



**EQUALITY
IN THE WORKPLACE**



**Congress Submission on Proposed amendment to section 37
of the Employment Equality Acts 1998–2011**

The Equality Authority is inviting 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.

What is Section 37?

Section 37(1) of the Employment Equality Act, 1998 permits institutions with a religious ethos to give preferential treatment on the grounds of religion to an employee or prospective employee where it is reasonable to do so in order to maintain the ethos of the school and to take action where it is reasonably necessary to prevent staff from undermining the religious ethos of the institution.

Section 37(1) of the Employment Equality Act came into force in October 1999. The wording of the section is as follows

“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 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—

“(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.”

The implications of this section are somewhat unclear. It is important to remember that the burden of proof rests with the employer who would have to prove that the less favourable treatment was reasonable in order to maintain the ethos of the school or that the action was reasonably necessary to prevent the employee from undermining the religious ethos of the school. Any such action will be subject to an objective test of what is reasonable. What is absolutely clear, however, is that the inclusion of this clause has reinforced fears of discrimination against workers in religious-run institutions, for example in schools and hospitals, and makes it even more difficult for such workers to be open about their sexuality.

Congress and Section 37

Congress and our affiliate trade unions have a long standing record of working to ensure the rights of our LGBT members:

<http://www.ictu.ie/equality/lgbt.html>

Congress, led by our Teacher Unions, opposed the introduction of such exclusions for certain institutions when employment equality legislation was first published in the form of a Bill, and has continually favoured the repeal of Section 37(1) of the Employment Equality Act. All of the Teachers unions have passed a number of resolutions at their conferences

calling for the deletion of the clause and at the Congress 2007 Biennial Delegate Conference, during the European Year of Equal Opportunities for All, the following ASTI motion was debated and unanimously passed:

Motion on Employment Equality Act

“Congress calls on the Minister for Justice, Equality and Law Reform to engage in a consultative process designed to affect the repeal of Section 37 of the Employment Equality Act, 1998”.

We welcome therefore this consultation and the opportunity to express our views on the matter.

Congress deplores the continued existence of the exemption related to religious schools and institutions as contained in Section 37(1) of the Employment Equality Acts. This is viewed by many workers as potentially threatening in view of their lifestyle or living circumstances. We have long held the view that there is no necessity or justification for having a double protection for religious institutions as contained in both Sections [16](#) and 37 of the Acts. Section 16 (1) specifies that the legislation does 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 and capable of undertaking the duties “*having regard to the conditions under which those duties are, or may be required to be, performed*”. It is difficult to envisage greater protection for any employer against a person who will not perform work as required and under conditions specified.

Religious ethos is further protected by sections 25, 37(1) and 37(2) of the Employment Equality Act and by a number of other laws. Sections 37(2) and 25 permit all employers to treat people differently where

there is a genuine and necessary occupational requirement. These sections, coupled with the duties arising from the person's individual employment contract, are an adequate safeguard to the religious ethos of the institution. Why then would the State continue to insist that we need one more safeguard in the existing section 37(1)(b)?

We have made this clear to various Governments and Ministers over the years including meetings with Minister John Moloney, Minister Mary White and the current Minister Kathleen Lynch.

Concerns widely shared...

We have not been alone in outlining concerns about this particular piece of legislation. LGBT groups have been to the fore in campaigning for its removal but a range of groups and politicians have expressed concern over the years.

As far back as 2002, responding to a recommendation contained in the seminal report - Implementing Equality for Lesbians, Gays and Bisexuals (EA 2002), the Equality Authority called for the removal of Section 37(1) when the Employment Equality Act is next reviewed.

Research published jointly by the Equality Authority and the Equality Commission for Northern Ireland in 2007 found that the fear associated with section 37(1) has a significantly negative impact on lesbian, gay and bisexual teachers. The presence of this provision effectively forces these teachers either to avoid seeking employment in given sectors or to take up employment in conditions where they are compelled to conceal their sexuality

In 2008, in a "reasoned opinion" to Member States that have not fully transposed European regulations prohibiting discrimination in the work

place, the European Commission issued warnings to Ireland in relation to a number of areas covered by Anti-discrimination Directives, including:

- “The exception from the ban on discrimination on grounds of religion is too broad “

Following correspondence with the Government (described as a “comprehensive rebuttal”), the Commission later decided to close the infringement procedure against Ireland on the issue.

In 2009, Minister John Moloney, in responding to a Seanad debate about the Ryan Report outlined his intention to re-examine the exemption clause, especially in light of what had occurred.

The current Programme for Government stated: “People of non-faith or minority religious backgrounds and publicly identified LGBT people should not be deterred from training or taking up employment as teachers in the State”.

