadvantage in access to employment opportunities for staff, another factor in assessing what is proportionate when it comes to assessing the rights of faith schools vis à vis equality for staff. Moreover, the freedom of free schools from traditional controls over curriculum and local authority regulation has led to a number of schools with a very explicit and strong religious ethos. The close involvement of religious organisations in the provision of state education not only remains firmly embedded in the current education environment, but also the levels of religiosity have increased in some cases.

Thus, the existence of faith schools can no longer be viewed merely as the continuation of a historic compromise reached between religion and the state at a time of financial necessity. Instead, the extension of faith schooling to other faiths has coincided with a move

by faith groups to use education provision as a means to access sections of the community who may not share the faith. Thus, it can no longer be assumed that the provision of faith schooling is a means to maintain an existing community of faith; in some cases, it is instead an opportunity for evangelism.

This changed context provides additional reason to allow for proportionality to be assessed rather than assumed in relation to the employment practices of faith schools.

4.3. Faith School Designation

Third, even accepting that it can be appropriate for some faith schools to be able to discriminate on grounds of religion in order to maintain a community of faith, this decision should be based on the context of school rather than on a legal designation which is based on the historical settlement which itself was based more on finances than on the religiosity of the school. The religious intensity of schools varies, and this variation has little or no link to the legal governance structure on which the legal rights of staff depend.

As has been said, the general law that applies to general religious employment allows, as proportionate, religious requirements to be imposed where the religious ethos permeates the life of the organisation. In contrast, the SSFA allows religious requirements to be imposed based on a legal structure which may bear no relation to the day-to-day practices of the school. The proportionality requirement in the general law enables the court to consider not just the religious context but also wider reasons for protecting both the religious rights of the school community, and the religious discrimination rights of teachers. Under the current legal framework of the SSFA, any such assessment is removed; the religious rights of the teacher are determined by the governance structure of the school, rather than the rights of the teacher in balance with the religious rights of the religious community.

5. Conclusions

In terms of the legal framework governing the employment of teachers in faith schools, the 1944 Education Act introduced little change, and little has changed since. What has changed significantly is the context in which these rules operate, not least the introduction of a legal framework which provides significantly greater rights to staff employed by religious organisations in other sectors. The result is a legal framework governing teachers in faith schools which is clearly at odds with the general legal framework which places greater emphasis on the rights of staff when seeking to reconcile their needs with the autonomy rights of religious organisations.

Moreover, since 1944, there has been a decline in the level of religious practice in many areas of society. In this changed context, the idea that discrimination against teaching staff is needed to reflect the religious sensitivities of a religious community clearly does not apply. Instead, the position of teachers in many faith schools in England are more akin to the doctors in church hospitals in Germany: workers who are employed in a context which is suffused with historical connections to the religion, but who are not, in their work and on a day-to-day basis, participating in a community of faith. In such a context, it is hard to justify religious discrimination against staff, and even harder to justify a blanket rule that allows for discrimination without any need for a proportionality review.

Thus, the legacy of the 1944 Education Act is not a very happy one in terms of the employment rights of teachers. This is especially the case in light of the mismatch between the current legal framework and the underpinning rationale for protecting religion in the workplace, set out above. The settlement reached as regards general employment involves a careful consideration of the rights of both the religious community and of individuals. The SSFA and the 1944 Education Act imposed on this delicate balancing exercise a fixed answer, based on a historical settlement which was largely based on the finances available to individual parishes at least 80 years ago. This is then imposed in a very different religious environment, in terms of a much wider diversity of religious belief in the community, and the broader decline in religious observance.

There are two possible remedies, which are both very simple. The first would be to repeal the relevant provisions of the SSFA, and to allow faith schools to be governed by the general provisions of the Equality Act 2010. These provisions operate, without complaint by the churches, to other forms of employment with a faith connection such as care homes and hospices, as well as religious bookshops and cafes. Indeed, the Church of England guidance notes and templates for teaching contracts makes clear that it is optional and at the discretion of the governing body whether the school uses the freedoms provided under the SSFA.⁵⁴ Alternatively, the SSFA could be amended to introduce the concept of proportionality.

