

# **Submission from Atheist Ireland On the proposed amendment to Section 37 of the Employment Equality Act 1998–2011**



## **Contents**

1. Introduction
2. Selective Nature of the Exemptions
3. Limited Opportunities for Employment Elsewhere
4. Conclusion
5. Appendix - Submission from Atheist Ireland and NSSUK to EC

## **1. Introduction**

1.1 Atheist Ireland is an Irish advocacy group. We promote atheism and reason over superstition and supernaturalism, and we promote an ethical, secular society where the State does not support or finance or give special treatment to any religion. You can read details of our policies on our website at <http://atheist.ie>.

1.2 Since being formed in late 2008, we have campaigned against the Irish blasphemy law, campaigned for a secular Irish Constitution and a secular Irish education system, lobbied political parties and candidates on secular policies. We have made Submissions to the United Nations and the Council of Europe and raised in particular the discrimination suffered by teachers, secular parents and their children in the Irish Education system.

1.3 In 2012 Atheist Ireland, along with National Secular Society (UK), made a Submission to the European Commission in support of the claim of Directive infringement by Ireland of EU Framework Directive 20007/78/EC. The Submission was written by Dr. Ronan McCrea, Barrister at Law (Ireland)(N.P.), Barrister (England and Wales) (N.P.), Lecturer, Faculty of Laws, University College London. We will quote from this Document and also provide it as an appendix.

1.4 In a Republic, Section 37 grants religious bodies and a foreign state control over the employment choices of minorities and their private lives, and it also grants them control over the private lives of Catholics who as a matter of conscience choose not to follow all the teachings of a church that they belong to. Section 37 undermines pluralism in a democratic state and breaches the human rights of minorities and consequently it should be removed.

1.5 In the 2011 census, over 340,000 people did not identify with any religion. 269,811 people selected “No Religion” (an increase of 44.8% over 2006). Another 3,905 people selected “Other” and wrote in “Atheist” (a 320% increase), while 3,521 wrote “Agnostic” (a 132% increase). 72,914 people did not state their religion (a 4% increase). Also, significant numbers of Irish Catholics do not believe in key tenets of the church’s teaching, according to an Irish Times/Ipsos MRBI poll last year.

## 2. Selective Nature of the Exemptions

### 2.1 Quote from Atheist Ireland/NSSUK Submission to EC

*“2. (b) **Selective Nature:** Exemptions are provided only to religious employers and not to employers with non-confessional beliefs and philosophies. This is despite the fact that the exemptions permitted by Directive are provided to organisations based “on religion or belief” (emphasis added). The European Court of Human Rights has consistently ruled that the protection of freedom of religion provided by Article 9 (and now by Article 10 of the Charter of Fundamental Rights of the European Union) applies equally to those with non-religious convictions. The selective nature of this exemption also violates the spirit of Article 17(2) of the Treaty on European Union which states that “The Union equally respects the status under national law of philosophical and non-confessional organisations””*

*“There are several notable features of Section 37:*

*(a) **Broad Scope:** the exemptions apply not merely to religious institutions but also to an “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”.*

*Thus, it potentially applies to occupations such as healthcare professional or teacher that are largely secular in nature.”*

2.2 The European Court of Human Rights recognises that the “supporters of secularism are able to lay claim to views attaining the “level of cogency, seriousness, cohesion and importance” required for them to be considered “convictions” within the meaning of Articles 9 of the Convention and 2 of Protocol No. 1 (see *Campbell and Cosans v. the United Kingdom*, 25 February 1982, § 36, Series A no. 48). More precisely, their views must be regarded as “philosophical convictions”, within the meaning of the second sentence of Article 2 of Protocol No. 1, given that they are worthy of “respect ‘in a democratic society’”, are not incompatible with human dignity and do not conflict with the fundamental right of the child to education.” (*Lautsi v Italy* (App No. 30814/06) 18th March 2011)

2.3 Section 37 grants exemptions to religious bodies at the expense of the right to freedom of conscience, freedom of expression and the right to private and family life of individuals. Section 37 has undermined the human rights of the non-religious, secularists and religious minorities as it undermines pluralism which is the foundation of a democratic society. It also undermines the human rights of some Catholics who as a matter of conscience do not follow all the teachings of the Catholic Church. As religious exemptions are guaranteed to religious institutions, individual conscience and human rights takes second place.

