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Equality of Opportunity in Employment

Meeting between NICS/NIO Officials and Lord Chancellor's Department

19 November 1987

Present: Sir Derek Oulton (Perm Sec) Sir Kenneth Bloomfield (Head of NICS)
Mr Potter Mr D Fell (Perm Sec DED)
Mr Hanratty Mr Chesterton (NIO)
Mr Wolstencroft (DED)
Mr Fergusson (NIO)

1. Sir Derek Oulton welcomed Sir Kenneth Bloomfield and his colleagues; accepted the serious political and legal nature of the problem; expressed appreciation of the need to do something urgently; and indicated that the Lord Chancellor's Department wished to be as positive as possible in its response. But the NI Judiciary were both reluctant to become involved in the contentious issue of religious equality of opportunity and sensitive to the need to maintain the general cross-community respect which they enjoyed (despite current well publicised issues) for their objective and impartial administration of justice. Sir Kenneth was invited to outline the general background to the problem.
2. Sir Kenneth thanked Sir Derek Oulton for his courteous and prompt response to his recent letter and request for a meeting. He then emphasised the following points: the political importance of the issue; the priority given to reducing the enduring disparity in employment experience between the two communities; the economic pressures implicit in the MacBride campaign in the US; the onerous burden on the UK of diplomatic and consular effort involved in countering this campaign; the RoI and Anglo-Irish dimension; and the particular difficulty of keeping the present RoI administration convinced of HMG's determination to effectively tackle this matter. Particular emphasis was placed on the need for an urgent statement of our legislative intentions early in 1988 with a view to the introduction of legislation in 1988/89.
3. In the light of the extensive range of responses to our Consultative Paper, and the comprehensive comments of the premier human rights body in NI - the

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Standing Advisory Commission on Human Rights - our proposals were stiffening considerably. In broad terms it was now proposed to place a statutory duty to practice employment equality on both the public and private sectors; to back this statutory duty with heavy fines for default; to introduce a registration regime; to continue to link our present tender acceptance policy to that regime; and, in addition, to withhold grants from private sector companies that are not registered. The key difference from our original proposals was that the main thrust of policy now centred on a statutory duty to practice equality of opportunity on both public and private sectors enforced by heavy fines; and registration in both sectors backed by economic sanctions in the private sector; whereas the initial intention was to concentrate the statutory duty exclusively on the public sector and to rely more heavily on economic sanctions - and particularly grant denial - in the private sector. But, since grant denial had to be maintained for political and presentational reasons, it could only apply selectively and differentially; so it was now considered essential to impose a statutory duty across the board.

4. In institutional terms it was recognised that the Fair Employment Agency had addressed a difficult job for some time without much success or public credibility. Basically it suffered from confused objectives since it was responsible for both investigation and quasi judicial decision making on the outcome of its investigations. It was now widely accepted by most respondents to the Consultative Paper that, as proposed by Government, these two functions should be clearly separated. In particular the decision making function should be exercised in future by a body with sufficient gravitas and status to attract public and political credibility in both communities - and that, inevitably, took our thinking in the direction of the Courts and judicial decisions. This consideration was re-enforced by the reflection that the decision on loss of registration could lead as a secondary consequence to loss of both Government's business (through non-acceptance of tenders) and its grants (because the Secretary of State would have the discretionary power to withhold selective grants from non-registered private companies).

5. Accordingly we envisaged the establishment of a new Commission to (i) process individual cases in similar manner to the way in which Industrial Tribunals handle sex/race cases in UK and GB respectively;

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(ii) monitor registration; (iii) carry out general pattern and practice enquiries. Decision making, however, would rest with a new Court and, preferably, we envisaged that Court dealing with all the cases listed at (i)-(iii) above. Since the process of arriving at decisions was of such critical importance it was considered important that this function should be exercised by someone of the status of a County Court Judge.

6. In discussion officials of the Lord Chancellor's Department made a number of points. First, they repeated the statement that the judges in NI had reservations about their direct involvement in this particular issue. Secondly, they indicated that Judge McKee had reservations about processing individual cases through the Industrial Tribunal network, though they accepted that this could be done with enforcement lying to the County Court. Thirdly, they indicated that it might be possible to handle each category of case through a different legal mechanism. Individual cases could fall to Industrial Tribunals; registration to the County Court; pattern and practice to some other form of special Court with particular experience and expertise in this area. Finally, they expressed concern about the likely high volume of business that could result from the new policy thrust and in particular articulated concern about a major increase in individual cases.

