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RESEARCH ARTICLE

# Tracing the Scope of Religious Exemptions under National and EU Law: Section 37(1) of the Irish Employment Equality Acts 1998–2011 and Ireland's Obligations Under the EU Framework Directive on Employment and Occupation, Directive 2000/78/EC

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This submission traces the scope of the religious exemptions for religious organisation both under the Irish Employment Equality Acts 1998–2011 at national level and under the EU Framework Directive on Employment and Occupation, Directive 2000/78/EC of November 2000, at EU level. It will be demonstrated that the Irish religious exemptions are broader in scope than those at EU level and therefore constitute a severe limitation on the equality rights of Irish citizens falling within protected grounds of non-discrimination other than religion or belief under the EU Employment Equality Directive. Special regard is had to the limitation of the rights of Irish citizens falling within the protected ground of non-discrimination on the basis of sexual orientation. It is considered whether, by allowing overly broad exemptions to subsist beyond the exigencies of a strict proportionality test, the Irish State is in effect giving efficacy to the typified intolerance between religions organisations and the LGBT community and in so doing, contributing to the perpetuation of these intolerances in Irish society rather than their erosion.

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**Keywords:** EU employment equality; Irish Employment Acts; Directive 2000/78/EC; Religious exemptions; Organisations

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*"Is it the tolerant person who discovers the limits of her tolerance or is it the intolerant one who labels everything that does not match his or her convictions as intolerable?"*<sup>1</sup>

## I. Introduction

It is contended that a hidden intolerance<sup>1</sup> is latent in the overly broad exemptions reserved to religious organisations under Irish employment equality legislation, which serves to insulate these organisations from the generally applicable EU grounds of non-discrimination. The overly broad interpretation of the religious exemptions provided for in the EU Framework Directive on Employment and Occupation<sup>2</sup> is partly attributed to the seemingly wide latitude within the Directive afforded to national practices and constitutional principles. It will be argued in this submission that the Irish Government has exhausted this latitude far beyond its reasonable construction. Further, it is questioned whether the exhaustion of this latitude – in the form of overly broad exemptions afforded to religious organisations – is readily reconcilable with the State's own self-professed commitment to equality and freedom of religion in its constitutional provisions and case-law. At a more basic level, this paper seeks to establish that the Irish legislator has failed to comply with even the unambiguous obligations of the Employment Equality Directive. This is evident in circumstances in which derogations from the Employment Equality Directive are expressly prohibited on the basis

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<sup>1</sup> Johan de Tavernier, 'Tolerance, Pluralism and Truth' in Didier Pollefeyt (ed), *Incredible Forgiveness: Christian Ethics Between Fanaticism and Reconciliation* (Peeters Publishers 2004) 118.

<sup>2</sup> Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16 ("Employment Equality Directive").

of national practice or constitutional provisions. It will be seen in this regard that nuances apparent from the explicit text of the Employment Equality Directive have failed to be incorporated into the Irish Employment Equality Acts. Conversely, in other instances, derogations have been granted to religious organisations contrary to the explicit obligations of the Directive. Without the incorporation of these delimiting nuances, the Irish Employment Equality Acts when applied serve to rescind the protections afforded to Irish citizens falling within the other grounds of non-discrimination of the Employment Equality Directive. The incongruity between the Employment Equality Directive and the Irish Equality Acts, aside from circumstances in which the Directive permits a consideration of national practices and constitutional provisions, culminates in a contravention of the EU obligations prescribed upon the Irish State and serves to defeat the spirit of the Employment Equality Directive overall.

The starting point for this submission is the initiatives undertaken by one of the Irish houses of Parliament, Seanad Éireann, to reform the system of legislative exemptions for religious institutions as stipulated by section 37(1) of the Employment Equality Acts.<sup>3</sup> Reforms to section 37(1) have been proposed in the Employment Equality (Amendment) Bill 2012<sup>4</sup> and under a second, Employment Equality (Amendment) (No. 2) Bill 2013.<sup>5</sup> The religious exemptions provided for in section 37(1) of the Irish Equality Acts and the proposed legislative amendments will be analysed in the context of the obligations of the Irish State under EU law in the Employment Equality Directive, which establishes a general framework for equal treatment in employment and occupation. Through following the legislative evolution of the Irish Equality Acts, it is submitted that it is the enlarged scope of the religious exemption, as opposed to the existence of an exemption in Irish employment equality, which hinders the effective transposition of the Employment Equality Directive.

At this juncture, it is acknowledged that the Irish State has a long tradition in the provision of religious exemptions to religious belief systems in order to preserve the “life and reality”<sup>6</sup> of these beliefs systems. Therefore, it must be understood that the Employment Equality Directive cannot be credited with introducing these novel conceptions of religious exemptions into Irish law. In fact, Article 44 of the Irish Constitution, Bunreacht na hÉireann, which guarantees the freedom of religion, was included in the 1937 constitutional text to facilitate religious pluralism in furtherance of the State’s obligations under the Anglo-Irish Treaty of 1921. It was thought that Article 44 would avoid “the establishment or the preference for any religious denomination which would have the undesirable consequence of a bigger breach between North and South”.<sup>7</sup> The discrepancies between the Employment Equality Directive and the Irish Equality Acts therefore do not hinge on the provision of a religious exemption but rather on the difference in the scope of the religious exemption afforded to religious organisations under each respective body of legislation. Therefore, in the analysis hereunder, as per Sandberg and Doe, the consideration is “not whether there ought to be a religious exemption but rather [what is] the scope of the exemption”.<sup>8</sup>

The present analysis has been sparked by the traction gained by the civil rights movement of the LGBT community in Ireland and the social evolution in Irish society to renounce the systemic exclusion of the LGBT community from public life generally. Following on from the introduction of a statutory civil partnership registration scheme for same-sex couples in January 2011 under the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010, calls for the amendment of section 37(1) of the Irish Employment Acts came to the fore. In the intervening period, the Gender Recognition Bill 2014 was passed in Seanad Éireann on the 11<sup>th</sup> March 2015.<sup>9</sup> This Bill seeks to grant formal legal status to transgender Irish citizens. It is noted that at present Ireland is the only EU Member State that does not permit legal recognition of its transgender

<sup>3</sup> Employment Equality Act 1998 (“Irish Equality Acts”) s 37(1) which came into force on 18 October 1999.

