



## **Submission to the Equality Authority**

### **Proposed Amendment to Section 37 of the Employment Equality Acts 1998 – 2011**

**13 November 2013**

## 1. Background

The Irish Council for Civil Liberties (ICCL) is Ireland's leading independent human rights watchdog, which monitors, educates and campaigns in order to secure full enjoyment of human rights for everyone. Founded in 1976 by Mary Robinson and others, the ICCL has played a leading role in some of the most successful human rights campaigns in Ireland.

The ICCL welcomes the opportunity to make a submission to the Equality Authority as part of the consultation process in relation to a proposed amendment to section 37 of the Employment Equality Acts 1998 – 2011 (EEA).

This brief submission highlights the significant shortcomings of section 37 with reference to governing EU law and recent jurisprudence emerging from the European Court of Human Rights (ECtHR). It also aims to address concerns that have been raised in relation to religious ethos exceptions and the protection of religious freedom as envisaged under international human rights law.

## 2. What does section 37 currently provide?

Section 37 provides for a number of exceptions to the general principle of non-discrimination. The first sub-section contains a broad **religious ethos exception** while subsection (2) sets out a **genuine occupational requirement** exception that applies to eight of the nine discriminatory grounds (an equivalent exception regarding the ninth ground, gender, is addressed under section 25 of the EEA).<sup>1</sup> Notably, the EU Equality Directives provide for the genuine occupational requirement as an exception to the principle of equal treatment across all of the discriminatory grounds covered by those directives.<sup>2</sup> As the genuine occupation requirement in section 37(2) is considered to be relatively uncontentious, the following sections will focus on the provisions of section 37(1) and the religious ethos exception.

## 3. What is covered under the religious ethos exception?

Religious ethos exceptions grant certain categories of employer or service provider latitude to 'discriminate' in a broader range of circumstances than is permissible under genuine occupational requirement exceptions as provided for in Article 4(1) of the Directive establishing a general framework for equal treatment in employment and occupation (Framework Directive).<sup>3</sup> Unlike the genuine occupational requirement, such exceptions are not confined to circumstances in which being of a certain religion is inextricably linked with a position and is thus necessary to fulfill the tasks and responsibilities that come with that post.

Article 4(2) of the Framework Directive provides for such an exception. The primary difference between it and the genuine occupational requirement provisions is that it only applies to "churches and other public or private organisations the ethos of which is based on religion or belief", and the word "determining" before "occupational requirement" is omitted, which means that a person's

---

<sup>1</sup> Genuine occupational requirements are provided in Section 37(2) of the EEA and permit employers to differentiate between individuals on the basis of a protected ground where that ground has an inherent link with the capacity to perform or the qualifications required of a particular job. In order to avail of the exception there must be an evident link between the nature of the work and the characteristic in question.

<sup>2</sup> See Article 4, Racial Equality Directive (2000/43/EC); Article 4(1), Framework Directive (2000/78/EC); Article 14(2), Recast Directive (2006/54/EC). Recital 18 of the Preamble to the Racial Equality Directive specifies that a difference of treatment where a characteristic related to racial or ethnic origin constitutes a genuine and determining occupational requirement is justified only in very limited circumstances. See also Recital 23 to the Framework Directive and Recital 19 to the Recast Directive.

<sup>3</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

religion or belief need not be decisive or intrinsic to a person's ability to carry out the tasks associated with the post.

The religious ethos provision set out under the EEA is far broader, allowing favourable treatment of employees and prospective employees on the religion ground in order to maintain the ethos of the institution and enabling action to be taken to prevent the "undermining" of same.