These options have been suggested by the EHRC ([Equality and Human Rights Commission \(UK\) 2016](#)). They leave space for schools which cater for minority religious communities to require staff to share the faith of the community, whilst avoiding the disadvantages that can arise when teachers who are not Christian can potentially be denied jobs or promotion⁵⁵ in up to a third of state schools.

Allowing a framework for a proportionality review of the imposition of religious requirements on staff would create a mechanism to achieve maximal protection for the equality rights of staff and the autonomy rights of religious organisations, and would bring the legal position of teachers in faith schools in line with both the spirit and the letter of the general law on the protection of religion and belief in employment.

Funding: This research received no external funding.

Institutional Review Board Statement: Not applicable.

Informed Consent Statement: Not applicable.

Data Availability Statement: The original contributions presented in the study are included in the article, further inquiries can be directed to the corresponding author.

Conflicts of Interest: The author declares no conflicts of interest.

Notes

- ¹ The term faith school is used here as it is in common use. The School Standards and Framework Act terminology is *schools with a religious character*.
- ² Different rules operate in Scotland, Wales, and Northern Ireland. For example, the Fair Employment (School Teachers) Act (Northern Ireland) 2022 removes the exception for school teachers from the Fair Employment and Treatment (Northern Ireland) Order 1998.
- ³ Article 9 ECHR provides: 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.
- ⁴ Article 2 of the First Protocol ECHR.
- ⁵ The employment status of clergy for the purposes of employment law is debated, but the non-discrimination provisions of the Equality Act 2010 apply.
- ⁶ The importance of education to religions in England is shown through the long history of schools' provision by religious organisations. See discussion in Section 3.1, and [Rivers \(2010\)](#) chapter 8.
- ⁷ See also Cooling, Green and Morris, Christian Faith in English Church Schools ([Cooling et al. 2016](#), Peter Lang).
- ⁸ *Eweida and Others v. UK* Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013. Early cases denied that the right to freedom of religion operated in the workplace. *Ahmad v. UK* Application No. 8160/78, 12 March 1981; *Stedman v. UK* Application No. 29107/95, 9 April 1997.
- ⁹ *Vogt v. Germany*, Application No. 17851/91, 2 September 1996.
- ¹⁰ *Saniewski v. Poland* Application No. 40319/98, 26 June 2001; *Pitkevich v. Russia* Application No. 47936/99, 8 February 2001.
- ¹¹ Elementary Education Act 1870.
- ¹² Education Act 1902.

Evidence suggests that not all voluntary-aided schools contribute 10% of capital costs—see <https://www.independent.co.uk/news/education/education-news/faith-schools-funding-money-religion-voluntary-aided-accord-coalition-a9192296.html> (accessed on 15 October 2024).

A small number of Jewish schools were also state-funded.

Section 30 Education Act 1944.

Although Jewish schools are also funded, more than 99% of state-funded schools are Christian, meaning the privilege is overwhelming enjoyed by Christianity.

S 60 SSFA 1998, as amended by s 37 of the Education and Inspections Act 2006.

S 58 SSFA 1998. After amendment by s 37 of the Education and Inspections Act 2006, if the head teacher is appointed to teach religious education, the head teacher counts as a reserved teacher so that the extra religious requirements can be imposed on the head teacher.

Governed by similar rules to those governing voluntary-aided faith schools, s 62 Education Act 2011.

S60(5)(b) School Standards and Framework Act 1998.

Independent Schools (Employment of Teachers in Schools with a Religious Character) Regulations 2003 SI 2003/2037 inserts new ss 124A and 124B into the SSFA 1998.

[1996] IRLR 372.

See also *St Matthias Church of England School v Crizzle* [1992] UKEAT 409_90_0712.