<sup>4</sup> Employment Equality (Amendment) Seanad Bill (2012) 11 (“first Amendment Bill”).

<sup>5</sup> Employment Equality (Amendment) (No. 2) Seanad Bill (2013) 23 (“second Amendment Bill”).

<sup>6</sup> *McGrath and Ó Ruairc v Trustees of Maynooth College* [1979] ILRM 166, [1979] 187. Henchy J, (Griffin, Kenny and Parke JJ concurring) notes: “The constitutional provision invoked here [Article 44.2.3°] must be construed in terms of its purpose. In proscribing disabilities and discriminations at the hands of the State on the grounds of religious profession, belief or status, the primary aim of the constitutional guarantee is to give vitality, independence and freedom to religion. To construe the provision literally, without due regard to its underlying objective, would lead to a sapping and debilitation of the freedom and independence given by the Constitution to the doctrinal and organisational requirements and proscriptions which are inherent in all organised religions”.

<sup>7</sup> Carmen Garcimartín, ‘Ireland’ in Javier Martínez-Torrón and Cole Durham Jr (eds), *Religion and the Secular State: Interim National Reports* (Brigham Young University 2010), 403.

<sup>8</sup> Russell Sandberg and Norman Doe, ‘Religious Exemptions in Discrimination Law’ (2007) 66(2) Cambridge Law Journal 302.

<sup>9</sup> Gender Recognition Seanad Bill (2014) 116.

citizens.<sup>10</sup> At the time of writing, the Irish public are due to vote in the constitutional referendum of the 22<sup>nd</sup> May 2015 on the Thirty-Fourth Amendment of the Constitution on Marriage Equality to Article 41 of the Constitution. It will be decided whether the additional wording; “marriage may be contracted in accordance with law by two persons without distinction as to their sex”<sup>11</sup> will be added as Article 41.4, and by consequence whether LGBT citizens may contract marriage and avail of the accompanying constitutional protections in that regard. These LGBT civil rights developments have therefore motivated a renewed discussion of the religious exemption afforded to religious organisations under Irish law, which curtail the employment equality rights of Irish LGBT citizens.

It is noted that calls for the amendment of section 31(1) have also arisen from other civil rights groups and international organisations. Atheist civil groups in Ireland have protested against the continued application of the religious exemptions in their current conception as they serve to accord a more favourable and protected status to traditional belief systems as opposed to non-belief system.<sup>12</sup> Ireland has also been subject to international pressure calling for the reform of section 37(1). Most recently, the UN Human Rights Committee criticized section 37(1) at Ireland’s fourth periodic examination in July 2014, during which it was recommended that this section “at a minimum, [...] be repealed to prohibit discrimination against persons in relation to one or more of the nine grounds covered under the legislation. [...] It should be replaced by new wording that complies with Article 4 of the European Union Framework Directive”.<sup>13</sup>

The LGBT civil rights movement has in its activism highlighted the clash between two protected grounds of non-discrimination in Irish legislation: the religion or belief ground and the sexual orientation ground. However, it is necessary to see this in the context that clashes between fundamental rights and equality rights are germane to the European continent as a whole and do not relate exclusively to these selected grounds. In fact, the propensity for clashes to occur between any and each of the protected grounds has increased given that “the catalogue of legally protected fundamental rights has grown incessantly”.<sup>14</sup> However, clashes between the non-discrimination grounds of religion and sexual orientation have given rise to particularised tensions. It is further acknowledged that there is the potential for clashes of fundamental rights and equality rights to be exaggerated for ideological purposes. Therefore, in order to escape a highly normative and politicized discussion, this analysis does not hang on the crux of the ideological clash between these particular non-discrimination grounds. Rather, emphasis is placed on the scope of the exemptions afforded to religious organisations and the equity of the balance that should be achieved between competing rights.

As to methodology, the paradoxical relationship between religious exemptions, which may serve to foster both tolerance for the manifestation of religious belief and simultaneously foster intolerance for the lifestyle of those individuals falling within the protected categories of non-discrimination, is set out hereunder. Thereafter, a consideration of the legislative evolution of the Irish Equality Acts is undertaken. Firstly, the fissure between the current Irish Equality Acts and the Employment Equality Directive is identified. Secondly, it will be analysed whether the first or second amendment Bills contribute to breaching this gap in line with the State’s obligations under EU law. Finally, comments are made as to the consequences of the continued misapplication of the Employment Equality Directive in Irish law and a limited discussion of the latitude afforded to constitutional provisions and national practices is entertained before concluding remarks are set out.

<sup>10</sup> International Service for Human Rights, ‘Ireland: Ensure Legal Recognition of Transgender People’ *ISHR* (Geneva, 23 February 2015) <<http://www.ishr.ch/news/ireland-ensure-legal-recognition-transgender-people>> accessed 1 August 2015.

<sup>11</sup> Minister Frances Fitzgerald TD, ‘Government Announces Wording for Marriage Equality Referendum’ *Department of Justice and Equality* (Dublin, 21 January 2015) <<http://www.justice.ie/en/JELR/Pages/PR15000009>> accessed 1 August 2015; Thirty-Fourth Amendment of the Constitution (Marriage Equality) Bill (2015) 5. This Implementation Bill was passed on the 27th of March and was accepted by 29 votes to 3 in Seanad Éireann.

<sup>12</sup> Atheist Ireland, ‘Atheist Ireland Submission to UN Committee on Economic, Social and Cultural Rights’ (26 September 2014) <<http://atheist.ie/2014/09/atheist-ireland-submission-to-un-committee-on-economic-social-and-cultural-rights/>> accessed 1 August 2015.