#### **4. Are the provisions compatible with Irish and EU law?**

The Supreme Court has held that section 37(1) is compatible with the Constitution. In *Re Article 26 of the Constitution and the Employment Equality Bill 1996*<sup>4</sup> the Supreme Court found that section 37(1) struck a reasonable balance between the right of free profession and practice of religion on one hand and the right to equality before the law and the right to earn one's livelihood on the other. The Court concluded that the use of the words "reasonable" and "reasonably necessary" in subsection (1) implied that the test was to be an objective one and that the matter was to be resolved "on a case to case basis".<sup>5</sup> However, the Supreme Court judgment was delivered prior to the advent of the Framework Directive. For that reason, Bolger *et al* suggest that it "may no longer be good law".<sup>6</sup>

Some employee representative bodies (e.g. teacher unions) have indicated that the very presence of the exception has considerable negative effects on gay and lesbian employees in particular and may also impede teachers' ability to address homophobic bullying of pupils.<sup>7</sup>

#### **5. Does the exception apply to all grounds?**

Section 37(1) is found in Part IV of the EEA, which contains 'Specific Provisions as to Equality between other Categories of Persons', that is, the Part dedicated specifically to grounds other than gender though gender is also likely to be covered.<sup>8</sup>

#### **6. What does section 37(1)(a) provide?**

This section applies only to the religion ground and permits the institutions in question to accord preferential treatment to persons on that ground where it is reasonable to do so in order to maintain the institution's religious ethos.

Section 37(1)(a) provides:

(1) A religious, education or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of services in an environment which promotes certain religious values shall not be taken to discriminate against a person for the purposes of this Part or Part II if—

---

<sup>4</sup> [1997] 2 IR 321.

<sup>5</sup> *Ibid.*, at p. 359.

<sup>6</sup> Bolger, Marguerite, Claire Bruton and Cliona Kimber (2012) *Employment Equality Law* (Dublin: Round Hall), p. 459.

<sup>7</sup> See e.g. Walsh, Judy et al (2007) *Enabling Lesbian, Gay and Bisexual Individuals To Access Their Rights Under Equality Law* (Equality Authority; ECNI), pp. 61-63; Gay and Lesbian Equality Network (GLEN) (2010) *Lesbian, Gay and Bisexual Diversity in the Workplace* (Dublin: Gay and Lesbian Equality Network), p. 43; Mawhinney, Alison (2009) *Freedom of Religion and Schools: the Case of Ireland: A Failure to Protect International Human Rights Standards* (Saarbrücken: VDM Publishing), pp. 175-176.

<sup>8</sup> Section 37(1) is explicitly applied to Part II of the Act, which *inter alia* sets out the general prohibitions of discrimination in various contexts, including direct discrimination on the gender ground (section 6). It also appears that the religious ethos exception may be availed of as a defence to a claim of gender discrimination. See Bolger *et al*, pp. 461-462.

(a) it gives more favourable treatment, on the religion ground, to an employee or a prospective employee over that person where it is reasonable to do so in order to maintain the religious ethos of the institution[...]

This provision aligns somewhat with Article 4(2) of the Framework Directive in permitting a difference of treatment on the religion ground and only on the religion ground. In other words, it just relates to the employee's faith or beliefs.

### **7. Should section 37(1)(a) be amended?**

Although Article 4(2) is a permissive provision and so the Oireachtas need not, under EU law, legislate for such an exception, retaining section 37(1)(a) in a modified form could be regarded as advancing human rights secured under both domestic and international human rights law. The beneficiaries of section 37(1)(a) are not individuals but rather collective entities formed around a shared belief or religion. Such an exception thus protects "freedom of religion, where this is understood as the right for churches or religious or philosophical organisations to act without interference from the State."<sup>9</sup> Indeed the EU Network of Legal Experts in the Non-Discrimination Field point out that even the position under the Framework Directive is ambiguous:

[T]he second paragraph [of Article 4] mentions the right of 'ethos-based' organisations to 'require individuals working for them to act in good faith and with loyalty to the organisation's ethos'. This affirmation is difficult to reconcile with the notion of the exception being presented as an option that is available to the States. Indeed, when implementing the Directive, the latter cannot ignore their obligation to respect the churches' freedom of religion and freedom of belief for ethos-based organisations, the freedoms here being understood in their collective dimension... Too broad an exception infringes on the prohibition of discrimination within Directive 2000/78/CE, whereas an absence of exception, which is not directly in opposition to the directive, could constitute a violation of religious freedom.<sup>10</sup>

Thus, although the necessity of including a religious ethos exception based on Article 4(2) is open to question, especially given the protections already accorded religious bodies<sup>11</sup> under domestic law, there are cogent arguments for its inclusion in a revised section 37.<sup>12</sup>

It is suggested that, in order to comply more completely with Article 4(2), the section should be amended to:

- Explicitly provide that the exception cannot be used to discriminate on another ground;
- Explicitly specify that the employee or prospective employee's religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos.<sup>13</sup>

---

<sup>9</sup> Bribosia, Emmanuelle, Isabelle Rorive and European Network of Legal Experts in the Non-Discrimination Field (2010) *In Search of a Balance between the Right to Equality and Other Fundamental Rights* (Luxembourg: Office for Official Publications of the European Communities), at p. 48.

