

## RECOMMENDATION PAPER

### **BACKGROUND**

#### **Section 37(1) Employment Equality Acts**

1. Section 37(1)(a) of the Employment Equality Acts 1998-2011 permits positive discrimination in certain circumstances by allowing more favourable treatment of employees or prospective employees on the religion ground in religious, educational or medical institutions. This provision can apply beyond access to employment and can allow for more favourable treatment to be applied to conditions of employment. The institutions referred to in section 37(1) must be 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. Such an employer's preferential treatment, whether in the context of access to employment or more favourable conditions of employment, will be permissible if it is reasonable in order to maintain the religious ethos of the institution. The concepts of "*religious, educational or medical institutions*" and "*religious ethos*" are not defined with the Employment Equality Acts.
2. Section 37(1)(b) applies where such an employer takes action which is reasonably necessary to prevent the undermining the religious ethos of the institution by an employee or prospective employee. This is different to the positive discrimination of subsection (a) for the purpose of maintaining the ethos and is subject to the more onerous test that the employer's actions must be reasonably necessary to prevent the undermining of their ethos.<sup>1</sup>

#### **Article 4(2) Framework Directive**

##### *Overview*

3. The European Framework Directive on Employment and Occupation requires the Member States to provide for employment equality on grounds of disability, religion, age and sexual orientation. Article 4(2) permits Member States to make special provision for certain employers, i.e. churches or public or private organisations which

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<sup>1</sup> A number of the submissions, including those from organisations representing groups with a religious interest, point out that Section 37(1)(b) only applies in exceptional circumstances. While this may be of some comfort to employees, it must also be of concern that the employer only has to establish that the action taken is "reasonably necessary".

have an ethos based on religion or belief. Article 4(2) provides that differences in treatment will not be discriminatory where by reason of the nature of the activities or the context in which they are carried out, a person's religion or belief constitutes "*a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos*".

4. This test is broader than the occupational requirement test of the Framework Directive which is that a "*genuine and determining occupational requirement*" may justify what will otherwise be unlawful discrimination under the Directive. Article 4(2) also allows organisations with an ethos based on religion or belief to impose requirements on the behaviour and conduct of its employees in order to ensure that they are in keeping with and not undermining of the organisation's ethos. Article 4(2) expressly provides that this permitted exemption cannot be imposed in a manner which constitutes discrimination on another ground. Article 9(1) of the Directive also requires Member States to introduce appropriate judicial processes for the enforcement of obligations under the Directive for persons who believe they have been wronged by the failure to apply the principle of equal treatment. It is likely that Ireland is not in compliance with this obligation by reason of the breadth of Section 37(1) if or where any difference in treatment purportedly applied in reliance on Section 37(1) constitutes discrimination on another ground within the Directive (such as sexual orientation).
5. If Section 37(1) permits discrimination that is prohibited by other equality directives such as the Recast Gender Directive or the Race Directive, this could also put Ireland in breach of its binding European law obligations as neither of those directives allow a derogation to discrimination similar to Article 4(2).
6. Article 4(2) of the Framework Directive is permissible rather than mandatory in nature for Member States. However if an exemption or derogation from the general non-discrimination principle on the basis of this Article is provided, then Ireland must conform with the requirements of Article 4(2).

*Application of Article 4(2) by Member States:*

7. It has been reported that some Member States have transposed Article 4(2) correctly, some have transposed it in too wide a manner and some Member States have not