<https://www.guardian.co.uk/education/2012/jul/13/third-new-free-schools-religious>, accessed on 16 October 2024. Examples of religious sponsors include the Emmanuel Schools Trust; Emmanuel Schools Foundation; Oasis Community Learning; and United Learning.

The Church of England is the biggest sponsor of academy schools under the original academy programme [https://www.churchofengland.org/education/national-society/academies-\(1\).aspx](https://www.churchofengland.org/education/national-society/academies-(1).aspx) (accessed on 16 October 2024).

See <https://humanism.org.uk/2012/09/12/news-1111/> (accessed on 16 October 2024).

That the day-to-day work of church schools varies in the extent to which it is distinctively Christian is recognised in the call for a set of common requirements in *The Church School of the Future Review 2012 The Church of England and the National Society*.

For example, contrast the webpages of <http://www.cliffe.n-yorks.sch.uk/web/> (accessed on 15 October 2024) and <http://sutton-in-cravencofe.n-yorks.sch.uk/> (accessed on 15 October 2024), both voluntary-controlled schools.

Apart from changes introduced to reflect the different governance and funding structures introduced such as free schools and academies.

Equality Act Schedule 22 para 4.

Equality Act 2010 s 13.

Equality Act 2010 Schedule 9 (1).

Equality Act 2010 Schedule 9(3).

Muhammed v The Leprosy Mission International ET/2303459/09.

Sheridan v Prospects for People with Learning Disabilities ET Case no: 2901366/06.

In the case of employment as a religious leader such as a priest, a requirement to comply with church teaching on sex or sexual orientation is subject to a separate exemption. Equality Act 2010 Schedule 9(2).

Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V. C-414/16; IR v. JQ, C-68/17.

IR v. JQ, para. 58.

Ibid., para. 59.

IR, para. 50–51.

UKEAT/0037/06.

The case was heard under the Employment Equality (Religion and Belief) Regulations 2003, the precursor to the Equality Act 2010.

ibid note 34.

A proportion of 55% of state funded rural schools are faith schools <https://www.gov.uk/government/publications/rural-primary-schools-designation> (accessed on 16 October 2024).

Post Brexit, national judges still have the duty to interpret national law in accordance with the Directive and its interpretation given by the CJEU, because the Equality Act is EU-derived law which was introduced before the UK's exit from the EU.

This is even more the case when one considers that faith schools are publicly funded. See *Vickers* (2009).

Church of England schools were the most common type among primary schools (26% of all primaries), with Roman Catholic schools the most common at secondary level (9%). Non-Christian faith schools remained very much in the minority (when combined, they comprised less than 1% of all state-funded mainstream schools) (<https://researchbriefings.files.parliament.uk/documents/SN06972/SN06972.pdf> accessed on 12 August 2024).

- 48 The Way Ahead, Church House Publishing, London, 2001, paras. 3.3–3.9.
- 49 <https://www.churchofengland.org/about/education-and-schools/vision-education> (accessed on 10 April 2024).
- 50 See *The Way Ahead* (2001) supplementary strategic document setting out strategy for 2007–11 cited in Vickers L, ‘Religion and belief discrimination and the employment of teachers in faith schools’ *Religion and Human Rights* 4 (2009) pp. 137–56.
- 51 <https://www.churchofengland.org/about/education-and-schools/church-schools-and-academies#na> (accessed on 10 April 2024).
- 52 See <https://www.churchofengland.org/about/education-and-schools/church-schools-and-academies> (accessed on 10 April 2024).
- 53 See <https://www.cescensus.org.uk/downloads/CensusDigestEngland2021.pdf> (accessed on 2 August 2024).
- 54 CEE0 Guidance on Model Template Employment Document—<https://www.churchofengland.org/about/education-and-schools/church-schools-and-academies/staff-contracts-schools-and-academies> (accessed on 16 October 2024).
- 55 While many faith schools do not exercise their rights to recruit only Anglicans or Catholics to teaching jobs, many do have such requirements for leadership positions in particular headships.

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