<sup>10</sup> *Ibid* at p. 48. According to a recent report, just three of the EU's twenty-eight Member States have not introduced an exception based on religious ethos: France, Portugal and Sweden: European Network of Legal Experts in the Non-Discrimination Field (2012) *The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Luxembourg: Publications Office of the European Union), at p. 17.

<sup>11</sup> It should be noted that organisations based on a philosophical ethos or belief do not appear to enjoy equivalent protections.

<sup>12</sup> See further: Whyte, Gerry (2005) 'Protecting religious ethos in employment law: a clash of cultures', *Dublin University Law Journal* 27, 169-183.

## 8. What does section 37(1)(b) provide?

This section contains a sweeping exception to the non-discrimination principle and clearly applies to eight of the nine discriminatory grounds provided for under the EEA.

An institution for the purposes of section 37(1) shall not discriminate if

(b) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

Even assuming that section 37(1)(b) is inapplicable to the gender ground (and hence to discrimination on the basis of gender reassignment), allowing the broad exception to remain intact for eight grounds, means that the Employment Equality Acts will continue not to comply with EU law in relation to age, disability, sexual orientation and race (which are covered by the Framework and Racial Equality Directives respectively). Of these eight grounds, those most likely to generate conflicts with a religious organisation's ethos are the civil status, disability, sexual orientation and religion grounds.

## 9. Should section 37(1)(b) be amended?

Commentators have suggested that section 37(1)(b) does not comply with EU law.<sup>14</sup> A report published by the European Commission expressly states that section 37(1) as it stands "is broader than allowed for in the Directive, as it does not provide that religion or belief must be relevant to the particular job in question; nor does it limit the exception to discrimination based on the grounds of religion or belief so that it cannot be used to justify discrimination on another ground".<sup>15</sup>

In addition, section 37(1) in its current form was enacted under the Employment Equality Act 1998 and so prior to the only EU directive that provides for a religious ethos exception, that is, the Framework Directive.

### *The Recast Directive: Gender Ground*

The Recast Directive addresses gender discrimination in the context of employment and vocational training. As noted above, section 37(1) apparently covers the gender ground. The Recast Directive does not contain any exceptions concerning religious ethos and so the application of section 37(1) to the gender ground, even in revised form, would not appear to be acceptable under EU law.<sup>16</sup>

### *The Racial Equality Directive: Race Ground*

The Racial Equality Directive also overlaps with the coverage of the Employment Equality Acts and contains no exceptions based on religious ethos. It is difficult to envisage a factual scenario in which

---

<sup>13</sup> See further Coen, Mark (2008) 'Religious ethos and employment equality: a comparative Irish perspective', *Legal Studies* 28(3), 452–474 and European Network of Legal Experts in the Non-Discrimination Field (2012) *The 27 EU Member States, Croatia, Former Yugoslav Republic of Macedonia, Iceland, Liechtenstein, Norway and Turkey compared* (Luxembourg: Publications Office of the European Union), at p. 20.

<sup>14</sup> See further: Coen, Mark (2008) 'Religious ethos and employment equality: a comparative Irish perspective', *Legal Studies* 28(3), 452–474; Whyte, Gerry (2005) 'Protecting religious ethos in employment law: a clash of cultures', *Dublin University Law Journal* 27, 169–183.

<sup>15</sup> Vickers, Lucy and European Network of Legal Experts in the Non-Discrimination Field (2007) *Religion and Belief Discrimination in Employment: The EU Law* (Luxembourg: Office for Official Publications of the European Communities), at p.58.