<sup>13</sup> UN Human Rights Council Legacy Steering Group, ‘International Covenant on Civil & Political Rights (ICCPR) Fourth Periodic Examination of Ireland: Submission to the Seanad Public Consultation Committee’, (21 March 2014) 9; The Irish Council for Civil Liberties, ‘A Roundup of Coverage of Ireland’s ICCPR Examination 14–25 July 2014’ <<http://iccl.ie/a-roundup-of-coverage-of-ireland-s-iccpr-examination-14-25-july-2014.html>> accessed 1 August 2015; Kitty Holland, ‘UN Asks How State Will Protect Non-Christian Children’ *Irish Times* (15 July 2014); Human Rights Committee, ‘Concluding Observations on the Fourth Periodic Report of Ireland’ *IHREC* (24 July 2014) <<http://www.ihrec.ie/publications/list/un-hrc-concluding-observations-on-ireland-and-iccpr/>> accessed 1 August 2015.

<sup>14</sup> Emmanuelle Bribosia and Isabelle Rorive, ‘In Search of a Balance between the Right to Equality and Other Fundamental Rights’ (DG for Employment, Social Affairs and Equal Opportunities, February 2010) 14.

## II. Part A

### A. Religious Exemptions

Religious exemptions in pluralist democracies, although a “challenge to the existing anti-discrimination paradigm”,<sup>15</sup> are indispensable to the preservation of religious plurality. Tolerance, particularly when plurality means that society will comprise of persons unable to comply with certain laws for religious reasons, is expressed through the granting of exemptions from laws which would force a practitioner to violate their mandated beliefs. Providing for plurality of belief but denying practitioners the ability to fulfil the mandates of their beliefs would constitute an empty tolerance. The exemption approach accords legitimacy to beliefs and by consequence facilitates the flourishing of differentiated and unique value systems and in particular, minority belief systems. Compliance with generally applicable non-discrimination law in these circumstances constitutes a limitation on the freedom of religious organisations to segregate themselves from non-members in order to maintain their integrity.

However, proper appreciation must be taken of the anomaly religious exemptions create: a practitioner’s right to violate a law that both practitioners of different belief systems and non-practitioners alike, must obey.<sup>16</sup> In this model, differentiated practitioners and non-practitioners alike are subject to legislative burdens, i.e. their rights may have to be limited in order to accommodate the religious mandates of practitioners.<sup>17</sup> Any limitations on the rights of others to accommodate religious belief are subject to scrutiny under concepts of proportionality. Therefore, when an exemption is sought from an equally protected ground of non-discrimination, without objective justification, the limits of tolerance are reached. More precisely, the limits of tolerance are reached where an exemption is sought from a protected ground of non-discrimination where the genuine occupational requirement is not satisfied. It will be submitted that a religious exemption promotes tolerance where it is broad enough to facilitate the flourishing of a diversity of majority and minority religions and belief systems but yet still requires practitioners and non-practitioners alike to adhere strictly to the generally applicable grounds of non-discrimination in the absence of the application of the genuine occupational requirement.

### B. Religious Exemptions under the EU Employment Equality Directive

The Employment Equality Directive requires Member States to provide for employment equality on the grounds of disability, religion or belief, age and sexual orientation. However, Article 4(1) of the Employment Equality Directive permits Member States to make provision for occupational requirements. Under this provision, employers may give effect to a difference in treatment based on a characteristic related to disability, religion, age and sexual orientation where “by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate”.<sup>18</sup> In other words, Article 4(1) permits a limitation on rights where there is a genuine occupational requirement.

A second, circumlocutory and conditional, exemption from the grounds of non-discrimination applies specifically to religious employers, churches and other public or private organisations whose ethos is based on religion or belief. The religious exemption provided for in Article 4(2) is in essence a restatement of the genuine occupational requirement in Article 4(1), addressing the particular circumstance whereby a religious organisation may accord preferential treatment to co-religionists where that religion or belief is a “genuine, legitimate and justified occupational requirement” and where such preferential treatment satisfies the extensive conditionality of the provision. The lengthy Article 4(2) provides that

“Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person’s religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person’s religion or

<sup>15</sup> Sandra Fredman, ‘Disability Equality: A Challenge to the Existing Anti-Discrimination Paradigm?’ in Anna Lawson and Caroline Gooding (eds), *Disability Rights in Europe: From Theory to Practice* (Hart Publishing 2005) 199.

<sup>16</sup> Mark Rienzi, ‘The Case for Religious Exemptions – Whether Religion is Special or Not?’ (2014) 127(5) *Harvard Law Review* 1396.

<sup>17</sup> *ibid* 109.

<sup>18</sup> Article 4(1), Employment Equality Directive (n 2).

belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

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

Ahdar and Leigh note that the presence of no fewer than six qualifying terms in Article 4(2) is indicative of "the extreme sensitivity surrounding the exception".<sup>19</sup> This religious exemption is limited by the requirements that the difference in treatment relates solely to the "reason of the nature of these activities or of the context in which they are carried out", constituting a "genuine, legitimate and justified occupation requirement" and which "should not justify discrimination on another ground."<sup>20</sup>

The interpretation of the latitude afforded to national practices and constitutional provisions under Article 4(2), in the absence of any Court of Justice of the European Union ruling, has been shrouded in ambiguity. However, given that the Directive is a set of minimum requirements,<sup>21</sup> the Employment Equality Directive unambiguously and expressly sets out that a religious exemption from the other generally applicable grounds of non-discrimination may not be granted at the national level. This prohibition applies irrespective of national practices and constitutional provisions. Exemptions under Article 4(2) are therefore subject to the absolute condition that the employment practices of such organisations "should not justify discrimination on another ground." It is submitted that any ambiguity surrounding this prohibition is contrived in situations where "national practices", "constitutional provisions and principles" are advanced as obstacles to the application of non-discrimination to the pursuits of religious organisations. In particular, the contrivance of this ambiguity may be fuelled by the political stakes involved in enforcing compliance with generally applicable non-discrimination legislation by religious organisations.

