



An Chartlann Náisiúnta National Archives

Reference Code:	2017/4/182
Creation Dates:	October 1987
Extent and medium:	14 pages
Creator(s):	Department of Foreign Affairs
Accession Conditions:	Open
Copyright:	National Archives, Ireland. May only be reproduced with the written permission of the Director of the National Archives.

mac bride

CONSULTATIVE PAPER ON EQUALITY
OF OPPORTUNITY IN EMPLOYMENT

IRISH GOVERNMENT SUBMISSION: OCTOBER 1987

The Irish Government submitted views on the Consultative Paper on 26 February 1987. In paragraph 6 of that submission we stated that "we intend to follow the debate closely and to put forward additional views and proposals as necessary". In the interval since then, there have been a number of developments; we have also had an opportunity to study some other submissions on the Consultative Paper including that of the FEA. We consider it timely therefore to submit some further views and proposals, which are set out below.

A number of the proposals in this paper amplify and strengthen views put forward in our earlier paper (for ease of reference, the proposals in our paper of 26 February are summarised at Annex 1). This paper is intended to be read in conjunction with - and not as a replacement of - our earlier submission.

TYPE OF LEGISLATION TO BE ADOPTED

We have noted some suggestions that consideration is being given to amending the existing legislation by Order in Council rather than by Act of Parliament at Westminster. We would feel that in order to

- signal the importance of the subject matter
- ensure that the legislation has the necessary wide scope

it is preferable that the new legislation be adopted by Act of Parliament.

We assume that the main argument in favour of an Order in Council is speed of passage. However, since the Consultative Paper was published a year ago and a wide variety of

submissions have been received, the ground has by now presumably been well laid for enactment of a Bill at Westminster. We would query therefore the suggestion that enactment of a Bill would necessarily be a long drawn out process.

1. STATUTORY DUTY TO PRACTISE EQUALITY OF OPPORTUNITY

Proposal

- The statutory duty to practise equality of opportunity in employment should be extended to cover all employers in both the public and private sectors.

Note

We feel that the imposition of an across-the-board statutory duty on all employers is important both psychologically and in practical terms. The argument may be made that contract compliance will be an adequate tool of pressure on the private sector. However, if contract compliance solely is relied on, those employers who have little contact with the government by way of grants and contracts will not be adequately covered. Since this sector includes a number of the employment growth areas (e.g., banks, insurance companies) it is important that an across-the-board statutory duty should apply.

The duty to practice equality of opportunity is an important "umbrella" concept which will of course have to be given specific definition in the detail of the legislation. Experience over the last decade has shown that it is not sufficient simply to make discrimination on the basis of religion illegal, as was done with the Fair Employment (N.I.) Act 1976. A stronger legal basis involving a new and positive definition of equality of opportunity is required.

The Race Relations Act 1976 already provides a context for legislation in the U.K. on positive action, although the statutory duty at Section 71 of that Act is limited to local authorities only. It places a duty on such bodies to make appropriate arrangements in order to carry out all of their functions with regard to the need to promote equality of opportunity. However, the wording of Section 71 is so imprecise that it remains virtually unenforceable and any steps taken under it are, in effect, optional. In the proposed new legislation for Northern Ireland, it will be essential to ensure that the new duties are spelt out clearly:

All public bodies and public companies should be required to make a statement in their annual reports about the work they are doing to fulfil their obligations in promoting equal opportunities. As well as ensuring public accountability, this could generate valuable discussion about how best to bring about change.

2. INDIRECT DISCRIMINATION

Proposal

- The legislation on fair employment should make indirect discrimination, as well as direct discrimination, unlawful.

Note

Both the British Race Relations Act 1976 and the Sex Discrimination (NI) Order 1976 prohibit indirect, as well as direct, discrimination. There is therefore nothing novel in the concept. Some of the thinking in the RRA could usefully be carried over to the proposed legislation on religious discrimination. However, the experience of implementation of the Race Relations Act - and developments over the last decade in the analysis of equal rights problems and their appropriate solutions - should be taken into account and appropriate adaptations should be made.

The concept of indirect indisiscrimination contained in Section 1(1)(b) of the Race Relations Act is defined as treatment equal in a formal sense as between different racial groups but unequal in its effects upon a particular group and which cannot be shown to be justifiable on other than racial grounds. Already major uncertainty has arisen over what constitutes a "justification". The interpretation of "justifiable" used by the British courts has been much broader than that accepted in the United States or in the operation of the sex discrimination legislation in the Republic of Ireland. In the latter instance the 1977 Act holds that the requirement in question must be an essential requirement of the job which is closer to the business necessity test used in the US Griggs case.

The enforcement and remedial provisions of the Race Relations Act also specifically distinguish between direct and indirect discrimination in a way which effectively undermines the application of the Act in cases of indirect indisiscrimination. Clearly it would be undesirable if this element of the R.R.A. were to carry over to new legislation.

3. INDUSTRIAL TRIBUNALS

Proposal

- Individual complaints of religious discrimination in employment should in future be dealt with by Industrial Tribunals.

