

THE IONA INSTITUTE

Submission to the Equality Authority on Section 37 of the Employment Equality Acts

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Introduction:

The Equality Authority has invited submissions from interested parties as part of a consultation process in relation to a proposed amendment to s37 of the Employment Equality Acts 1998 – 2011.

The Iona Institute is pleased to take part in this process. We note that the Equality Authority has frequently criticised Section 37. We hope and trust that the Authority will give a fair hearing to rival points of view about this matter.

Section 37 of the Employment Equality Act is frequently the target of criticism on the grounds that it permits religious employers to 'discriminate' against certain categories of persons, for example, those who are openly gay or lesbian. The same might be said of employees or prospective employees who are cohabiting, or divorced, or remarried for example.

Currently, religious organisations including schools do in fact employ many individuals who are gay or lesbian, divorced or remarried as well as those who are cohabiting. These organisations have little difficulty accommodating such individuals because they respect the private lives of their employees and the employees respect the ethos of their employer.

Section 37 has, of course, been upheld by the Supreme Court in *Re the Employment Equality Bill 1996* on the grounds that it strikes a proper 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".

We hope that the Equality Authority gives due weight to this decision in its deliberations

The decision means that religious employers are constitutionally entitled to take certain actions to maintain their ethos. It allows they may employ only those individuals who will respect their ethos. We agree with the Supreme Court that a religious employer must be allowed to take such action as is reasonably necessary to protect its ethos. We further believe that any withdrawal of this protection is both unconstitutional and an attack on the right of free profession and practice of religion.

Freedom of religion and parental choice: The Supreme Court's view

Article 44.2.1 of the Constitution says: "Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to any citizen".

As Justice CJ Hamilton pointed out in his ruling on Section 37, the Constitution also allows that "religious education of the children is primarily a matter for the parents and parents are free to establish this education in their homes or in private schools or in school recognised or established by the State."

Section 37 does not protect denominational schools only. But the Constitution would appear to give denominational schools a 'double protection', as it were, through Article 44 and Article 42.

Therefore, any attempt to weaken or repeal Section 37 must argue past both freedom of religion and the right of parents to educate their children as they see fit within certain very broad limits.

Neither of these freedoms can be properly upheld if a denominational school is forced to employ teachers whose lifestyles or views are openly contradict the ethos of the school.

In fact, this would be to place the right of someone to be employed by a given organisation above the right of that organisation to have its own ethos, and above the right of parents (in the case of schools) to see their children educated in the ethos they support.

In effect, this would discriminate against the beliefs of parents and the ethos of the relevant religious organisation.

Practice of religion includes the right to live by the tenets of your religion and to pass on your beliefs to others.

The right to freely practice your religion is seriously undermined if you cannot freely establish organisations that can fully operate by its ethos and form others in that ethos. This right should only be subject to limitations in exceptional circumstances.

Obviously various rights have to be held in balance with one another. However, the Supreme Court ruled that Section 37 (specifically Section 37 sub-s. 1) has struck the correct balance because it entitles a religious organisation to give favourable treatment to an employee or a prospective employee only where it is "reasonable to do so in order to maintain the religious ethos of the institution" or to take action "which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution".

The Supreme Court ruled that the "use of the words 'reasonable' and 'reasonably necessary' implies that the test is to be an objective one and that the matter is to be resolved on a case to case basis".

It is also very important to note that Counsel for the Attorney General (under the then Fine Gael/Labour Government) submitted to the Supreme Court in defence of Section 37 that it was "necessary (and no more than is necessary) to give effect to the provisions of Article 44 of the Constitution. *Moreover they submit that the Bill would offend Article 44 if the ban on religious discrimination contained in s. 6 of the Bill stood alone without the exception of Section 37*". [Our italics]

In other words, not alone is Section 37 constitutional in the view of the then Attorney General, but the Employment Equality Bill would have been unconstitutional without it.

European law and Section 37

In 2008, the European Commission introduced an infringement proceeding against Ireland on the grounds that Section 37 was in violation of the EU's Employment Equality Directive. The then Government defended Section 37 and the infringement proceeding was withdrawn. Therefore, Section 37 was judged not to be in violation of the Equality Directive.

Indeed, Article 4.2 of the Directive says: "Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

"Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos."

In addition, a number of cases have come before the European Court of Human Rights which indicate that Section 37 does not breach the European Convention on Human Rights either.

One is *Rommelfanger Vs the Federal Republic of Germany*. In this case, the court upheld the right of a Catholic hospital to dismiss a doctor who publicly advocated in favour of a more liberal abortion law.

A more recent case was *Fernandez Martinez Vs Spain*. In this instance, the court upheld the right of the Catholic Church in Spain to dismiss Martinez from his post as a religion teacher in a public school because he was a married priest who publicly advocated for the removal of the rule of celibacy.

So we can see that European law gives very considerable latitude to freedom of religion.

Conclusion:

It is the view of The Iona Institute that insufficient weight in much public discourse at present is being accorded to religious freedom. A view of 'discrimination' is taking hold that, logically and consistently applied, would make it extremely difficult for any organisation (religious or otherwise) to uphold its ethos if forced to employ individuals who sought to undermine its ethos directly or indirectly.

For example, would the Equality Authority employ an individual who was actively (the stress on 'actively') opposed to its aims? Would it employ an individual who, even if they carried out their

functions well during the hours of employment, outside of those hours argued publicly against the aim of the organisation? It seems unlikely.

Would this be discrimination? It would certainly not be unjust discrimination because employers are permitted to take into account characteristics of their employees or prospective employees that are relevant to their employment.

We recommend that Section 37 be retained. **ENDS**