This interpretation has also been adopted by other authors. For example, Ahdar and Leigh construe Article 4(2) to mean that "the language appears to leave open the possibility that a state could allow a religious body to argue that a life-style condition related to its doctrines means that it should be exempted, despite its effect on practicing homosexuals and lesbians".<sup>22</sup> It is submitted that this is a misconstruction of the scope of the religious exemption on two bases. Firstly, as *supra*, it is an unqualified condition that the exemption "should not justify discrimination on another ground". Secondly, it cannot be said that an exemption is allowable "despite its effect" on the established grounds of non-discrimination as such is contrary to the concept of indirect discrimination. An interpretation in this manner would render the concept of indirect discrimination null. The concept of indirect discrimination aims to combat apparently neutral provisions, criteria or practices which would put persons having a particular racial or ethnic origin, religion or belief, sex, disability, age or sexual orientation at a particular disadvantage compared with other people. It is precisely this effect which is to be taken into account when balancing the application of competing rights. In summation, the Employment Equality Directive represents a set of minimum requirements, an exemption accorded from which cannot serve to rescind the protections afforded to other grounds of non-discrimination. In permitting the scope of the religious exemption to extend also to the other protected grounds of non-discrimination, established protections for the individuals falling within these protected categories are rescinded. Where the mandates of religious organisations clash with the other protected grounds of non-discrimination, the provision for religious exemption may not be construed so broadly as to in fact be used to support discriminatory practice dealt by religious organisations. Individuals identifying within the protected category of non-discrimination on the grounds of sexual orientation therefore

<sup>19</sup> Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (2nd edn, Oxford University Press 2013) 370.

<sup>20</sup> Article 4(2), Employment Equality Directive (n 2).

<sup>21</sup> Employment Equality Directive (n 2) Recital 28 reads "[t]his Directive lays down minimum requirements, thus giving the Member States the option of introducing or maintaining more favourable provisions. The implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State." Article 8 states: "1. Member States may introduce or maintain provisions which are more favourable to the protection of the principle of equal treatment than those laid down in this Directive. 2. The implementation of this Directive shall under no circumstances constitute grounds for a reduction in the level of protection against discrimination already afforded by Member States in the fields covered by this Directive".

<sup>22</sup> *ibid.*

may not be subject to differential treatment on this ground where religion or belief is not a genuine occupational requirement. Hereunder, the exemptions for religious organisations as set out under the Irish Equality Acts are contrasted with Article 4(1) of the Employment Equality Directive.

### **C. Religious Exemptions under the Irish Equality Acts 1998–2011**

Under Irish employment law, section 37(1) of the Irish Equality Acts legislates for an exemption from the generally applicable grounds of non-discrimination in order to preserve religious ethos. Whereas the Employment Equality Directive applies to “occupational activities within churches and other public or private organisations”, the Irish legislation is addressed to the arguably more narrowly defined category of “religious, education or medical institution(s)”. Section 37(1) in its current conception states that

- “A religious, education 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 [...] 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.”

Significant divergence between Article 4(2) of the Employment Equality Directive and section 37(1) of the Irish Equality Acts can be identified. The provisions of Article 4(2) of the Employment Equality Directive are narrower than section 37(1) in two significant respects. Firstly, the Directive requires that it has to be shown that by virtue of the nature or context in which they are carried out, the employee’s religion or belief constitutes a genuine, legitimate and justified occupational requirement with regard to the employer’s ethos. Thus, as per Bolger, it is “necessary to show that a person’s religion is a determining factor in her actual ability to discharge the duties of her job, rather than simply showing the employers perception that such religion or belief is fitting in light of the organisation’s ethos”.<sup>23</sup> Secondly, the standard applicable to secure a religious exemption differs between the EU and Irish level. It is acknowledged that the Irish legislation does require religious employers apply a semblance of the genuine occupational requirement test, which considers whether the employee needs to practice a specific religion in order to undertake the role within the ethos of the organisation. However, the legislative text merely indicates that an employer may secure the exemption where “it is reasonable to do so in order to maintain the religious ethos of the institution”. This standard is far less rigorous than that elucidated in the EU Employment Equality Directive which requires that religiosity be a genuine occupational requirement of the role in question. Therefore, within section 37(1), religiosity serves a blanket exemption that insulates organisations identifying as having a religious ethos from non-discrimination law where there is a mere reasonable link between preferential treatment and religiosity. In applying treatment blanket exemption, it can be argued that adequate appreciation is not taken on a case-by-case basis of situations where there is no clear link between religiosity and the employee’s role within the organisation. Further, it is not convincing that this reasonable link standard would motivate enquiries into alternatives for the redistribution or reorganisation of the responsibilities of that role where the role only partially requires religiosity in order to be effectively carried out. Finally, this blanket exemption fails to appreciate that employees may keep their own values without simultaneously detracting from the ethos of the organisation as well as fulfil the role and “act in good faith and with loyalty”,<sup>24</sup> without identifying with the religion or belief in question.

In connection with these two delineated discrepancies between the religious exemption under the Employment Equality Directive and section 37(1) of the Irish Equality Acts, section 37(1)(b) is discussed. Section 37(1)(b) states that a religious organisation shall not be taken to discrimination where:

- “it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.”

<sup>23</sup> Margaret Bolger, ‘Discrimination on Grounds of Religion: Theory and Practice’ (The European Network Against Racism Conference, 23 October 2003) 13.

<sup>24</sup> Article 4(2), Employment Equality Directive (n 2).

Section 37(1)(b) is identified as a threat to the effective enforcement of the grounds of non-discrimination. Whereas Article 4(2) allows religious organisations to place a positive obligation on “individuals working for them to act in good faith and with loyalty to the organisation’s ethos”, section 37(1)(b) provides the capacity to religious organisations to take action against employees which will not be reprimanded as discriminatory action.