7. It was pointed out by NICS/NIO officials, however, that it was reasonable to expect all organs of the establishment to bear a part of the strain involved in tackling this key political priority. The involvement of the Judiciary was important to ensure the objective acceptability of the new policy in both communities. It was accepted that individual cases could be singled out for processing through the Industrial Tribunal system; and, if Judge McKee's reservations could be overcome, this was a possible option. Though a tripartite approach to the processing of cases was also possible as an option it was much less attractive than having one single and prestigious focus for decision making or, as a possible alternative, processing individual complaints through the Industrial Tribunal system with the balance of registration and pattern practice cases being determined by a separate court. In terms of volume it was likely that there would be some increase in the level of individual complaints (because it was intended to outlaw indirect and well as direct discrimination); some work had been done

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on an estimation of likely volume, but it was necessarily impressionistic. Moreover it was important to bear in mind that - as in the case of the present EOC and CRE - the new Commission would filter out frivolous individual cases and there would be no legal aid. Indeed since a crucial educational and promotional role would also attach to the new Commission, its basic concern would be to encourage public and private sector employers into compliance and to reduce as far as possible the number of occasions on which it would be necessary to have recourse to legal and financial sanctions.

8. Officials of the Lord Chancellor's Department fully accepted the need to distinguish between the exercise of investigatory powers on the one hand and judicial powers on the other. They also recognised the argument for the exercise of the decision making power by a high status body particularly in relation to both registration and pattern and practice cases. Accordingly they indicated that they would like to think further about
- (i) channeling individual cases through the Industrial Tribunal network;
 - (ii) establishing a "Commissioner" (perhaps a leading and experienced QC) of equivalent status to the President of the Lands Tribunal, and assisted by lay assessors, who would make judicial decisions on both registration and pattern and practice cases;
 - (iii) having that "Commissioner" (who should be an internationally recognised figure of legal status) appointed by the Lord Chancellor with the approval of the Secretary of State for Northern Ireland;
 - (iv) ensuring that the determinations of the "Commissioner" were final on matters of fact; and that the Commissioner had power to impose heavy fines;
 - (v) only allowing appeal by way of case stated on a point of law to the Court of Appeal (to guard against the "re-hearing" of cases determined by the "Commissioner");

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- (vi) leaving enforcement of the "Commissioner's" decisions to the County Court;
 - (vii) the possibility of having the "Commissioner" deal with all three types of case (ie) individual, pattern and practice and registration so that there would be one single focus for decision making in each area.
9. The urgent need to put a policy paper to PCC on Thursday 26 November, and to obtain "H" Committee approval in December, was stressed. Officials in the Lord Chancellor's Department agreed to process matters expeditiously and to let NICS/NIO colleagues have their considered views within the next few days. They would inform the Lord Chancellor about the matter and discuss the implications with Lord Lowry. But it was accepted that it would be premature for the Lord Chancellor to talk to the Secretary of State on the matter; NI Ministers had not yet been fully briefed on the latest trend in their officials thinking. It was agreed, therefore, that Lord Chancellor's Department would forward urgently their official view on the way forward and that the Lord Chancellor would not yet raise the matter with the Secretary of State.
10. Following the meeting it was agreed by NIO/NICS officials that it was unlikely that the presentation of a paper to PCC next week could await receipt of the views of the Lord Chancellor's Department. It was further agreed that, taking receipt (so far as practicable in the current timescale) of comments on the draft PCC paper received by close of play on Friday 20 November the PCC paper should then be urgently re-drafted and circulated early next week. In discussion at the PCC meeting on Thursday 26 November a report could then be given on the response of the Lord Chancellor's Department which should be to hand at that stage.

J.E. Wolstencroft
J E WOLSTENCROFT
20 November 1987

cc PS/Sir Kenneth Bloomfield
Secretary
Dr Quigley
Mr Erskine (LDO for information)
Mr Chesterton
Mr Hodges
Mr McCartney (Legal Advisor)
Mr Kirk (NIO-L)
Mr Fergusson (NIO-L)
Mr Lavery

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