

Submission to the Equality Authority on Section 37(1) of the Employment Equality Acts 1998-2011

GLEN - Gay and Lesbian Equality Network

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Introduction

GLEN welcomes the opportunity to make a submission on a proposed amendment to Section 37 of the Employment Equality Acts 1998-2011.

GLEN considers that this consultation process is an important step in the fulfilment of the Programme for Government commitment to ensure 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'*.

GLEN's goal is for LGBT people to be able to enjoy full and equal participation in all aspects of employment and training. In that context, employment and equality legislation should fully protect LGBT people in all aspects of employment; there should be no provision for discrimination on the basis of one's sexual orientation or gender identity in employment or equality legislation; and there should be no **perception** of a threat to LGBT people that discrimination on the grounds of sexual orientation or gender identity in employment is possible.

1. Protections against Discrimination in Employment

In general, all employees in this State, including LGBT employees, enjoy broad protections against discrimination in employment and training across nine grounds including sexual orientation and civil status.

- The Unfair Dismissals Act 1993 prevents an individual from being dismissed on the basis of their sexual orientation after 12 months continuous service.
- Further protections against discrimination in seeking employment or training opportunities, and in employment, on the grounds of sexual orientation, civil status and family status amongst others are provided in the Employment Equality Acts 1998-2011. The Acts also prohibit discriminatory dismissal.
- The Civil Partnership Act 2010 provide for equal treatment between civil partners and married couples in all aspects of employment, including pension provisions.

The protections under the Employment Equality Acts for transgender people arise from case law.

2. Exemptions in Equality Laws

However, Section 37(1) of the Employment Equality Act (EEA) provides for specific exemptions from discrimination protections for religious, educational or medical institutions under the direction or control of a religious body or whose objectives include the provision of services in an environment which promotes certain religious values. The particular exemptions allow these institutions to;

- a. Give more favourable treatment, on the religion ground, to an employee or a prospective employee where it is reasonable to do so in order to maintain the religious ethos of the institution, or to
- b. Take action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

The potential application of the exemptions contained in section 37(1) are particularly problematic given that more than 93% of primary schools and more than half of all post-primary schools in Ireland have a religious patron, and that many hospitals in Ireland are run by religious bodies. Many of these schools and hospitals are funded by the State to a large extent.

Given the potential broad reach of the exemption GLEN is concerned that the fundamental purpose of the Employment Equality legislation to promote 'equality between employed persons across nine grounds' is seriously undermined, in particular in relation to the employment and workplace opportunities for LGBT people.

3. Impact of Exemptions

While there is yet no case law in relation to these exemptions, the existence of the exemptions has acted as a 'chill factor' amongst LGBT employees in the above institutions.

In 1985 the High Court upheld the dismissal of a teaching employee of a school whose employment was terminated on the grounds of her life circumstances

conflicting with the ethos of the school¹. This case was the legal precedent for the exemptions in the Employment Equality Act.

The Section 37(1) exemptions have given rise to a perception that the legislation allows for discrimination against teachers or health workers in religious run institutions who could potentially be seen by those institutions as undermining their religious ethos. Many people who are LGBT, who are divorced, who are in a civil partnership, who are cohabiting or who are unmarried parents employed by these institutions, or seeking employment with these institutions, perceive these exemptions as posing a considerable threat to their job security, progression in employment or ability to secure employment in such institutions.

NGO's, Trade Unions and researchers have consistently highlighted the 'chilling effect' of Section 37(1):²

- Research suggests that teachers (including LGBT teachers) who believe their life circumstances may not be compatible with the ethos of their school tend to avoid roles which might involve greater scrutiny being placed upon their personal lives/identity; some sought positions that avoided teaching religion or Relationships and Sexuality Education (RSE) while others avoided senior management positions.
- LGBT teachers have reported a high degree of vulnerability in revealing any aspect of their personal identity to other staff members, which has impacted on their relationships in the staffroom and with other staff members.
- Some teachers have also felt that the need to conceal an aspect of their personal identity impacted on their ability to address such issues as homophobic name-calling and bullying, as to do so would draw attention to their own sexual orientation.

¹ Flynn v Power (1985) Irish Reports 648.

² For example, see ICTU http://www.ictu.ie/download/pdf/mary_white_letter.pdf and the INTO 2007 submission on the Employment Equality Acts

<http://www.into.ie/ROI/InfoforTeachers/TeacherSpecialInterestGroups/LesbianGayBisexualTransgenderTeachersGroup/Section371/INTOSubmission/>;

Aoife Neary (2012) Lesbian and gay teachers' experiences of 'coming out' in Irish schools, British Journal of Sociology of Education, DOI:10.1080/01425692.2012.722281;

Gowran, (2004) 'The Experiences of Lesbian and Gay Teachers in Irish Schools' in Primary Voices: Equality, Diversity and Childhood in Irish Education. IPA.

Sheils (2011) Unpublished thesis: 'Section 37.1 of the EEA: It's impact on the personal and professional lives of primary school teachers, particular lesbian, gay and bisexual teachers'

GLEN press releases 7/03/2013, 11/4/2012. 2/05/2012.