In its present conception, 37(1)(b) has been described as a “mandate to discriminate”<sup>25</sup> and may serve to reinforce prejudices and fear of reprisal amongst the LGBT community. As per Angela Kerins, Chairperson of the Irish Equality Authority, “it is clear that this clause has reinforced fears of discrimination against lesbian, gay and bisexual 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”.<sup>26</sup> The reflection of the duty to act in good faith and with loyalty of Article 4(2) in section 37(1) creates an inverse power in religious employers to act in a discriminatory manner and to be extrapolated from liability for this discrimination.

In implementing the Employment Equality Directive, section 37(1) fails to incorporate the qualifying nuances of Article 4(2). In so doing, minimum non-discrimination requirements are rendered negligible and the current protections afforded to those falling within the protected grounds of non-discrimination are rescinded. Section 37(1), therefore, represents a modest interpretation of the obligations Article 4(2) requires of the implementing Member State.

In the second part of this submission, this discourse will consider the provisions of first and second Amendment Bills in legislative evolution of the Irish Equality Acts in order to determine whether they serve to bring the Irish legislation more in line with obligations under EU law incumbent on the Irish State.

### III. Part B

#### A. First Amendment Bill

The first Amendment Bill of May 2012 took tentative steps towards requiring that religious organisations submit to the grounds of non-discrimination legislated for in the Irish Equality Acts; and by consequence, towards ensuring that the Irish State conform with its obligations under EU law. At this juncture, it is noted that the protected grounds of non-discrimination differ as between the Employment Equality Directive and the Irish Equality Acts. The Employment Equality Directive legislates against discrimination on the grounds of religion or belief, disability, age or sexual orientation. Additionally, it is noted that the EU has also passed Directives implementing the principle of equal treatment between persons irrespective of racial or ethnic origin<sup>27</sup> and in the access to and supply of goods and services on the basis of sex.<sup>28</sup> By comparison, Irish legislation provides nine grounds of discrimination, amongst which superfluous to EU law are the “family status ground”, “civil status ground” and the “traveller community ground”.

Section 3 of the first Amendment Bill proposed to amend section 37 through the insertion of the following subsection immediately after subsection (6):

“Nothing in subsection (1) may be relied upon by an institution referred to in subsection (1) to justify or permit discrimination or to allow any action to be taken against any employee or potential employee on the basis of that employee’s or potential employee’s civil status or sexual orientation.”<sup>29</sup>

On one hand, this proposed insertion would have served to subject religious organisations to the non-discrimination grounds of “civil status” and “sexual orientation” and contribute to alleviating the typified intolerances between religion and sexual orientation. However, on the other hand, the scope of the exemptions afforded to religious organisations under the first Amendment Bill is still overly broad and religious organisations would still not be subject to all grounds of non-discrimination in the Employment Equality Directive, namely the gender ground, race ground, age ground, disability ground, membership of the traveller community ground and, of particular relevance to a discussion concerning the civil rights movement

<sup>25</sup> House of the Oireachtas, ‘Employment Equality (Amendment) Bill 2012: Second Stage’ (2 May 2012) 215(3) Seanad Éireann Debate, Senator Ivana Bacik at para 162 <<http://debates.oireachtas.ie/seanad/2012/05/02/00007.asp>> accessed 1 August 2015.

<sup>26</sup> Irish Equality Authority, ‘Equality Authority welcomes Minister Quinn’s announcement on Lesbian, Gay and Bisexual teachers’ (11 April 2012) 5 <[http://www.ihrec.ie/download/pdf/equality\\_news\\_summer\\_2012.pdf](http://www.ihrec.ie/download/pdf/equality_news_summer_2012.pdf)> accessed 1 August 2015.

<sup>27</sup> Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

<sup>28</sup> Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37.

<sup>29</sup> First Amendment Bill (n 4).

for the LGBT community, the family status ground. Similarly, although section 37(1)(b) as a “mandate to discriminate”<sup>30</sup> against individuals on the civil status or sexual orientation ground, it is mitigated; religious organisations under section 37(1)(a) are still afforded the opportunity to accord preferential treatment to employees or prospective employees on religious ground without being subject to the stringent test of genuine, legitimate and justified occupational requirement. Therefore, in its application, the first Amendment Bill may still have circumvented the prescriptions of the Employment Equality Directive in the absence of a stringent genuine occupation requirement and through allowing religious organisations to still evade the application of the other grounds of non-discrimination.

### **B. Second Amendment Bill**

The first Amendment Bill was defeated in the Seanad Éireann; mostly due to constitutional concerns<sup>31</sup> at the second stage on 2<sup>nd</sup> May 2012.<sup>32</sup> The, then, Minister for Justice and Equality, Deputy Alan Shatter, elucidated those constitutional concerns as rooted in the balance struck by the Irish courts between the rights of religious organisations to manage their internal affairs and the rights of other Irish citizens to equality before the law and to earn a livelihood. These concerns are addressed limitedly at the conclusion of this submission.

Following the defeat of the first Amendment Bill, a second private members bill<sup>33</sup> was introduced proposing amendments to section 37(1).<sup>34</sup> The second Amendment Bill of the 8<sup>th</sup> March 2013 proposed that section 37(1) remain in place for wholly autonomous religious institutions whereas medical and educational institutions in receipt of public funds may only impose more favourable treatment on their employees where this preferential treatment does not contravene any of the protected grounds of non-discrimination grounds set out in the Employment Equality Directive. The Bill proposed to amend section 37(1) by inserting section 3 of the Bill which states

“(1) (a) Subject to paragraph (b) below, 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—

- (i) 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
- (ii) it takes action which is reasonably necessary to prevent an employee or a prospective employee from undermining the religious ethos of the institution.

(b) Notwithstanding paragraph (a), where an educational or medical institution of the type mentioned in that paragraph is maintained or assisted by recurrent grants provided out of public funds—

- (i) More favourable treatment of the type referred to in subparagraph (i) of that paragraph shall be taken to be discrimination unless—
  - (I) the treatment does not constitute discrimination on any of the other discriminatory grounds, and
  - (II) 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;
- (ii) action of the type referred to in subparagraph (ii) of that paragraph shall be taken to be discrimination unless, by reason of the nature of the employment concerned or the context in which it is carried out, the action taken is objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary.”