utilised the exemption in the breadth provided by the Article.<sup>2</sup>

8. In the Netherlands, the General Equal Treatment Act (GETA) provides for specific exemptions. It allows for Churches and other organisations with an ethos based on religion or belief to discriminate where it is necessary, having regard to the institution's purpose, for the duties of that post to be fulfilled, so long as the discrimination does not lead to distinction on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status. In other words any discrimination in a positive light for religious purposes such as appointment of a particular candidate, etc based on their religion or belief is lawful but not to the detriment or taking account of a person's sexuality, or to justify discrimination on another ground etc. The GETA also has an additional exception for private education institutions allowing discrimination where necessary in order for such establishments to effectively realise its founding principles as long as this does not lead to discrimination on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status. Again this is a narrow exemption.
9. In the United Kingdom the Equality Act 2010 allows a requirement related to sexual orientation for an employee to be of a particular sex, nor not to be transsexual, or not to be married or a civil partner if, because of the nature of the position or job, it is necessary to comply with the doctrines of the religion (the compliance principle) or to avoid conflict with the religious convictions of a significant number of the religion's followers (the non conflict principle).<sup>3</sup> Further the Act provides specifically in the context of religion or belief that an employer with an ethos based on religion or belief does not contravene the Act by applying in relation to work a requirement that a person be of a particular religion or belief.
10. The UK Employment Appeal Tribunal decision in *Glasgow City Council v McNab*,<sup>4</sup> provides a thorough examination of what is required for legitimate reliance to be placed on the genuine occupational requirement for religious organisations. It held that the requirement that a teacher be Roman Catholic was not a genuine occupational requirement for appointment to a pastoral care teacher. The Tribunal examined the

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<sup>2</sup> L. Vickers, *Religion and Belief Discrimination in Employment – the EU Law*, (European Commission, 2006) at 57.

<sup>3</sup> Schedule 9 of the Equality Act 2010.

<sup>4</sup> [2007] I.R.L.R. 476

position of pastoral care teacher and found that the responsibilities involved providing advice and assistance on a large number of issues in connection with the school curriculum and knowledge of the beliefs and convictions of the Catholic Church would only be required for a very small proportion of the duties of the role. Therefore the reliance on the genuine occupational defence by the school was unlawful and excessive. This approach is similar to a decision of the Aachen Labour Court in Germany which held that the refusal of a hospital to employ a male nurse as he was not a member of a religious community as the genuine occupational requirement that a nurse be of a particular religion was not essential as the position did not capture duties which were pastoral, catechetical or educational in nature.<sup>5</sup> The Supreme Court of the United Kingdom more recently determined that the approach to be adopted in scrutinising whether reliance on a particular religion being a genuine occupational defence for organisations with a religious ethos is permissible is an objective one and whether in all of the circumstances the requirement is genuine, legitimate and justified.<sup>6</sup>

11. The genuine occupational requirement of an employee/applicant being of a particular religion or belief was held lawful by the Board of Equal Treatment in Denmark. This arose in the context of a requirement that the secretary of an organisation within the Danish national church be a member of this religion as this occupational requirement was relevant for the position.<sup>7</sup> The Employment Tribunal in the United Kingdom similarly upheld as lawful by virtue of the genuine occupational defence ethos based defence a requirement that a finance administrator of a Christian charity to be Christian due to the context in which the job was carried out.<sup>8</sup> It is likely however that if the role does not have a sufficient connection to the ethos of the organisation such as a cleaning position or the position is one connected with recreational activities such as sport, reliance on the genuine occupational defence for an organisation with a religious ethos would fail.
12. Therefore in determining whether reliance on the genuine occupational defence is legitimate, it is likely in this jurisdiction an examination will be conducted by a Court or Tribunal of the type of role, the context in which it is carried out and whether the position/role is sufficiently connected to the ethos of the organisation. Although the

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<sup>5</sup> Labour Court Aachen, CA4226/11, decision of the court 13 December 2012.

<sup>6</sup> *Jivraj v Haswani* [2011] I.R.L.R. 827.

<sup>7</sup> Board of Equal Treatment Decision 18 May 2011 (Case number 2500250-10).

<sup>8</sup> *Muhammed v The Leprosy Mission International* (16 December 2009, ET/2303459/09).

test in Article 4(2) for objective justification appears to be less onerous than the ordinary genuine occupational requirement defence which applies to all grounds of discrimination and all employers by reason of Article 4(2) omitting reference to the occupational requirement being “determining”, the case law cited above has not adopted this approach. The case law has examined whether the requirement to be of a particular religion is necessary for the role having regard to the types of duties involved therefore implicitly importing a requirement that the particular religion or ethos be a determining factor having regard to the duties of the position.