## 2.4 The European Court has stated that:-

“31. As enshrined in Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.”<sup>1</sup>

## 2.5 Quote from Atheist Ireland/NSSUK Submission to EC

*“The legislation does not mention the need to balance the need to prevent the undermining of the ethos of an institution with the right of an employee to protection of their rights to privacy, free expression, equal treatment and dignity, all of which are protected by the Union’s Charter of Fundamental Rights.*

*An action may be regarded as reasonably necessary to prevent the undermining of the ethos of an institution while involving a disproportionate restriction of, for example, an employee’s right to privacy.*

*For example, teacher in a small town who lives with a same-sex partner could be seen by a religious employer as undermining the ethos of his or her employer and could be subject to the kind of intrusive inquiry into his or her private life found unacceptable by the Court of Human Rights in Smith and Grady v United Kingdom.*

## 2.6 In a Circular Letter issued in 2008 the Holy See stated that:-

“6. Catholic schools are characterised by the institutional link they keep with the Church hierarchy, which guarantees that the instruction and education be grounded in the principles of the Catholic faith and imparted by teachers of right doctrine and probity of life (cf. c. 803 CIC; cc. 632 e 639 CCEO).”<sup>2</sup>

In Ireland the human rights of some employees are determined by a foreign state (the Holy See) and that foreign state’s specific religious belief on what constitutes probity of life.

---

<sup>1</sup> <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57827> para 31

<sup>2</sup> [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_20090505\\_circ-insegn-relig\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20090505_circ-insegn-relig_en.html)

### 3 Limited Opportunities for Employment Elsewhere

#### 3.1 Quote from Atheist Ireland/NSSUK Submission to EC

*“The dominance of religious employers within the Irish education system makes the failure of the legislature to include clear limitations based on proportionality and genuine occupational requirement tests, particularly grave. Teachers whose employment is terminated on grounds that such an action is necessary to prevent the undermining of a school’s ethos do not have available to them significant opportunities for employment in non-religious schools. In 2010, 91.1% of primary schools were under the control of the Catholic Church. Only 2.3% were non-religious schools. “*

3.2 Minorities are deterred from training or taking up employment as teachers in the State. A Certificate in Religious teaching is compulsory for teachers who wish to take up employment in the vast majority of publicly funded schools in the state. In the main this is Catholic religious teaching which is not only confined to a single class but integrated into the state curriculum. This is an issue of conscience as the UN has already raised concern about the integrated curriculum in denominational schools and the rights of secular parents and their children. In order to take up employment as a teacher secularists are obliged to teach a religion (which is against their conscience) and integrate it into the state curriculum and the daily life of the school which consequently undermines the human rights of secular parents and their children and religious minorities.

In a Circular Letter on Education the Vatican has stated that:-

"13. Based on what has been said, it is clear that teaching the Catholic religion has its own specific nature vis-à-vis other school subjects." <sup>3</sup>

3.3 In their Submission to the UN Committee on the Rights of the Child the Holy See stated that:-

*“Aims of Catholic Education.* The content of Catholic education is inspired by Christian anthropology, guided by Scripture, Church tradition and Church teachings.”

*Introduction.* The Holy See promotes and encourages the system of Catholic schools, which are not State institutions but nonetheless have a public function. The educational activities are carried out in accordance with the Catholic school’s own authority and responsibility under canon law, and pursuant to the laws of the respective States in which they operate.

---

<sup>3</sup> [http://www.vatican.va/roman\\_curia/congregations/ccatheduc/documents/rc\\_con\\_ccatheduc\\_doc\\_20090505\\_circ-insegn-relig\\_en.html](http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_20090505_circ-insegn-relig_en.html)

The Catholic school is a “place of ‘integral education of the human person through a clear educational project of which Christ is the foundation’, directed at creating a synthesis between faith, culture and life” (CCE, *“Educating Together in Catholic Schools: A Shared Mission Between Persons of Consecrated Life, and the Lay Faithful,”* 2007, n. 3).<sup>4</sup>