Encouragingly, it is seen that the second Amendment Bill adopts the genuine occupational requirement test as mandated expressly by Article 4(2) of the Employment Equality Directive in respect of publicly funded organisations. Further, it is seen that as per the Directive, public religious organisations are subject to all

<sup>30</sup> House of the Oireachtas (n 25), Senator Ivana Bacik at para 162.

<sup>31</sup> *ibid*, Minister for Justice and Equality (Deputy Alan Shatter) paras 152–154.

<sup>32</sup> *ibid* para 162.

<sup>33</sup> Second Amendment Bill (n 5).

<sup>34</sup> *ibid* 3.

grounds of the generally applicable non-discrimination legislation. However, effectively these amendments create a situation whereby the inadequate provisions of the first Amendment Bill, although applicable only to private institutions, subsist sidelong the provisions of the second Amendment Bill, which would implement the full conditionality of Article 4(2) but only with respect to publicly funded religious organisations.

The approach of the second Amendment Bill creates a two-tier system of exemptions. The first tier of exemptions permits private religious organisations to continue to avail of overly broad exemptions and to elude the application of the stringent genuine occupational requirement test. Further, section 37(1)(b) as a mandate to discriminate is reincarnated as section 37(1)(a)(ii). The second tier of exemptions, which satisfy Article 4(2) of the Employment Equality Directive, are applicable to publicly funded religious institutions. Section 37(1)(b) allows for more favourable treatment to be accorded to an employee on the religion ground where it does not constitute discrimination on another ground and where it is strictly related to the genuine occupational requirement. This two-tiered system of exemptions cannot be understood to fulfil the Irish State's obligations under the Employment Equality Directive. It is noted in this respect that Article 4(2) does not distinguish between private and public institutions – “in the case of occupational activities within churches and other public or private organisations”. Therefore, the two-tiered approach of the second Amendment Bill, which addresses different standards of compliance to different categories of Irish citizens, may continue to leave the state exposed to a breach of its Article 4(2) obligations. By virtue of this distinction, the protections afforded to the LGBT community under the employment legislation are still rescinded in practice. This is a particularly cogent concern as organisations with a religious ethos are demonstrated to be dominant in the provisions of services in the field of education and medicine. It is not proven empirically in this discussion whether that is the case; rather it is advanced that where EU non-discrimination protections are secured partially, the protection for the whole class of individuals is nominal.

The second Amendment Bill was presented on the 8th of March 2013 and proceeded to the Second Stage on the 13th and advanced to the Committee stage as of the 9th of April 2014. Amongst the Committee Stage amendments proposed it is seen that section 6(2)(e) is submitted to be revised making reference to “religion and belief”, and not merely “the religion ground”. The Government at the time proposed that the amendments be signed into law before end of 2014; which has not yet transpired at the time of writing.

### ***C. Oversight of the Implementation of the Employment Equality Directive by European Commission***

The discrepancy between the Employment Equality Directive and Irish Equality Acts have come under scrutiny by the European Commission, the executive branch of the European Union empowered to monitor the application of Union law. In the Commission's 2006 report on religion and belief discrimination in employment, it was noted that that section 37(1)(b) does not conform with Article 4(2) of the Employment Equality Directive given that the exemption thereunder is broader in scope and “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>35</sup>

That the Irish Equality Acts maintain in force lesser protections than those granted to EU citizens under the Employment Equality Directive is a deleterious position which would leave the State open to infringement proceedings taken by the European Commission under Article 258 TFEU. Article 258 TFEU provides that

“If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union.”

However, it should be noted at the outset that the invocation of Article 258 TFEU by the Commission is a politically sensitive procedure and by consequence, the Commission's dealings with Member States thereunder are politically charged rather than legal in character. For this reason, resolution of the inconsistency may be sought through dialogue exchanged with the Commission rather than through the hefty court procedure. In this regard, the Commission, under Article 258 TFEU, issued a reasoned opinion to the Irish State on the 31<sup>st</sup> January 2008 regarding its concerns with the transposition of the Employment Equality Directive

<sup>35</sup> Lucy Vickers, 'Religion and Belief Discrimination in Employment – The EU law' (DG for Employment, Social Affairs and Equal Opportunities, November 2006) 29.

into Irish law; one concern of which related to the exemptions for religious institutions which were seen to be overly broad in their ambit.<sup>36</sup> The Department of Justice and Equality responded to this reasoned opinion by letter of 8th April “providing additional explanations on several topics, including the one concerning the protection against discrimination based on religion”.<sup>37</sup> Unfortunately, these explanations regarding the maintenance of discriminatory provisions in Irish statutory law which were provided by the Irish Department of Justice and Equality to the European Commission have not been made available to the public. However, in the Commission’s responses to the queries of the European Parliament concerning these discussions with the Irish Department of Justice and Equality, there is evidence for the proposition that the Irish State relied upon the balance struck in the Irish Constitution between competing rights and the role of the Irish judiciary in evaluating conflicts on a case by case basis. Thereafter, it was announced that the Commission would not pursue infringement proceedings at this juncture as it was “satisfied with the measures that have been taken and has, therefore, decided not to pursue the infringement procedure at this point”.<sup>38</sup> In the European Parliament in June 2014, the Commission was called to answer a written question on the closure of infringement proceedings against Ireland concerning non-conformity of Irish transposing legislation with Employment Equality Directive on the 6<sup>th</sup> May 2008 and in particular, the “the compatibility of Article 4(2) of the Directive and Section 37(1) of the Employment Equality Acts”.<sup>39</sup> The Commission indicated that it had considered the issue in detail and

“is of the view that the implementation of the Directive in Ireland provides for the necessary balancing of rights on a case by case basis. The Commission has not received any complaints concerning individual cases of discrimination which would indicate that this is not the case. It would be for the national court in any particular given case to decide what was ‘reasonable’ or what was ‘reasonably necessary’”.<sup>40</sup>