- Recent research explored the experiences of employment in religious-run schools of LGBT teachers, of teachers who agreed that their life circumstances adhered to the religious ethos of the school and of teachers who felt that their life circumstances did not adhere to the religious ethos of the school. This research found that LGBT teachers were the group who felt the highest potential for discrimination in employment and who were most vulnerable in revealing normal aspects of their personal lives in their professional context.
- Other research suggests that teachers believe that Section 37(1) is *unnecessary* to preserve the ethos of their school.

4. School Culture

Recently the Department of Education and Skills issued schools with new mandatory Anti-Bullying Procedures for Primary and Post-Primary³ schools. The Procedures provide direction and guidance to schools in preventing and tackling bullying and outline key principles of best practice for both preventing and tackling bullying which schools must commit to in their anti-bullying policies. The procedures recognise that a cornerstone in the prevention of bullying is a positive school culture and climate that is welcoming of difference and diversity and is based on inclusivity and respect. Schools are now required to adopt a policy that includes measures to address homophobic bullying through positive school climate.

The procedures make reference to the important role that principals and teachers play in acting as good role-models for pupils (section 6.2.3). However the exemptions in Section 37(1) of the EEA mean that many LGBT teachers are strongly discouraged from being positive role models for students as the possible repercussions of disclosing their sexual orientation are too great. The chilling effect of Section 37(1) is likely to seriously impede a schools ability to create the positive school culture and climate that is necessary to effectively address identity based bullying such as homophobic and transphobic bullying.

³ <http://www.education.ie/en/Schools-Colleges/Information/Bullying/Anti-Bullying-Procedures-in-Schools.html>

5. Civil Partnership

The lack of definition within the EEA legislation in relation to the term ‘undermining’ is problematic from the perspective of an employee who is LGBT, who is divorced, is in a civil partnership, who is cohabiting or who is an unmarried parent. There is a question as to whether this aspect of their individual identity or particular life circumstance could be considered to be *‘undermining the religious ethos of the institution’* and consequently worthy of *‘reasonable action’* on the part of the employer to prevent such perceived erosion.

Following the enactment of Civil Partnership legislation in 2010 the Department of Education and Skills issued direction⁴ to all school management bodies, vocational education committees, institutes of technology, universities, and any agencies under its aegis in how civil partners should be treated. The Department stated that civil partners, or those intending to enter civil partnerships, should be treated in the same way as spouses or those intending to enter a civil marriage.

Despite Department policy and State provision of legal rights to same-sex couples some LGBT teachers, for example, have stated that they believe they would be compromising their employment security by publically entering a civil partnership during the academic year, or by disclosing that they have entered a civil partnership. The uncertainty around Section 37(1) creates the fear that entering a civil partnership could be viewed by a religious employer as a public act that ‘undermines’ the ethos of the employer.

6. Recommendations

It is a priority for GLEN to ensure that both in law and in perception an LGBT employee or prospective employee is fully protected in their employment or prospective employment on the basis of their sexual orientation, gender identity, civil status or family status, and that there are no actual or perceived impediments on these grounds to them flourishing in their employment.

⁴ <http://www.education.ie/en/Education-Staff/Information/Employment-Terms-Conditions/Civil-Partnership-Notice.pdf> Issued May 2012.

Consequently, GLEN recommends that any amendment to the Employment Equality legislation needs to ensure an absolute clarity amongst employees and employers that:

- There is no barrier to an LGBT person enjoying any legal rights available within this State. For example, an LGBT teacher should be free to publicly enter into a civil partnership or avail of parental leave in the event of his/her partner giving birth without the threat or perception of threat to their employment status.
- There should be no impediment or consequence to employment for an LGBT person participating in any ordinary activities as a citizen of this state, whether social, cultural or political. For example, an LGBT teacher should be freely able to participate in an LGBT community group, event or campaign without fear that it could impact on their employment.
- For the avoidance of any doubt, express legal provision should be made to ensure that a person's sexual orientation or gender identity should not be grounds for any employer (including a religious employer) treating an employee less favourably in employment. (An employer should however be required and entitled to provide reasonable accommodation for a person who is transgender while that person is transitioning.) Similarly, an employee should not be penalised for entering into a cohabiting relationship, whether same-sex or opposite-sex.
- Independently of Section 37(1) all employees owe a duty of loyalty to their employers. This means that employees are expected to promote the interests of the employer, and not seek to undermine the work of their employers.

It is possible that the act of entering into a civil partnership (or a civil marriage), in the case of a religious employer, may be perceived by them as an act that breaches the duty of loyalty, given in particular that it is a public act.

It is therefore recommended that, for the avoidance of doubt, express provision be included in legislation to clarify that the act of entering into a civil partnership shall not give any employer (including a religious employer) grounds to treat an employee less favourably than a person who has entered into a marriage. In particular, conduct relating to the formation of civil partnerships should not give an employer grounds to treat employees as having breached the duty of loyalty to the employer or as having undermined its ethos. More generally, the formation of a consenting intimate adult relationships as well as the act of cohabitation should not be treated as conduct that justifies an employer in treating an employee less favourably.

In addition to the above clarity that should be provided in any amendment to the Employment Equality Act, given the broad scope of the exemptions provided by Section 37(1), the only means to ensure full protection for LGBT teachers on the basis of their sexual orientation, gender identity or civil status is the full repeal of the aforesaid section.