- Guidelines should be laid down for the conduct of cases before the Tribunals, these should be designed to ensure an accessible speedy and informal procedure.

- Tribunal members should be given training in respect of both the content of the legislation on religious discrimination in employment and on the serious social problems which provide the backdrop to the legislation.
- A Tribunal may exercise its discretion and conduct the hearing of a case in private. It would also be desirable to require Tribunals to ensure the anonymity of complainants if so requested in cases of religious discrimination. However the Tribunals should not give guarantees of anonymity to the respondent.
- The legislation should provide that Guidelines issued to employers on fair employment practice are accorded equivalent legal recognition to that given the Codes of Practice which may currently be treated as evidence in proceedings before an Industrial Tribunal.
- The legislation should provide that in cases of religious discrimination complainants may apply to the re-vamped Fair Employment Agency for assistance and representation in the processing of their claim. The Agency should have discretion to grant assistance on the same basis as applies under Article 75 of the Sex Discrimination (Northern Ireland) Order, 1976.
- The new Agency should have the right of appearance before a Tribunal (as amicus curiae) in cases of religious discrimination in which it is not representing the complainant.

Note

We are aware of the debate over whether the Industrial Tribunal mechanism is likely to be more effective than the FEA in handling individual complaints of discrimination. On balance, we feel that the arguments for transfer to

Industrial Tribunals are compelling. The FEA would then be free to concentrate its resources on investigating patterns of discrimination. The concerns about increased exposure of complainants to publicity could be met along the lines suggested above. An important advantage of Tribunals is that they make clear and public findings of whether or not discrimination has taken place and they lay down clear ground-rules for establishing what is and is not permissible.

There is a strong case in view of the difficulties encountered in proving religious discrimination, whether direct or indirect, for having a shift within the Industrial Tribunal system towards a more investigative approach. This is particularly relevant because indirect discrimination, even when clearly defined in abstract terms, presents further difficulties when it comes to practical identification. The experience in relation to the role of the Equality Officer who conducts a preliminary investigation into the facts of a case in advance of a Labour Court investigation in the Republic of Ireland is relevant in this regard.

4. EVIDENTIAL BURDEN OF PROOF

Proposal

- The evidential burden of proof should rest with the respondent where it has been shown that there has been less favourable treatment, that the individuals concerned are of different religious persuasion and they possess the minimum necessary qualification.

Note

5. APPEAL FROM FINDINGS OF FEA

Proposal

- Appeals from the findings of the FEA should be to the High Court rather than to the County Courts.
- The grounds for judicial review of the FEA findings should be narrowly defined.

Note

6. ADEQUATE REMEDIES

(i) Discrimination against individuals

Proposal

- Industrial Tribunals must be given discretion to apply an extensive range of remedies in cases where an individual is found to have been discriminated against.
- The criteria for determining compensation should be two-fold: the dissuasive effect on the employer and the prejudice suffered by the victim of discrimination.
- Where an Industrial Tribunal finds that an individual was dismissed for discriminatory reasons, the tribunal should be empowered to order the re-instatement of the individual.
- The Tribunals should have quasi-injunction type powers which would allow them to "freeze" a situation as interim relief while allegations of discrimination were being investigated.

(ii) Patterns of Discrimination

Proposal

- Where an FEA investigation identifies a pattern of discrimination in a firm or body, the Agency should have wide powers to require employers to take remedial action.
- The legislation should expressly identify a range of "permissive" measures, i.e., steps which the FEA could legally require an employer to take to remedy a situation of serious imbalance.
- The following should be among the requirements which the FEA could impose
 - special training and outreach measures (cf. No. 7 below)
 - adoption of binding goals and timetables
- Where significant under-representation of one religious community is identified, an employer should be expressly permitted to carry out a policy of preferring a member of the under-represented group in the narrowly confined situation where competing applicants for employment are equally well qualified to carry out the job in question.

Note

7. OUTREACH MEASURES

Proposal

- The legislation on fair employment should permit "outreach measures" designed to seek out applications from the under-represented group, through more intensive advertising to that group (these advertisements could expressly welcome applications from the under-represented group) and by the provision of training programmes exclusively for members of that group.

Note

Both the British Race Relations Act (RRA) 1976 and the Sex Discrimination (NI) Order 1976 permit such "outreach measures". Both Acts have provisions permitting the use of outreach measures as a method by which employers can voluntarily seek to redress imbalances. However, experience to date has shown that employers are reluctant to implement such measures. We believe that the new religious equality legislation should go further and permit the Fair Employment Agency to include the use of outreach measures in its affirmative action programmes.

It will be essential to ensure that outreach measures are not hedged around with unnecessary bureaucratic restrictions. We would also consider it important that apprenticeships be defined as training and would thus be covered by outreach measures.

8. LOCAL GOVERNMENT APPOINTMENTS COMMISSION

Proposal

- A Local Government Appointments Commission should be appointed to undertake recruitment on behalf of the 26 District Councils and other appropriate local government bodies.