13. **Constitutional provisions and principles** Article 4(2) of the Framework Directive requires that any difference in treatment based on a person’s religion or belief “*shall be implemented taking account of Member State’s constitutional provisions and principles, as well as the general principles of Community law...*”. The relevant provisions of Bunreacht na hEireann must therefore be taken into account. Article 40.1 sets out an all-encompassing constitutional article on equality before the law. Article 42.1 provides constitutional recognition of the right of parents to choose a particular school of a particular religion provided to parents. In Article 44.2.2 the State guarantees to every Irish citizen freedom of conscience and the free profession and practice of religion subject to public order and morality. Article 44.2.3 provides that the State shall not impose any disabilities or make any discrimination on the ground of religious profession, belief or status.
14. The constitutional protections for free practice and profession of religion and the eschewal of endowment of religion or discrimination on grounds of religion, profession, belief or status can conflict. For example the accommodation of one religious viewpoint or tenets of a particular religion or belief has the capacity to be interpreted as constituting discrimination against members of a different religion. In *Quinn’s Supermarket v Attorney General*<sup>9</sup> the Supreme Court rejected the argument advanced that the special exemption for kosher butcher from the Sunday trading laws was discriminatory against non-Jewish shop owners and upheld the exemption on the basis that it was necessary to protect the freedom of religion of the Jewish community. In spite of recognising the need to protect religious interests, the Supreme Court elevated the constitutional free practice of religion guarantee over the non-

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<sup>9</sup> [1972] I.R. 1.

discrimination guarantee. A similar analysis to that of *Quinn's Supermarket* was provided by the Supreme Court in *McGrath v Trustees of Maynooth College*<sup>10</sup> which concerned the argument of the plaintiffs who were dismissed on grounds relating to their religion that this action constituted “*discrimination on grounds of religious status*” within Article 44.2.3 of the Constitution. In following the reasoning of *Quinn's Supermarket*, the Supreme Court concluded that the purpose of the prohibition on religious discrimination was to protect the free practice of religion. This resulted in the prohibition on religious discrimination effectively being superseded or overcome by the protection of the right to free practice of religion. One of the only judgments where the non endowment of religion came to the fore was that of *Campaign to Separate Church and State v Minister for Education*<sup>11</sup> where the constitutional right of parents to have religious education provided in schools which their children attend qualified the prohibition on religious endowment as being subject to the principal of State support for denominational education.

15. By contrast, in *Murphy v IRTC*<sup>12</sup> the restriction on free practice of religion by virtue of a legislative provision which prohibits the broadcast of advertisements “*directed towards any religious ... end*”<sup>13</sup> was justified. The Supreme Court found there was no breach of the right to practice religion as all religions were treated equally.
16. The constitutionality of section 37 as it was subsequently enacted was considered by the Supreme Court in the Article 26 reference.<sup>14</sup> The Supreme Court espoused the well-established constitutional principle that it is not permissible to make discrimination or distinction between citizens on grounds of religion. However, it is permissible, on a constitutional basis to make distinctions on grounds of religion where it is necessary to “*give life and reality to the guarantee of free profession and practice of religion.*” Section 37 was described by the Supreme Court as being 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 emphasised that the use of the words “reasonable” and “reasonably necessary” in section 37 implied that the test was to be an objective one

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<sup>10</sup> [1979] I.L.R.M. 166.

<sup>11</sup> [1998] 3 I.R. 321

<sup>12</sup> [1999] 1 I.R. 12

<sup>13</sup> Section 10(3) of the Radio and Television Act 1988.