3.4 The Joint Managerial Body AMCSS Secretariat’s ‘Guidelines on the Inclusion of Students of Other Faiths in Catholic Secondary Schools’ states that:

“The general programme of the school will be considered as a form of **pre-evangelisation**.” (bolding in original document)<sup>5</sup>

Pre-evangelisation of pupils who are not Catholic does not constitute respect for the religious and philosophical convictions of minorities, and it is official policy in the majority of schools in the country. Teachers would fall foul of Section 37 if they refused to pre-evangelise, as they would not be upholding the ethos of the school. In essence, in order to take up employment as a teacher, a person must be willing to undermine the freedom of conscience of minorities.

3.5 Section 37 gives control to religious bodies over the rights of those belonging to other communities. In the main it is the Catholic Church who has control over the human rights of minorities which means that a foreign state the ‘Holy See’ has control in a Republic over the rights of minorities.

The European Court has stated that –

“Furthermore, while it is important to ensure that representatives of religious communities are allowed to give input and advice, this should not be taken to the extreme of giving them too much decision-making power at the cost of abdicating state responsibility.

The European Court of Human Rights has made it clear that excessive involvement of religious authorities from one community in decisions that affect the rights of those belonging to another community may itself amount to a violation of the right to freedom of religion or belief.”<sup>6</sup>

---

<sup>4</sup> <http://www2.ohchr.org/english/bodies/crc/crcs65.htm>

<sup>5</sup> <http://www.jmb.ie/publications>

<sup>6</sup> *Manoussakis v Greece* (ECHR, 18748/91 1996) para 49-38 Toledo Guiding Principles p68

3.6 It is also worth noting that the Holy See has rejected the Toledo Guiding Principles. The Toledo Guiding Principles are based on human rights and in particular the right to freedom of conscience. Ireland is a member of the OSCE and has not rejected the Toledo Guiding Principles. Out of the 56 States in the OSCE the Holy See is the only one that has rejected the Toledo Guiding Principles.

The reason they gave is as follows:-

“Furthermore, the Holy See has noted the upcoming presentation of the Toledo Guiding Principles on Teaching about Religions and Beliefs in Public Schools and is surprised. While recognizing that they were prepared by the Panel of Experts on Freedom of Religion, it is difficult to understand why participating States, especially the Holy See that speaks openly on matters of religion, were not consulted. The Document contains a reductive view of religion and a conception of the secular nature of States and their neutrality that obfuscates the positive role of religion, its specific nature and contribution to society. In doing so, the document contradicts what has always marked the OSCE’s understanding of religion.”<sup>7</sup>

It is clear that Catholic education and human rights law are incompatible.

#### **4. Conclusion**

In a Republic, Section 37 grants religious bodies and a foreign state control over the employment choices of minorities and their private lives, and it also grants them control over the private lives of Catholics who as a matter of conscience choose not to follow all the teachings of a church that they belong to.

Section 37 of the Employment Equality Act undermines pluralism in a democratic state and breaches the human rights of minorities and consequently it should be removed.

#### **5. Appendix Enclosed**

**Submission from National Secular Society UK and Atheist Ireland to the EC**

---

<sup>7</sup> <http://www.osce.org/pc/28557>

## 5. Appendix

### Submission from National Secular Society UK and Atheist Ireland to the EC

#### Religious Exemptions in Irish Law: Section 37 of the Employment Equality Act and Directive 2000/78

##### Report for the National Secular Society

8 December 2012

The exemptions provided by Irish law for religious employers raise serious issues in relation to the duty of the Irish authorities to implement Directive 2000/78 for the following reasons. The exemptions provided by the Irish legislature in Sections 37(1) and (2) of the Employment Equality 1998 (as amended) fail to respect key features of the directive that have been repeatedly identified by the Commission and which violate the general principles of EU law.