Note

The public sector should lead the way in acting as a model of fair employment practice for the private sector. Unfortunately, the reverse has often been true in Northern Ireland. The local government situation in particular is clearly unsatisfactory. Only seven of the twenty-six District Councils have signed the Declaration of Principle and Intent. On performance to date, we see no basis for confidence that attitudes in the District Councils will change without radical action. The time has therefore come in our view to remove the personnel function from the District Councils by the appointment of an independent Local Government Appointments Commission which would make all middle and senior level local government appointments.

(A note on the Irish Local Appointments Commission is attached at Annex 2.)

9. PUBLIC SECTOR (SEMI-STATE) BODIES

Proposal

- In situations where a public body has demonstrably failed to implement fair employment practices, the Secretary of State should be empowered to relieve that body of its personnel functions and transfer those functions to a specially-appointed Commissioner.

Note

The track record of the various semi-state bodies varies considerably. However the situation in some (e.g., the Northern Ireland Electricity Board) continues to give rise to serious concern. The government has a specific responsibility to ensure that semi-state bodies, as well as the civil service, are "flagships" in the fair employment area.

It is to be hoped that the threat of removal of personnel functions would act as a powerful incentive to all public bodies to implement fair employment practices and that the need for appointment of a Commissioner would therefore only rarely arise. However, it is essential that the threat be a credible one and that the public bodies be convinced of the Secretary of State's determination to act where necessary.

10. FLAGS AND EMBLEMS

Proposal

- The display in the workplace of flags and emblems and other such objects which are likely to give offence or cause apprehension should be prohibited.

Note

This summer has seen progress on the ground in this area. The firm line taken by Shorts management, and the publicity it received, were particularly noteworthy. The new "Guide to Effective Practice" also addresses the issue and indeed uses the terminology "giving offence or causing apprehension". The ground is therefore well prepared for legislative action. The legal responsibility for ensuring that the workplace is free of such display should rest with the employer.

We are aware of the interpretation that the existing Fair Employment Act implicitly prohibits display of offensive flags and emblems in the workplace. However we consider that in order to make the situation quite unambiguous, the prohibition should be clearly spelt out in the new legislation.

RECAPITULATION

In a paper submitted in February 1987, the following points were made (the Irish paper addressed only the question of discrimination in employment based on religious affiliation).

Affirmative Action: The need to retain this concept and make clear what is involved.

Public Sector: Detailed provision should be made to impose a statutory duty to practise fair employment in the public sector with enforcement procedures.

Monitoring: Employers in both the public and private sectors should be obliged by statute to monitor their workforce according to perceived religious affiliation and report thereon. The results of monitoring should be published annually.

The Declaration of Practice would need to be amended in line with new legislation and should be signed by all employers in both the public and private sectors. Strict requirements, including signature of the Declaration of Practice, would be laid down for the award of a Certificate of Fair Employment. A regular review of the award of certificates should be set up.

Grants and Tenders awarded by the public sector should be given only to employers with fair employment certificates.

Future Administrative Structure: The Fair Employment Agency should be the central body dealing with discrimination on the grounds of religion or political opinion. The structure of the Agency should be examined with a view to increasing its ability to be effective.

Remedial Measures

- Clarification and publication of investigations by the FEA.
- Regular review (and withdrawal if necessary) of Certificates of Fair Employment.
- Improved procedures for individual complaints.
- Regular reviews of the legislation on fair employment

Short-Term Measures

- Government grants awarded only to firms who have signed the Declaration of Principle and Intent.
- Extension of scheme of contract compliance to cover all local government, public bodies and state subvented undertakings.
- Opening up periodically of recruitment to higher grades in the Civil Service.
- Local Government should undertake monitoring on the lines of the Civil Service.
- Increase in resources of the FEA.
- Early publication of the annual FEA report.
- Introduction of an appeals procedure to Section 42 of the Fair Employment (N.I.) Act 1976 (which exempts acts done for the purpose of safeguarding national security etc. from the provisions of the Act).
- Introduction of statistics which would give a breakdown of school leavers according to religion for monitoring purposes.

LOCAL APPOINTMENTS COMMISSION

1. The Local Appointments Commission was set up by the Local Authorities (Officers and Employees) Act, 1926, to deal with all appointments of senior and middle level in local administration. The Commission hold office "at the pleasure of the Government" and may not exceed three in number at any time. Traditionally the Commissioners have consisted of the Ceann Comhairle, the Secretary to the Department of the Environment and one other Secretary of a Government Department.

2. The posts of Manager, Assistant Manager, Chief Executive Officer, County Secretary, County Accountant and other senior posts are filled by the Local Authority on the recommendation of the Local Appointments Commission. Any posts "the qualifications for which are wholly or in part professional" (the terms of the Act) are also filled on the recommendation of the Commission (engineering, medical and other such posts.) As well as the posts specifically catered for in the Act, the Minister, with the concurrence of the Commissioners, may decide which other posts the terms of the Act apply to.