<sup>14</sup> *In the Matter of Article 26 of the Constitution and In the Matter of the Employment Equality Bill, 1996* [1997] 2 I.R. 321 at p. 359.

and that the matter was to be resolved on a case to case basis, and stated somewhat ambiguously that the question of what it reasonably necessary to protect an ethos “*will rest with the court, and the court in making its overall decision will be conscious of the need to reconcile the various constitutional rights involved.*”<sup>15</sup> In an approach reminiscent of *Quinn’s Supermarket*, the Supreme Court upheld religious discrimination as it was necessary to secure and bolster the free practice of religion.

17. Significantly in the Article 26 reference, the Supreme Court did not hold that religious discrimination was permissible from a constitutional perspective but rather that it was permissible in certain circumstances: “insofar-but only insofar- as this may be necessary to give life and reality to the guarantee of the free profession and practice of religion contained in the Constitution”. Therefore the application of the judgment of the Supreme Court may not be as encompassing as some may suggest.
18. The above case law is now subject to the provision of Article 4(2) of the Framework Directive given the supremacy of European law in the Irish legal order. Article 4(2) is designed at affecting a balance between recognising the necessity for protection of freedom of religion and non discrimination on grounds of religion or belief and respecting the rights of others who have a right to equality on the other hand. As an exemption to the general principle of non discrimination within employment and occupation, Article 4(2) imports the principle of proportionality to the balance of the right to equality and freedom of religion which interact and conflict in certain circumstances. In applying to certain employers, the section is likely to recognise the rationale that in certain limited employment sectors, the communication and personification of a certain set of religious values is required of employees. It would allow for the provision of school chaplains of a particular religion in schools and continue the provision of religiously run schools in this jurisdiction. It is not necessary for the constitution recognition of religious freedom within schools to be protected in the absolute fashion it is by section 37(1)(a).
19. Therefore the protection on freedom of religion is present in Article 4(2) of the Directive albeit not in as broad a manner as the constitutional judgments cited above. Article 4(2) allows for the protection of religious freedom but not in the breadth referred to by the Supreme Court in the Article 26 reference. There is a requirement for proportionality by virtue of Article 4(2) within any objective justification of any

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<sup>15</sup> *In the Matter of Article 26 of the Constitution and In the Matter of the Employment Equality Bill, 1996* [1997] 2 I.R. 321 at p. 359.

criteria applied ostensibly pursuant to section 37 to protect religious freedom. This appears to also have been envisaged by the Supreme Court in its Article 26 judgment in spite of upholding as constitutionally permissible the lower standard of justification for action taken by employers captured by section 37. Article 4(2) bolsters the general right to equality as the Irish Constitutional provision on equality<sup>16</sup> provides very limited protection in the context of employment equality law.

### **Other provisions of relevance**

20. A number of provisions within the European Convention on Human Rights (ECHR) and the European Charter of Fundamental Rights (the Charter) must also be considered both in terms of the scope of Article 4(2) and their importance within Irish Law (particularly the ECHR).<sup>17</sup> The ECHR is referred to in two of the recitals to the Framework Directive and therefore is placed at the core of the provisions of the Directive. Article 9 of the ECHR provides for freedom of religion and conscience along with a restricted and qualified right to manifest religion and beliefs in “*worship, teaching, practice and observance*.” Article 10 of the Charter prescribes the right of freedom of thought, conscience and religion, the right to manifest religion or belief and the right to conscientious objections is recognised in accordance with the national laws governing the exercise of this right.
21. The EU Commission issued a reasoned opinion on 31 January 2008 regarding a number of concerns it had with the transposition of the Framework Directive into Irish law, one of which was in relation to the exemptions for religious organisations provided in the Irish equality legislation which was seen to be too broad in its ambit. The Department for Justice and Equality responded and in April 2008, it was announced that the EU Commission would not pursue its reasoned opinion any further as it was “satisfied with the measures that have been taken”.<sup>18</sup> We have been unable to obtain a copy of the correspondence between the EU Commission and the Department as it is strictly privileged. We are therefore unable to comment on what measures are referred to in the EU Commission press release of May 2008.
22. An EU Commission supported report concluded that section 37(1)(b) does not comply with Article 4(2) of the Framework Directive as it is “*broader than allowable in the*

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<sup>16</sup> Article 40.1.

