

The logo consists of a blue rectangular background. The text 'EQUALITY & RIGHTS' is written in white, uppercase, sans-serif font. Below it, the word 'ALLIANCE' is written in a larger, bold, orange, uppercase, sans-serif font.

**EQUALITY & RIGHTS
ALLIANCE**

Submission to the Equality Authority:

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

Submitted by:

Equality and Rights Alliance

November 2013

Equality and Rights Alliance

The Equality and Rights Alliance (ERA) is a coalition of over 170 civil society groups and activists campaigning to defend and strengthen the Irish equality, anti-poverty and human rights infrastructure¹. ERA works for an effective and independent equality, human rights and anti-poverty infrastructure.

Equality Authority Review

ERA welcomes this review of S37 of the Employment Equality Acts 1998-2011. We believe, however, that there is a need for a much broader review of the exemptions in current equality legislation. Many of these exemptions date from the origins of this legislation over a decade ago and reflect a caution based on the fact that the legislation was breaking new ground domestically and at EU level.

With over a decade experience, some of these exemptions have emerged as problematic, and indeed have been the subject for comment by the Equality Authority in the past. A necessary broader review should include (but not be limited to) the following key areas:

- The general exemption in S14 of the Equal Status Acts 2000-2011 providing that nothing shall prohibit the taking of any action that is required under: statutory provision or court order; any act done or measure adopted by the EU; or any international treaty which imposes an obligation on the State,
- The exemption in relation to ‘non-nationals’ in S14 of the Equal Status Acts 2000-2011, whereby any action by a public authority or Minister in relation to certain categories of non-Irish nationals is permissible.

Review of Section 37 Employment Equality Acts 1998-2011

Recommendation:

The Equality and Rights Alliance recommend removal of S37(1) (a) and (b) of the Employment Equality Acts (1998 – 2011)

Section 37(1) of the Employment Equality Acts 1998-2011 allows for a very broad exemption on the basis of religious ethos to certain religious, educational or medical institutions, while S37(2) allows for differential treatment on the basis of a protected ground, where there is a genuine occupational requirement. The focus of this submission is S37(1), since it is this broad exemption for religious institutions, that is the most problematic and contested aspect of S37.

S37(1) provides the following:

A religious, educational or medical institution which is under the direction or control of a body established for religious purposes or whose objectives include the provision of

¹ List of ERA member organisations: <http://www.eracampaign.org/about-us>.

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 111 if:

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

Impact of S37(1)

Section 37(1) has been the subject of criticism from trade unions, human rights organisations and NGOs working to represent the interests of women and LGBT people. In particular, S37(1)b is considered to offer considerable scope for religious run institutions to discriminate against employees or potential employees, in particular on the grounds of gender, family status, and sexual orientation, whose life-style, choices, identity and/or behaviour are deemed to be undermining or having the potential to undermine the religious ethos of that institution. The Supreme Court has noted that the word “*ethos*’ is a vague term and is nowhere defined in the Bill².”

While the Supreme Court has upheld the constitutionality of S37(1) , its discriminatory impact, especially towards LGBT people, has never been tested in the courts or in the Equality Tribunal, since, it has been argued, taking such a case poses a very high career risk for individuals concerned³.

Section 37(1) has, however, lead to a so-called ‘chilling factor’ whereby LGBT people in particular, have felt compelled to either avoid seeking employment or promotion in such institutions or to take up employment under conditions where they are forced to conceal their sexual orientation and/or gender identity.

In their 2007 report for the Equality Authority and the Equality Commission for Northern Ireland, Walsh et al detail the consequences of this exemption for LGB people⁴. Interviewees for their report described the impact of this chill factor for LGB teachers, which included: constant self-censoring; not applying for parental leave and other entitlements; not going for promotion; and avoiding involvement in anti-homophobic bullying campaigns in the school for fear that their own sexual orientation would be revealed. Since the writing of this report, Ireland has enacted civil partnership legislation. It is likely that lesbian and gay teachers working in religious run schools may be deterred from entering into civil partnerships for fear that their employer may then become aware of their sexual orientation. These issues were also raised in a report by the Equality Authority on implementing equality for LGB people, where removal of S37(1) was recommended⁵.

² The Supreme Court, The Employment Equality Bill 1996 , 259, Hamilton C.J.

³ Walsh, Judy, Conlon, Catherine, Fitzpatrick, Barry and Hansson, Ulf (2007) “Enabling Lesbian, Gay and Bisexual Individuals To Access Their Rights Under Equality Law” A Report Prepared for The Equality Commission for Northern Ireland And The Equality Authority

⁴ IBID

⁵ The Equality Authority (2002) “Implementing Equality for Lesbians, Gays and Bisexuals” pg 67

This chilling effect of S37(1) also extends to people who are separated or divorced and to unmarried parents, who fear that their circumstances may also be deemed to undermine the religious ethos of an institution.

The enactment of this section of the Employment Equality Act 1998, was seen as giving statutory effect to the High Court decision in *Flynn v. Power* [1985] IR 648 which upheld the dismissal of Eileen Flynn, from her post in a convent school, because she was pregnant and unmarried. Her dismissal was upheld by the High Court on the grounds that the Holy Faith order was entitled to take action to prevent its ethos being undermined.

Inadequate transposition of EU Directives

EU Equal Treatment Directives permit differential treatment in employment (on the basis of a protected ground) with two main conditions: firstly it must be shown that there is a clear link between the nature of the job and the protected ground in question, and secondly, it must be the case that differential treatment does not constitute discrimination on another ground. Such genuine occupational requirements are provided for in S37(2) of the Employment Equality Acts 1998-2011, for eight of the nine protected grounds in Irish legislation (equivalent protection under the gender ground is provided for in S25 of the Acts). The wording of these provisions, S37(2) and S25, is in keeping with that contained in EU Directives.

Section 37(1) does not comply with Article 4(2) of the *Framework Equality Directive*, which, as with other EU equal treatment Directives, states that differential treatment on the basis of religion should not justify discrimination on another ground⁶. The Directive also requires that such differential treatment must “*constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation’s ethos*”. Neither of these conditions apply with respect to S37(1).

Recommendation

Section 37(1) (a) and (b) should be removed from the Employment Equality Acts (1998-2011).

Rationale:

While the discriminatory impact of S37(1) has not been tested out in casework under the Employment Equality Acts, there is sufficient evidence to indicate the chilling effect of S37(1), particularly for people from the LGBT community, but also for women in particular circumstances. This chilling effect impairs their ability to make use of the equality legislation in place and diminishes their prospects on the labour market.

Religious run institutions can avail of occupational exemptions under S37(2) of the Acts. The additional provisions of S37(1) are in breach of the EU equal treatment Directives.

⁶ see for example, Bell, Mark (2004) “Combating Sexual Orientation Discrimination in Employment; Report of the EU group of legal experts on combating sexual orientation discrimination” report on Ireland
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