<sup>16</sup> The Recast Directive does allow a limited exception to the bar on discrimination at access stage in Article 14(2): "a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate." The Employment Equality Acts 1998–2011 already allow for such differences in treatment under Section 25.

a characteristic associated with one's 'race', colour or ethnic origins would be regarded as undermining an organisation's religious ethos. The exception should nonetheless be removed for the race and Traveller community grounds, as its continued application to those grounds does not comply with EU law.

#### *The Framework Directive: Age, Disability, Religion or Belief and Sexual Orientation Grounds*

Unlike the Recast Directive and the Racial Equality Directive, the Framework Directive does make specific provision for organisations with an 'ethos based on religion or belief'. Under Article 4(2) of the Framework Directive an institution may only treat people differently (i.e. less favourably or more favourably) on the basis of a person's religion or belief, where that religion or belief constitutes a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. And this limited exception cannot be used to justify discrimination on another ground. In other words, different treatment is allowed just on the religion ground and EU law expressly forbids that exception to be used a cloak for discriminating against a person on the age, disability or sexual orientation grounds.

Section 37(1)(b) refers only to an employer taking action that is 'reasonable' or 'reasonably necessary' to prevent an employee from undermining an organisation's religious ethos. It is not limited by reference to an occupational requirement and so potentially concerns all aspects of an employee or prospective employee's conduct and behaviour, including their personal life outside the organisation. This, it has been argued, provides a potential chilling effect for employees or prospective employees, who may fall under one or more grounds otherwise protected under anti-discrimination legislation, leaving them vulnerable to action aimed at upholding the religious ethos of an employer / prospective employer.

#### **10. How should section 37(1)(b) be amended?**

It is submitted that section 37(1)(b) ought to be deleted in its entirety from the EEA. The subsection does not appear to comply with EU law, which contains no equivalent exception to the principle of equal treatment. As currently drafted, the provision does not contain adequate safeguards as required by jurisprudence of the European Court of Human Rights. The protections afforded in this subsection are likely to be superfluous given extant protections for the religious freedoms of organisations.

#### **11. What is the position of section 37(1) in relation to the ECHR?**

Section 37(1) as it stands may be too broad and vague to comply with the European Convention on Human Rights (ECHR) even in the case of persons employed directly by churches. In *Schüth v. Germany*<sup>17</sup> the European Court of Human Rights found a violation of the Article 8 rights of a Catholic Church organist and choirmaster who was dismissed on the basis that he had engaged in an extra-marital relationship. The Court found a violation on the basis that the German courts had failed to adequately balance his right to privacy against the right of his employer to institutional religious freedom. In particular, the fact that he would have great difficulty in finding alternative employment meant that there had been a failure to respect his Convention rights.<sup>18</sup> This and the related case of *Obst v Germany*<sup>19</sup> make it clear that the Convention requires the application of a proportionality test, which carefully balances the particular employee's rights with the objectives pursued by the employer, and a consideration of the nature of the post (i.e. genuine occupational requirements

---

<sup>17</sup> Application no. 1620/03, 23 September 2010.

<sup>18</sup> Coen points out that because "of the dominance of religious control in education, especially at primary level, one could conceive of a situation whereby a person would be unable to get a post in a religious school because they were perceived as likely to undermine the ethos. Disbarment from the religiously managed sector would dramatically reduce the number of schools to which such a teacher could apply for a job." Coen, Mark (2008) 'Religious ethos and employment equality: a comparative Irish perspective', *Legal Studies* 28(3), 452-474, at p. 461.

<sup>19</sup> Application no. 425/03, 23 September 2010.

should enter the frame here too). Section 37(1) contains no reference to a genuine occupational requirement or to a proportionality test. In interpreting section 37(1), an Irish court or Tribunal could attempt to “read in” a genuine occupational requirement and proportionality tests to the terms “reasonable” and “reasonably necessary”. However, arguably this is not sufficient to discharge Ireland’s obligations under either the Convention or EU law. The European Court of Justice has consistently held that the provisions of Directives must be implemented with sufficient clarity and precision to satisfy the requirements of legal certainty.<sup>20</sup>