<sup>17</sup> Article 6 of the Treaty on the Functioning of the EU recognises that the EU should “recognise fundamental rights as guaranteed by the ECHR”. The Charter is now attached to the TFEU has the same legal value of all preceding and current Treaties. See also the ECHR Act 2003.

<sup>18</sup> See The Irish Independent 28 April 2008 and Press Release 6 May 2008, IP/08/703.



*Directive, as it does not provide the 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>19</sup>

23. Concern that the scope of the exemptions contained in section 37(1) may result in discrimination contrary to Article 26 of the International Covenant on Civil and Political Rights has been expressed by the UN Human Rights Committee<sup>20</sup>. It is also worth recognising the observations made by other UN and Council of Europe bodies, which encourage Ireland to promote the establishment of non denominational or multi denominational schools to encourage diversity and tolerance of other faiths and beliefs.<sup>22</sup> Amendments to section 37 would assist with achieving these aims.

#### **Background to recommendations:**

24. The current Programme for Government contains a commitment that “*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*”.<sup>23</sup> There was a Private Members Bill published in 2012 (‘the Power Bill’)<sup>24</sup> which proposed amendments to section 37 but this was defeated due to constitutional concerns and the limited nature of its amendments which were seen by some Senators to be too narrow. There is currently a Private Members Bill (‘the Bacik Bill’) which proposes amendments to section 37.<sup>25</sup>
25. In October 2013, the Equality Authority sought submissions from interested parties as a part of a consultation process in relation to a proposed amendment of section 37 of the Employment Equality Acts 1998-2011. Sixty one submissions were received from interested parties such as representative groups, individuals and trade unions.

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<sup>19</sup> L. Vickers, *Religion and Belief Discrimination in Employment – the EU Law*, (European Commission, 2006) at p. 58.

<sup>20</sup> Concluding Observations on Ireland’s Second Periodic Report under the International Covenant on Civil and Political Rights. Concluding Observations-Ireland 24/7/2000, at paragraph 22, UN Doc. CCPR A/55/40 (2000).

<sup>22</sup> United Nations Committee on the Elimination of Racial Discrimination, Concluding Observations of the Committee on the Elimination of Racial Discrimination, (April 4 2011, UN Doc. CERD/C/IRL/CO/3-4, para.26; Concluding Observations of the UN Human Rights Committee, UN Doc. CCPR/C/IRL/CO/3, 30 July 2008, para 22; Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities, Third Opinion on Ireland, adopted on 10 October 2012 ACFC/OP/III(2012)006, para. 114.

<sup>23</sup> Fine Gael and Labour, Programme for Government 2011-2016 (2011).

<sup>24</sup> Employment Equality (Amendment) Bill 2012.

<sup>25</sup> The Employment Equality (Amendment) (No. 2) Bill 2013

26. In this options and recommendation paper we will examine four potential options for section 37(1). It is a matter for the Commission to determine its preferred option(s) however we submit a recommendation for amendments to section 37 setting out the core elements of what we consider will be required in any such amendments.

## OPTIONS

### A. Maintenance of status quo and retention of section 37 in its current form:

27. Maintain section 37(1)(a) and 37(1)(b) in their present form with no amendments. The arguments in favour of such an approach are:

- i) that the EU Commission dropped infringement proceedings as against Ireland for section 37 as it was apparently satisfied with the response of the Department of Justice and Equality;
- ii) that section 37(1) can be interpreted in line with Article 4(2);
- iii) that the constitutional protection of the rights of parents to choose a religious school for their child and/or to exercise their freedom of religion require Section 37(1) to be maintained.