Therefore, it appears that the Commission did not see cause to take reprisal against the Irish Equality Acts as currently in force based on its exchanges with the Irish State. It is submitted that this course of action is partly attributed to the fact that the Commission has erroneously identified “reasonably necessary” in the Irish Equality Acts as conforming to the stringent genuine occupational requirement test. It is seen that over-reliance is placed on the ability of Irish LGBT citizens to litigate their rights before the Irish courts. It is advanced that the judicial protection afforded to the provisions of the Employment Equality Directive in Irish law is negligible. Further, as will be discussed briefly below, it is seen that the balance struck by the Irish courts system has been conceptually broader than that envisaged under the Employment Equality Directive. Nevertheless, as heretofore mentioned, non-reprisal of the Commission does not mean that the Irish Equality Acts are deemed to conform with the Employment Equality Directive for all time and the issue may be revisited depending on further amendments. Should the second Amendment Bill proceed to be signed into law, the author submits that the discrepancies between section 37(1) and Article 4(2) will be enhanced and the two-tier application of religious exemptions in Irish Equality Acts will evince the flawed nature of the transposition of the Employment Equality Directive on a greater number of technicalities than under the current Irish Equality Acts. In this situation, the Commission may be motivated to revisit the implementation of the Employment Equality Directive into Irish law.

#### **D. Constitutional Principles and Provisions**

Section 37(1) has been deemed to pass constitutional muster in the Irish Supreme Court in *In Re Article 26 and the Employment Equality Bill 1996*;<sup>41</sup> in which it was pronounced that

<sup>36</sup> European Commission, ‘Employment Directive (2000/78/EC): List of Member States to Which a Reasoned Opinion or Letter of Formal Notice Will Be Sent’ (MEMO/08/68, 31 January 2008) <[http://europa.eu/rapid/press-release\\_MEMO-08-68\\_en.htm?locale=en](http://europa.eu/rapid/press-release_MEMO-08-68_en.htm?locale=en)> accessed 1 August 2015. Reasoned opinion sent to Ireland for the following reasons: “Incorrect definition of indirect discrimination, discrimination based on beliefs is not prohibited, exclusion of protection against discrimination for certain “private” types of employment, interested bodies do not have the right to participate in legal proceedings on behalf of victims of discrimination, limit to damages payable to victims of discrimination, the exception from the ban on discrimination on grounds of religion is too broad”.

<sup>37</sup> European Commission, ‘Closure of the Infringement Procedure on the Transposition in Ireland of Directive 2000/78/EC’ (Press Release IP/08/703, 6 May 2008) <[http://europa.eu/rapid/press-release\\_IP-08-703\\_en.htm](http://europa.eu/rapid/press-release_IP-08-703_en.htm)> accessed 1 August 2015.

<sup>38</sup> European Commission, ‘MEMO/08/68’ (n 36) (emphasis added).

<sup>39</sup> Answer of Mrs. Reding on behalf of the Commission to Written Question E-004412/2014 by Emer Costello (S&D) to the Commission ‘Section 37.1 of the Irish Employment Equality Act and Directive 2000/78/EC’ [2014] OJ C337.

<sup>40</sup> *ibid.*

<sup>41</sup> *Re Article 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (SC).

“it would therefore appear that it is constitutionally permissible to make distinctions or discriminations on grounds of religious profession belief or status 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”.<sup>42</sup>

In the judgement, Hamilton CJ considered that “the use of the words “reasonable” and “reasonably necessary” implies that the test is to be an objective one and that the matter is to be resolved on a case to case basis”.<sup>43</sup> Further, it is advanced in the same breath that “the final decision on this question as well as the final decision on what is reasonable or reasonably necessary to protect the 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>44</sup> It is clearly seen that the Commission’s comments on closure of the Article 258 TFEU procedure are borrowed directly from Irish constitutional precedent; no doubt as result of correspondence with the Irish Ministry for Justice and Equality. The ratio of Hamilton CJ in *In Re Article 26 and the Employment Equality Bill 1996* is advanced as the proper balance struck by the Irish judiciary between the rights of religious organisations to manage their own affairs and maintain institutions for religious and charitable purposes and the rights of other citizens to equality before the law and to earn their livelihood under the Irish Constitution. This balance is different than that enunciated by Article 4(2) of the Employment Equality Directive and has so far served to operate as a shield to critics of the transposition of the Directive. The balance struck under *In Re Article 26 and the Employment Equality Bill 1996* as set out above has on a case-by-case basis served to protect that which is conducive to religiosity and not merely objectively justified. This is elucidated in the jurisprudence of *DPP v Draper*<sup>45</sup> in which McCarthy J stated that religious exemptions “may be justified where the effect of the legislative restriction is not to inhibit religious practices, but merely to render their exercise inconvenient or disadvantageous”.<sup>46</sup> In this example, the overly broad nature of this constitutional balance as compared to the balance struck under Article 4(2) is clearly evinced. At the very minimum, the author queries the Commission’s judgement, in holding this balance as legitimate, to discharge the obligations of the Irish State under the Employment Equality Directive. The Irish legislation is further reliant on individuals enforcing their rights in the Irish constitutional courts in order to secure the protections of the EU Employment Equality Directive; something, which is questionable under a consideration of judicial protection as mentioned above. In circumstances where the broad scope of section 37(1) favours religious practitioners, this would signify that persons falling within the affected categories of non-discrimination do not have equal access to employment protections. Finally, albeit in the absence of any precedent or interpretation of Article 4(2) by the Court of Justice of the European Union, it is advanced by the author that there is no indication in Article 4(2) that the discretion to maintain in place “national practices”, “constitutional provisions and principles” is not similarly subject to the generally EU applicable grounds of non-discrimination. In fact, if it were not, it would constitute an illogical construction of Union legislation which seeks to introduce minimum standards in the protection of employment equality rights across the EU. The introduction of such minimum standards would be untenable if each Member State could secure varied exemptions in accordance with their constitutional provisions and national practices.