Responding to a recommendation (the result of a joint submission on Section 37.1 made on behalf of the three teachers’ unions to the “Your Rights, Right Now” campaign, which developed the civil society submission) following Ireland’s examination under the UN Universal Periodic Review process which stated:

“Amend Article 37 of the 1998 Employment Equality Act in order to prevent such discrimination against homosexuals and unmarried parents”,

the Government, stated that:

“The specific provision of the Employment Equality legislation referred to has been considered by the Supreme Court as striking a

reasonable balance between the right to the free profession and practice of religion, on the one hand, and the principle of equality, on the other. The application of this provision in individual instances is subject to an objective review by the courts so as to reconcile the competing constitutional rights involved. Ireland is committed to an inclusive society and to ensuring that people of non-faith or minority religious backgrounds and publically identified LGBT people should not be deterred from training or taking up employment as teachers in the state. The Government is currently examining how this commitment can be implemented. Ireland also has strong protection in our legislation against discrimination on grounds of family status”.

Mr Ruairi Quinn T.D., Minister for Education and Skills, in April 2012 while addressing the Teacher Union conferences announced that “section 37(1) of the Employment Equality Act is to be amended to ensure it cannot be used to discriminate against lesbian, gay and bisexual teachers”.

And in January 2013, Minister Shatter himself stated:

“While intended to provide in a balanced way for schools and other institutions to maintain their religious ethos, I am concerned that, in practice, the balance is not a fair one and that this provision (S.37) can operate in a way that is unfair to LGBT persons.”

Recent Progress

Despite all of this, it was not until the term of the current Government, that two Bills have been introduced in the Senate, proposing amendments to s.37.1, one by Senator Averil Power (FF), which was opposed by the Government, and in March this year the [Employment Equality \(Amendment\) \(No.2\) Bill 2013](#) was introduced by a group of Labour Party Senators and TDs. It seeks to amend Section 37.1 of the Employment

Equality Act to remove any prospect of lesbian or gay teachers being discriminated against based on who they are.

The Bill provides an opportunity to clarify for once and for all that people cannot be prevented from taking up a job or discriminated in your job because of your sexual orientation. It aims to ensure that employees or prospective employees in publicly funded, religious run institutions such as schools cannot be discriminated against just because they are married, single, divorced or in a civil partnership, or because they are lesbian, gay, bisexual or transgender (LGBT).

Congress welcomes the intention behind this Bill and there is no doubt that it marks significant progress towards ensuring that full employment equality is provided for LGBT people and that no threat or perception remains that LGBT people can be discriminated against in employment. The additional protections afforded to those who might be discriminated against in section 37(1)(b) are very welcome. However, subsection (ii) remains problematic. This states that religious bodies are allowed to "take action" which is reasonably necessary to prevent an employee or prospective employee from undermining the organisation's ethos. This is too broad, and employees would still have something to fear. As Senator Katherine Zappone stated in her contribution in the Seanad on this Bill, "While the action taken by the religious body against the employee must be proportionate, this amendment means that a lesbian pregnant through assisted reproductive technology or an unmarried mother living with her children could still be discriminated against. While it may now be harder to invoke a sanction against an employee on the basis of her or his identity, it is still possible. My real concern is that the protection of religious ethos can extend beyond the ground of religion into an employee's private life and is not confined to what she or he says or does in the workplace." She added:

“The addition of the proportionality test does not offer enough protection in practice. Somebody’s private life is still relevant to whether he or she is a good employee or not...”

It is our continued view therefore that we should seize the opportunity to repeal this clause in the Employment Equality Act. It is clear that it has reinforced fears of discrimination against lesbian, gay and bisexual workers in religious-run institutions and makes it even more difficult for such workers to be open about their sexuality. Removing the clause could help to tackle discrimination and to create a culture in schools of real inclusion for LGBT teachers and indeed students.

Section 7.3 of Equal Status Act

We also believe that the lesser known Section 7.3 of Equal Status Act needs to be changed. Schools can legally turn children away because of their religion. Section 7.3 (c) of the Equal Status Act 2000 allows schools to refuse students entry if "refusal is essential to maintain the ethos of the school". It is our view that it's important for children to mix, have teachers from a variety of backgrounds, and for everyone to learn together. Section 7.3 enshrines in Irish law discrimination against children on the basis of religion. No child should be made to feel they are not welcome in a school. There have been a number of cases where a school has been oversubscribed and non-religious students have been forced to attend a school not in their catchment area. Exclusion on the basis of their beliefs is not a situation any child should face.

In that regard, we welcome the draft regulations on enrolment to post-primary schools. It is a welcome acknowledgement of schools’ obligation to eschew discriminatory practices and to outlaw discrimination against students on the 9 grounds. It also allows students to opt out of religious instruction – the showcase for their ethos, without penalty.

Conclusion

In conclusion, it is 15 years since the Employment Equality Act came into being. In that time there have been very many positive developments in relation to LGBT people, not least the introduction of civil partnership and resultant practical benefits for LGBT employees in the areas of pensions and employment benefits. With the Government having also recently decided upon a 2015 referendum for Marriage Equality, it is surely clear to everyone that Section 37.1 has no place in the Irish statute book and should be repealed.