28. It is our view that these are weak arguments and that Section 37(1) is in breach of Article 4(2) of the Framework Directive. It is difficult to see how the section can be interpreted in the light of Article 4(2) without effectively rewriting the legislation which is exactly what the High Court has said cannot be done by an administrative body such as the Equality Tribunal<sup>26</sup>. The relevant provisions of Bunreacht na hEireann cannot and will not save Section 37(1) from the consequences of its inconsistency with Article 4(2) given the supremacy of European law in the Irish legal order. Therefore in the interests of common sense and legal certainty, maintaining Section 37(1) as it currently exists is not desirable or appropriate. Employers covered by section 37(1) and employees of such employers are entitled to know the precise parameters of an exception and or derogation to the general principle of non discrimination within the workplace. Employees are entitled to undertake actions in

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<sup>26</sup> *Minister for Justice, Equality and Law Reform and Commissioner of An Garda Síochána v Director of Equality Tribunal* [2009] IEHC 72, [2010] 2 I.R. 455, [2009] E.L.R. 116. The High Court found that any administrative body including the Equality Tribunal “is obliged to construe national legislation in the light of the obligation under European law in which it has its origins. That obligation, however, does not extend to re-writing the legislation; to implying into it a provision which is not there; or to doing violence to its express language.”

the workplace in good faith and should be aware whether their actions could give rise to a potential cessation of their employment for example

B. Delete section 37 and rely on other provisions within the Employment Equality Acts 1998-2011 as sufficient protection

29. A number of the submissions furnished by trade unions suggest that section 37(1) could be deleted in its entirety and there is sufficient protection for employers who are religious, educational or medical institutions within other provisions within the Employment Equality Acts.

*Section 16(1)*

30. Section 16(1)(a) provides that a person who is unwilling to undertake the duties of their position is not entitled to continue in their employment:

*(1) Nothing in this Act shall be construed as requiring any person to recruit or promote an individual to a position, to retain an individual in a position, or to provide training or experience to an individual in relation to a position, if the individual—*

*(a) will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed.*

31. It is unlikely that section 16(1)(a) could provide protection to an employer who dismisses an employer for their failure to undertake a reasonable request due to their religious belief. It would be a difficult argument to maintain given the circumstances in which freedom to manifest religion has been recognised most notably by the ECtHR, which jurisprudence has a clear application to EU law given the Treaty on the European Union (TEU), Article 6 of which provides that EU law should respect “fundamental rights as guaranteed by the [ECHR] and as they result from the constitutional traditions common to Member States, as general principles of Community law”. Section 16(1) fits in well with the ordinary common law implied contractual duties imposed on employees such as to obey reasonable instructions and any action taken as a result of this cannot constitute discrimination. Section 16(1) could not be applied in a manner which constitutes discrimination on another ground.

Section 16(1)(a) could be applied in a *Ladele* factual matrix<sup>27</sup> for an employee who refused to undertake a particular part of their duties due to their conscientious objections or for a homosexual employee in a religious school who refused to teach a class on marriage being between one man and one woman, etc. It is possible that section 16(1)(a) would be found to apply on to the disability ground only.<sup>28</sup> It is also likely that Section 16(1)(a) and its application would have to be objectively justified similar to age discrimination claims which can be defended by safety concerns (eg firefighters).

*Section 37(2): Genuine Occupational Requirement*

32. We consider it could be problematic for institutions currently captured by section 37(1) to have to rely on Section 37(2) which permits a defence to what would otherwise be discrimination to be on the basis of a “*genuine and determining occupational requirement*” (our emphasis). This is not the same as Article 4(2) of the Framework Directive which allows a defence due “*a genuine, legitimate and justified occupational requirement.*” For example a Christian school might find it difficult to argue that it is a ‘*determining*’ requirement (as per Section 37(2)) that a maths teacher be a Christian but might find it easier to argue that it is a ‘*legitimate and justified*’ requirement (as per Article 4(2)) in order to maintain and promote the ethos of the school.<sup>29</sup>

*Positive Discrimination Provisions: Sections 24 and 33*

33. We have also considered whether the positive discrimination sections of the Employment Equality Acts could apply to allow for the lawfulness of what appears to be discrimination. It is well established in the jurisprudence of the Court of Justice that positive action measures have to be justified by way of cogent and substantive reasons and therefore these provision would be difficult to apply in practice and ultimately will be of little practical use to religious employers who can currently rely on Section 37(1).