Leaving aside an analysis of the Irish constitutional principles and case-law advanced as an obstacle to the correct transposition of the Employment Equality Directive in Irish legislation, it is submitted the current legislation in force is not itself easily reconciled with the Irish State’s own profound commitments to equality both in the Constitution and in legislation.<sup>47</sup> Further, the introduction of a distinction between public and private religious organisations constitute an illogicality within Ireland’s own constitutional history. It is noted that the Fifth Amendment Act of the Constitution in 1972 removed an article from the Constitution which served to create a hierarchy of religion within the State and which came to be viewed as potentially discriminatory.<sup>48</sup> This amendment was signed into law in 1973 by, then, President de Valera, who had origi-

<sup>42</sup> *ibid* 358.

<sup>43</sup> *ibid* 359.

<sup>44</sup> *ibid*.

<sup>45</sup> *The People (DPP) v Draper* (Irish Times, 24 March 1988).

<sup>46</sup> Eoin Daly, ‘Re-Evaluating the Purpose of Church State Separation in the Irish Constitution: The Endowment Clause as a Protection of Religious Freedom and Equality’ (2008) 8(2) *Judicial Studies Institute Journal* 32.

<sup>47</sup> Article 40.1° reads “[a]ll citizens shall, as human persons, be held equal before the law”.

<sup>48</sup> Article 44.2° and 44.3° formally read as follows: “2°. The State recognises the special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens. 3°. The State also recognises the Church of Ireland, the Presbyterian Church in Ireland, the Methodist Church in Ireland, the Religious Society of Friends in Ireland, as well as the Jewish Congregations and the other religious denominations existing in Ireland at the date of the coming into operation this Constitution.”

nally drafted the Article 44 freedom of religion guarantee.<sup>49</sup> The reintroduction of a distinction between private and public religious organisations goes further than that necessary to preserve the autonomy of internal management of religious organisations<sup>50</sup> and recreates a hierarchy between variant belief systems. It is submitted that second the Amendment Bill constitutes a regression in the development of the Irish State's freedom of religion guarantee.

Far from becoming ensnared in a constitutional discussion which is not practicable in this submission, this discussion is concluded with three observations. The first of which is to acknowledge that the constitutional balance with respect to religious exemptions is broader in scope than the balance struck by the Employment Equality Directive because it serves to protect that which is conducive and not merely essential to religiosity. Secondly, it is remembered that a constitutional referendum is imminent in May 2015 which, if passed, may have far reaching consequences for the LGBT civil rights movement and motivate the re-weighting of this constitutional balance amongst other developments in Irish society in recent years, requiring the Irish courts to "re-evaluat[e] the concept of law in a culturally diverse, plural society".<sup>51</sup> Finally, it is queried in an open-ended manner whether the mystique surrounding Irish constitutional provisions has been the main reason for the refraction of the EU employment equality guarantees of the Irish LGBT community at national level. It would seem that the Commission is reluctant to wade into the Irish constitutional provisions and case law and critically examine the balance struck by the Irish courts between these competing rights. It is submitted that if this critical examination was undertaken, the Commission may be motivated to pursue its reasoned opinion further.

#### IV. Conclusions

Within this submission, the author has sought to demonstrate through comparative analysis that the Irish State maintains in force a religious exemption broader than the scope of the religious exemptions set out in the Employment Equality Directive. Further, it has been submitted that the proposed legislative amendments instigated by the Irish government would not serve to rectify the enforcement gap. In fact, with regard to the propositions of the second Amendment Bill, it is submitted that, if passed, the disparity between the Employment Equality Directive and the Irish Equality Acts will be evinced even more strongly.<sup>52</sup> The propositions of the second Amendment Bill would serve to create a hierarchy between religion and belief systems and non-belief systems in contradiction with the Irish State's own constitutional commitment to freedom of religion. It is also submitted that the second Amendment Bill further illuminates the points of contention between the EU Employment Directive and the Irish Equality Acts which may serve as a basis for the Commission to conduct renewed enquiries into Irish equality legislation. Overall, this submission argues that the Irish government should amend its employment equality legislation to ensure that the religious exemptions therein are limited by the strict conditionality of Article 4(2) and the imperative to satisfy the exigencies of the genuine occupational requirement test. By virtue of the provision of an overly broad religious exemption in section 37(1), a hidden intolerance towards the Irish LGBT community has been permitted to fester. The subsistence of this intolerance in Irish legislation has in fact served to rescind the protections granted to these individuals under EU employment law. Beyer's maxim eloquently elucidates the crossroads at which the Irish State finds itself: "tolerance is the non-tolerance of the intolerance".<sup>53</sup> Where the Irish State fails to implement the stringent provisions of the Employment Equality Directive, it is advanced that the State itself becomes complicit in perpetuating intolerance. The Irish State is therefore recommended to amend the scope of section 37(1) to fully comply with the textual nuances of Article 4(2) in order to strike a functionally tolerant, and not just superficially tolerant, balance between religious tolerance and generally applicable civil non-discrimination law.

#### Competing Interests

The author declares that they have no competing interests.

<sup>49</sup> *ibid.*

<sup>50</sup> Mauro Gatti, 'Autonomy of Religious Organisations in the European Convention of Human Rights and European Union Law' in Lucia S Rossi and Giacomo Di Federico (eds), *Fundamental Rights in Europe and China: Regional Identities and Universalism* (Editoriale Scientifica 2013) 132–153.

<sup>51</sup> Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (Glass House Press 2005) 1.

<sup>52</sup> In this regard, it is noted that in the Commission's reasoned opinion of 31 January 2008 references the grievance that "exclusion of protection against discrimination for certain "private" types of employment." See (n 36).

<sup>53</sup> Hendrick JM Beyer, *Tolerantie en Fanatisme: Een Studie over Verdraagzaamheid* (Van Loghum Slaterus 1948) 153.

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