The Irish legislation remains untested in litigation before the superior courts (High Court and Supreme Court). The absence of litigation cannot be taken as evidence that the law is operating satisfactorily. The vagueness of Irish law in this area coupled with the particular structure of the Irish education system, within which the vast majority of schools (including over 90% of primary schools) are under the control of religious bodies, means that it is impossible for individuals to test the legislation in the courts without risking losing almost all opportunities for employment within the sector. Indeed, the Irish Congress of Trade Unions has cited Section 37 as a major concern to its members and has called for the scope of the exemptions it provides to religious employers to be narrowed.<sup>8</sup>

##### The Relevant Legislation:

Section 37 of the 1998 Act provides that:

*“(1) 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*

---

<sup>8</sup> <http://www.ictu.ie/equality/lgbt.html>

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

There are several notable features of Section 37:

**(a) Broad Scope:** the exemptions apply not merely to religious institutions but also to

*“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”.*

Thus, it potentially applies to occupations such as healthcare professional or teacher that are largely secular in nature.

**(b) Selective Nature:** Exemptions are provided only to religious employers and not to employers with non-confessional beliefs and philosophies. This is despite the fact that the exemptions permitted by Directive are provided to organisations based “*on religion or belief*” (emphasis added).<sup>9</sup> The European Court of Human Rights has consistently ruled that the protection of freedom of religion provided by Article 9 (and now by Article 10 of the Charter of Fundamental Rights of the European Union) applies equally to those with non-religious convictions.<sup>10</sup> The selective nature of this exemption also violates the spirit of Article 17(2) of the Treaty on European Union which states that “*The Union equally respects the status under national law of philosophical and non-confessional organisations*”.<sup>11</sup>

**(c) Failure to include Genuine Occupational Requirement or Proportionality Tests:** Section 37 allows more favourable treatment on the religion ground where it is “*reasonable to do so in order to maintain the religious ethos of the institution*” or where it takes action “*reasonably necessary to prevent an employee from undermining the ethos of the institution*”. Neither of these exemptions is limited by a genuine occupational requirement test or by a proportionality test. In the Reasoned Opinion sent to the United Kingdom authorities in relation their implementation of Directive 2000/78,<sup>12</sup> the Commission noted that under the relevant British legislation:<sup>13</sup>

*“an employer can apply a requirement related to sexual orientation in respect of employment for an organised religion in order to comply with the doctrines of the religion or so as to avoid*

---

<sup>9</sup> Directive 2000/78 Article 4(2).

<sup>10</sup> See *Kokkinakis v Greece* 17 EHRR 397 para. 31 and *Arrowsmith v United Kingdom* No. 7050/75, 19 DR 5 (1978).

<sup>11</sup> Treaty on European Union, Article 17(2).

<sup>12</sup> Infringement No. 2006/2450. Reasoned Opinion, November 2009.

<sup>13</sup> Regulation 7(3) of the Employment Equality (Sexual Orientation) Regulations 2003.



*conflicting with the strongly held religious convictions of a significant number of the religion's followers.”*

The Commission noted that:

*“these provisions are based on Article 4(1) of the Directive, the general provision allowing differences of treatment where a particular characteristic is a genuine and determining occupational requirement of the job in question.”*

It found that the British legislation failed to fulfil the United Kingdom's obligations under the Directive as Article 4(1):

*“contains a strict test which must be satisfied if a difference of treatment is to be considered non-discriminatory: there must be a genuine and determining occupational requirement, the objective must be legitimate and the requirement proportionate.”*

As these elements were absent from the British legislation, the Commission concluded that there a breach of EU law had taken place.

Like the British legislation, Section 37 of the Employment Equality Act lacks both proportionality and genuine occupational requirement tests and is accordingly overbroad. The sole limiting factor under Section 37 is the requirement that the more favourable treatment be

*“reasonable to maintain the ethos of the institution” or “reasonably necessary to prevent an employee [...] from undermining the ethos of the institution”.*

This does not amount to a satisfactory balancing of the rights of employees and employers.

The legislation does not mention the need to balance the need to prevent the undermining of the ethos of an institution with the right of an employee to protection of their rights to privacy, free expression, equal treatment and dignity, all of which are protected by the Union's Charter of Fundamental Rights. An action may be regarded as reasonably necessary to prevent the undermining of the ethos of an institution while involving a disproportionate restriction of, for example, an employee's right to privacy. For example, teacher in a small town who lives with a same-sex partner could be seen by a religious employer as undermining the ethos of his or her employer and could be subject to the kind of intrusive inquiry into his or her private life found unacceptable by the Court of Human Rights in *Smith and Grady v United Kingdom*.<sup>14</sup>

---

<sup>14</sup> (1999) 29 EHRR 493.