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<sup>27</sup> [2013] I.R.L.R. 231. This case concerned a registrar of births, deaths and marriages, whose job had been extended to include registering civil partnerships. The claimant objected to providing this facility for gay couples on the basis of conscientious objections. It was her Christian belief that marriage was the union of one man and one woman, and that same-sex civil partnerships were contrary to God's law. She was disciplined by her employer for her refusal, culminating in the loss of her job.

<sup>28</sup> *Collins v Browne*, DEC-E2011-182 The Equality Officer refused to accept the employer's attempts to justify the dismissal of a pregnant employee on the basis of the employer's novel argument that section 16(1) of the Acts justified the dismissal of an employee whom the employer claimed was incapable of performing the essential duties of her job.

<sup>29</sup> P. Beaumont, 'Christian perspectives on the law: what makes them distinctive?' in R. O'Dair and A. Lewis (eds) *Law and Religion*, (Oxford: Oxford University Press, 2001), 529 at p.538.

34. Relying on positive discrimination could also severely limit the protection ostensibly afforded to religious employers by Article 4(2) where there is no intervening Irish legislation given that Article 4(2) is permissive and not mandatory in nature.

*Other difficulties with removing Section 37(1)*

35. Removing section 37(1) entirely could constitute a violation of the rights of employers and employees to religious freedom. Such a right exists within European and Irish Constitutional law.
36. It is possible that the exemption from what would otherwise be unlawful discriminatory treatment by reference to Section 37(1) that could be deleted in its entirety are the grounds protected in law but not covered by Article 4(2) i.e. race, as defined by the Race Directive<sup>30</sup> (racial or ethnic origin but not nationality which is a creature of Irish law) or pregnancy, maternity or gender as there is no provision within the Race or Recast Directives allowing for an exemption similar to that in Article 4(2).
37. Overall we view this option as far too legally uncertain . It could lead to a most unsatisfactory situation whereby discrimination on another protected ground could be deemed lawful. This would be in breach of Article 4(2) and the directive's requirement that the Member State ensures access to an effective judicial process.

C. Deletion of section 37 and expressly provide for freedom of religion within the Employment Equality Acts:

38. An express provision for the right to religious freedom could be included in the Employment Equality Acts in a similar manner to the Charter and the Convention. It would create a hierarchy of rights within the Employment Equality Acts and could put rights such as equal treatment on grounds of sexual orientation, the right to religious freedom or the right to gender equality in conflict with each other. For this reason this option is not desirable.

D. Amendment of section 37(1)(a) and 37(1)(b)

39. This option came through strongly in the submissions from interested parties as being a viable alternative to the current section 37(1). It is also legally desirable given what we view as the lack of conformity of Section 37(1) with Article 4(2).

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<sup>30</sup> Council Directive 2000/43/EC

40. The Bacik Bill proposes that section 37(1) remains in place for wholly autonomous religious institutions, whereas medical and educational institutions which are in receipt of public funds may impose more favourable treatment of their employees where this does not constitute discrimination on another ground and, by reason of the nature of the institution's activities or the context in which they are carried out, the religion or belief of the employee or prospective employee constitutes a "*genuine, legitimate and justified occupational requirement having regard to the institution's ethos*". An action on the part of such an institution which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution can be justified by reason of the nature of the employment concerned or the context in which it is carried out, where the action is justified by reason of a legitimate aim and the means of achieving that aim are appropriate and necessary.
41. The approach of this Bill would create a two tier system of protection, absolving religious institutions (even those in receipt of public funds) from the Article 4(2) provisions and would allow privately funded medical and educational institutions to continue to be bound by section 37(1) as it currently stands. This would, in effect, allow discrimination otherwise prohibited by the Act to be lawful.
42. Article 4(2) does not distinguish between private and public institutions and we are of the view that the approach of this Bill is undesirable and may continue to leave the State exposed to a breach of its Article 4(2) obligations.
43. If section 37(1)(b) was amended to narrow its potential application and such actions could not constitute discrimination on another ground, this could be in conformity with the Directive. We are satisfied that in order to ensure conformity with Article 4(2) of the Framework Directive, amendments to section 37(1) are required. These should be broadly speaking similar to the wording of Article 4(2).
44. There is a need to balance conflicting rights between employers and employees, the interests of the religious institution, the protection of their ethos and the rights of all individuals to a workplace free from discrimination. The balancing of such interests occurred in the ECtHR in *Ladele* and *Eweida*. The Courts and Tribunals in this jurisdiction are very familiar with such an approach in assessing objective justification of indirect discrimination in equality law.
45. In Australia, section 38 of the Sex Discrimination Act 1984 provides that any discrimination of staff in an educational institution can only arise in the context of "*doctrines, tenets, beliefs or teachings of a particular religion or creed*". In our view