## **12. What about the right to freedom of thought, conscience and religion?**

Jurisprudence from the ECtHR suggests that any interference with a right protected under Article 9 of the Convention (a right to freedom of thought, conscience and religion) must be justified, proportionate and necessary in a democratic society. In the recent landmark case of *Eweida & Ors v United Kingdom*<sup>21</sup> the Court drew what has been described as a “bright line” between the protected right to freedom of religious expression, and the prohibition of discrimination on grounds of conscience.<sup>22</sup> Each case concerned the alleged violation of an employee’s right to religious freedom. Two of the four judgments relate to the provision of services to LGBT persons being withheld on grounds of freedom of conscience or religious belief. In both cases, the Strasbourg Court found that intervention prohibiting the withholding of services contrary to domestic policies to uphold anti-discrimination measures and/or to strike a balance between competing Convention rights, was within the margin of appreciation granted to states by the Convention. As a result, claims to freedom of thought, conscience and religion, as provided under the Convention, to justify discrimination are subject to competing rights protected under the Convention and must be balanced accordingly.

## **13. How will reform of section 37(1) impact on the freedom of an institution to uphold a religious ethos?**

It is suggested that, notwithstanding the provisions of section 37(1)(b), respect for an institution’s religious ethos is adequately safeguarded both by the EEA and by other laws.

Sections 25 and 37(2) of the EEA ensure that religious organisations will not be required to hire, promote or retain people who cannot carry out the core duties associated with posts in such institutions.<sup>23</sup> Moreover, a modified section 37(1)(a) would allow an institution to prefer members of its own faith for a job, promotion, particular duties and so on. It, together with section 37(2) and section 25, which permit all employers to treat people differently on the basis of a characteristic related to a discriminatory ground where that characteristic is a genuine and determining occupational requirement etc., is adequate to safeguard the religious ethos of an institution. Taken together these provisions reflect the exceptions permitted under EU law.

Further, the EEA do not require an employer to recruit, promote, retain or provide training for a person who will not undertake the duties attached to a position or who will not accept “the conditions under which” such duties must be performed, or who is not fully competent, available

---

<sup>20</sup> See in particular *Commission v Germany* [1985] ECR 1661, para 23; *Commission v Italy* [2001] ECR 1-3541, para 24; *Commission v Greece* [1995] ECR 1-499, para 9; and *Commission v The Netherlands* [2001] ECR 1-3541, paras 17 and 21.

<sup>21</sup> Applications nos. 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013

<sup>22</sup> Irish Council for Civil Liberties, Press Release: ‘European Court Crucifix case draws “bright line” between religious freedom and discrimination says ICCL’ – 15 January 2013, [www.iccl.ie/news](http://www.iccl.ie/news)

<sup>23</sup> In addition, Section 12 EEA permits differences in treatment on the religion ground in access to programmes of training for nurses and primary school teachers. Section 7(3)(b) of the Equal Status Acts 2000-2012 provides that where an institution is established for the purpose of providing training to ministers of religion and admits students of only one gender it may validly refuse to admit a person who is not of that gender.

and capable of undertaking the duties "having regard to the conditions under which those duties are, or may be required to be, performed" (section 16(1)). In other words, no provision of employment equality law can be used to protect an employee who will not undertake the duties attached to a post including those associated with upholding an organisation's religious ethos. This provision reflects the position at common law which implies terms into every contract of employment to the effect that an employee is under a duty to obey reasonable and lawful orders of their employer.

#### **14. Conclusion**

**The ICCL recommends that section 37(1)(a) should, at the very least, be modified to bring it into alignment with Article 4(2) of the Framework Directive. This section should be amended to:**

- **Explicitly provide that the exception cannot be used to discriminate on another ground;**
- **Explicitly specify that the employee or prospective employee's religion or belief must constitute a genuine, legitimate and justified occupational requirement, having regard to the religious ethos of the institution in question.**

**The ICCL recommends that section 37(1)(b) of the EEA should be deleted as it is likely to be incompatible with current EU law as set out in the Directives.**

**The ICCL suggests that, as a result of these changes, greater protection would be afforded to employees and prospective employees where an applicable ground for discrimination may otherwise facilitate unwarranted and unnecessary action being taken in circumstances where such status is deemed to undermine the ethos of an institution.**

**The ICCL also suggests that that amending section 37(1) would facilitate, in a meaningful way, efforts to find the correct balance between competing Convention rights including in relation to freedom of thought, conscience and religion.**