#### **(d) Limited Opportunities for Employment Elsewhere**

The dominance of religious employers within the Irish education system makes the failure of the legislature to include clear limitations based on proportionality and genuine occupational requirement tests, particularly grave. Teachers whose employment is terminated on grounds that such an action is necessary to prevent the undermining of a school's ethos do not have available to them significant opportunities for employment in non-religious schools. In 2010, 91.1% of primary schools were under the control of the Catholic Church. Only 2.3% were non-religious schools.<sup>15</sup>

In *Schüth v. Germany*<sup>16</sup> the European Court of Human Rights found a violation of the Article 8 (ECHR) rights of a church organist who was removed from his post on the basis that he had engaged in an extra-marital relationship. The Court found a violation on the basis that the Germany 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.

Section 37, through its failure to provide that employers may only discriminate against employees where this is justified by a genuine occupational requirement limitation and is proportionate, fails to fulfil the obligations set down by the Directive. It opens the possibility that employers will be entitled, under Irish law, to interfere with the privacy rights of employees in a manner that would violate Article 8 of the ECHR, particularly given the near impossibility of obtaining employment in non-religious schools for teachers whose identity or life-choices are incompatible with the teachings of the Catholic Church or other religious bodies.

#### **(e) Failure to Provide Legal Certainty**

National courts are, of course, under an obligation to interpret legislation so that it is compatible with EU law insofar as it is possible to do so.<sup>17</sup> It is possible that the Irish Courts, in interpreting Section 37, may read in genuine occupational requirement and proportionality tests to the terms “*reasonable*” and “*reasonably necessary*”. However, this is not sufficient to discharge Ireland's obligations under EU law. As the Commission stated in its Reasoned Opinion to the United Kingdom:

*“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 (see in particular cases 29/84 Commission v Germany [1985] ECR 1661 paragraph 23, C-159/99 Commission v Italy [2001] ECR I-3541 paragraph 24, case C-365/93 Commission v Greece [1995] ECR*

---

<sup>15</sup> Mainstream National Primary Schools 2010-2011 School Year. Enrolment as on 30th September 2010, Statistic delivered by Department of Education and Skills website.

<sup>16</sup> Application no. 1620/03, 23 September 2010.

<sup>17</sup> *Marleasing* Case C-106/89 [1991] 1 ECR 4135.

*1-499, paragraph 9; and C-144199 and case Commission v The Netherlands, [2001] ECR 1-3541, paragraphs 17 and 21)."*

As Section 37 currently stands, employees in Ireland who work in institutions that have a religious ethos cannot be sufficiently certain that they will be protected from less favourable treatment (including termination of employment) only when such treatment is justified by a genuine occupational requirement and/or is proportionate.

In the context of an education system where falling foul of the ethos requirements of an employer may result in an inability to work in the vast majority of schools, this uncertainty represents a violation of the requirements of the Directive and of the right to privacy under the EU Charter of Fundamental Rights and the ECHR.

The potentially dire consequences of a failed legal challenge to Section 37 for an employee of a religious school means that those whose rights are affected by this legislation are understandably unwilling to take the risk of a litigating on the basis a hope that the Irish courts may read in limitations on the right to discriminate that do not appear in the text of the legislation. As the Irish Congress of Trade Unions states, section 37 *"is viewed by many workers as potentially threatening in view of their lifestyle or living circumstances"*.<sup>18</sup>

#### **Conclusion:**

For the above reasons, as it stands, Irish legislation appears to be in serious breach of the obligations laid down by Directive 2000/78.

Dr. Ronan McCrea

Barrister at Law (Ireland)(N.P.), Barrister (England and Wales) (N.P.),  
Lecturer, Faculty of Laws, University College London

---

<sup>18</sup> Letter of the Irish Congress of Trade Unions to the Minister for Community, Equality and Gaeltacht Affairs, 9 April 2010. [http://www.ictu.ie/download/pdf/mary\\_white\\_letter.pdf](http://www.ictu.ie/download/pdf/mary_white_letter.pdf)