that this is a suitable standard by which to assess an employee's undermining of their religious employer, subject to the requirement of proportionality between the objective sought to be achieved by the religious institution and the restriction on the employee's rights.

46. We are of the view that the wording of section 37(1) should therefore include the following elements to strike a balance between individual rights and religious freedoms:

- a. Discrimination on grounds of religion or belief would be permissible by an institution (being an educational, medical or religious organisation) with an ethos founded on religion or belief where adherence to a particular religious belief is a genuine, legitimate and justified occupational requirement. This would allow for example that a mosque could legitimately require an Imam be Muslim. It could also be permissible for the Chief Executive of a Christian charity to be of a particular religion depending on the duties of the position. It would also be arguably lawful for a school to promote a teacher to a position involving the espousing of religious belief (such as a school chaplain) on the basis of the religious belief of that individual even where there is a candidate of a different religious belief with greater experience and qualifications for the position but would not necessarily permit the same approach to a teacher of a subject with no religious dimension.

Consideration should be given as to whether this would only apply to access to employment which could be sufficient to satisfy any proportionality requirement as part of a justification test. To allow this discrimination beyond access to employment could be overly broad, although some consideration may need to be given to an employer's requirements to maintain numbers of employees of a particular religion at a particular level within an organisation.

Some connection between the role and the requirement to be of a particular religion or belief would be necessary. It appears that a test of "*genuine legitimate and justified occupational requirement*" (as per Article 4(2)) is broader in application than the ordinary genuine occupational requirement defence which requires the occupational requirement to be "*determining*". However the case law cited above from Member States indicates a strict test will be applied to the exemption and there likely to be a requirement for a

connection with the position or role and the religious ethos of the organisation in order for the exemption to apply. It is certainly unlikely that a role such as that of a groundkeeper employed by an organisation with a religious ethos would be captured by the exemption.

- b. The burden of proof for reliance on the justification of actions of an employer within section 37(1)(a) or (b) should rest with the employer.
- c. No discrimination is permissible (including any action taken by the employer where it is alleged the employee is undermining the religious ethos of the particular organisation) where it constitutes discrimination on another ground protected by the Employment Equality Act.
- d. Section 37(1)(b) the action should only be taken against an employee where there is active and significant undermining in the workplace during the course of employment to the core tenets of the religious belief. Consideration should be given to
  - i) whether such undermining could include actions outside of work or unrelated to work activities;
  - ii) the need to balance the employee's right to privacy, as a matter of constitutional law and an ECHR right;
  - iii) whether the section should be applied (other than in exceptional circumstances and for reasons connected to the employment duties of the employees) to the employee's personal life outside of work.
- e. The application of the section cannot be used if it constitutes discrimination on any other of the protected grounds within the Employment Equality Acts.
- f. The concepts of religious ethos and religious, medical or educational institutions should be defined to clarify the type of institutions involved. The current definition of such institutions as being 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 is not sufficiently clear to ensure the certainty to which employees and employers are entitled in assessing their legal obligations and entitlements.



**Marguerite Bolger SC**

**Claire Bruton BL**