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Subject: Religious Belief/Political Opinion

Patricia

I am currently doing a policy paper on the grounds to be included in the SEB.

In the course of preparation I unearthed the attached which I had done some time ago. Do you think it reaches a fair conclusion in the way we want to go on this in the SEB. Do we just include "religion or belief" or do we need to add "political opinion" either directly (spelt out) or indirectly (ie just rely on "religion or belief") in addition? Do we also recommend the exclusion of the "use of violence" provision in relation to political opinion.



POLICY PAPER ON RELIGIOUS BELIEF.dc

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POLICY PAPER ON RELIGIOUS BELIEF/POLITICAL OPINION

The Issue:

1. Current anti-discrimination legislation in Northern Ireland includes the Fair Employment and Treatment (Northern Ireland) Order 1998 (FETO) which covers discrimination on the grounds of "**religious belief or political opinion**". Section 2(3) of the Order further provides protection for a person's supposed religious belief or political opinion or the absence or supposed absence of either. Section 2(4) provides an exclusion with regard to a person's political opinion if it includes approval or acceptance of the use of violence for political ends connected with the affairs of Northern Ireland.
2. Council Directive 2000/78/EC of 27 November 2000 (The Framework Directive) relates to, inter alia, combating discrimination on the grounds of "**religion or belief**". The Directive has to be implemented in Northern Ireland by December 2003.
3. In relation to the current legislative cover in this field, and our need to implement the Directive, decisions have to be made on the scope and meaning of the current provisions in FETO regarding "religious belief or political opinion" and what, if anything, needs to be done to bring it into line with the Directive requirements.

The Issues are:

- taking account of what might have been the original intention of including "religious belief/political opinion" in the NI Constitution Act 1973, can we now go anyway to making it more definitive?
- do we keep "political opinion" as a ground in the Single Equality Bill?
- what does "belief" mean in the Directive?
- does "religious belief" in FETO equate to "religion or belief" in the Directive?

Background

4. In considering the implications of the Directive (which makes no direct reference to "political opinion") it is important not to lose sight of the significance of the link between religion and political opinion in the Northern Ireland context.
5. The concept of "religious belief or political opinion" was first placed in legislation by the Constitution Act 1973. In Part III "Prevention of Religious and Political Discrimination" :
 - section 17 provides that any legislation passed in Northern Ireland which discriminates against any person or class of persons on the ground of religious belief or political opinion, shall be void.
 - Section 19 covers discrimination by public authorities on the same ground.
 - Section 20 sets up the Standing Advisory Commission on Human Rights with the purpose of advising the Secretary of State on the law preventing discrimination on either ground (ie religious belief or political opinion).
6. The Northern Ireland Act 1998 carried forward the same concept :
 - Section 75 places a duty on public authorities to carry out their functions and have due regard to promoting equality of opportunity between persons of different religious belief or political opinion.
 - Section 76 makes it unlawful for a public authority to discriminate against a person or class of a person on the ground of religious belief or political opinion.

Discussion

What was the original intention of "religious belief/political opinion in the Constitution Act 1973 and can we go anyway to making it more definitive for the Single Equality Bill?

7. As a starting point it could reasonably be assumed that, in the Northern Ireland context of the early 1970's, "political opinion" did not exist separately from "religious belief" and that both terms were inextricably linked. However it is interesting to note an apparent inconsistency in the NI Constitution Act 1973, where section 17 refers to "**the ground**" of religious belief or political opinion while section 20 refers to "**discrimination on either ground**"

Furthermore, the Notes on Clauses for the 1973 Act state:

"Religious belief" and "political opinion" are not identified in the Bill; the Courts will not find difficulty in identifying **these grounds** for discrimination where they exist".

8. Clearly the main difficulty is that the legislation does not define the terms. Consequently this has given rise to a number of cases which have attempted to widen the scope of the terms "religious belief" and "political opinion" beyond the confines of Catholic/Protestant and Nationalist/Unionist.
9. Case law in Northern Ireland has developed thinking in these areas in recent years with judicial interpretation extending the meaning of political opinion beyond the historic link between religion and politics in Northern Ireland.
10. **Annex 1** sets out the main points and judgement in the case of *McKay v Northern Ireland Public Service Alliance and another*. In this instance the Court of Appeal held that "political opinion" is not restricted to where the political opinion displays some connection or correlation between religion and politics in Northern Ireland. Nor is the term "political opinion" confined to "political opinion" relating solely to the political affairs of Northern Ireland. The Lord Chief Justice commenting during the appeal said that he could see no valid

reason upon which to confine the term "political opinion" to the Unionist/Nationalist divide because as in other parts of the UK citizens can hold other political opinions relating to Conservatism and Socialism. To confine it in such a way would be to read words of restriction into the legislation which it does not contain.

11. **Annex 2** provides a similar summary for a case *Gill v Northern Ireland Council for Ethnic Minorities*. Here the Court of Appeal pulled back somewhat from the McKay ruling in that it said "political opinion" was "that which relates to one of the opposing ways of conducting the government of the state, which may be that of Northern Ireland but is not confined to that political entity....."

..... the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy".

12. **In summary**, it is clear that since first introduced in the Northern Ireland Constitution Act 1973 no definitive conclusions have been reached on whether or not "political opinion" was intended as no more than a reflection of the religious/political landscape of Northern Ireland. An examination of the Hansard debates for the 1973 Act reveal no further indications. No conclusions can therefore be drawn apart from the rulings in the two significant cases noted. It has been left to the Courts to impose their own definitions.

Do we keep "political opinion" as a ground in the Single Equality Bill?

13. The Directive does not permit a lesser degree of protection from discrimination than existed prior to its implementation.
Article 8 states that:

"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."

14. It follows therefore that any attempt to remove "political opinion" now would attract adverse criticism. While the Directive's scope in this area is not entirely clear, the deletion of "political opinion" from FETO could run the risk of a challenge that the Directive was not being fully implemented in Northern Ireland (in breach of the grounds set out in Article 1, which includes the undefined concept of "Religion and belief"). In addition it could also be challenged in that the level of protection offered to person's here was reduced on implementation of the Single Equality Bill (Article 8). It has to be borne in mind that "belief" could be interpreted by the Courts as much wider than a religious belief alone.
15. There is however scope to amend one of the conditions linked to the concept of "political opinion" in FETO. The existing provision in FETO which excludes a political opinion which co-exists with a person's acceptance of the use of violence for political ends connected with the affairs of Northern Ireland needs to be considered. In its present form there would appear to be a loophole through which, for example, animal rights activists using force to achieve their objectives would be protected or similarly a bombing in Northern Ireland by international terrorists objecting to UK foreign policy in Afghanistan. The deletion of the words "connected with the affairs of Northern Ireland" would possibly rectify this provision. It is suggested that this is in line with the European Convention on Human Rights safeguard in Article 9 which places a restriction on the manifestation of one's religion or beliefs in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.
16. **In summary** it is recommended that the ground of "political opinion" should remain in FETO to avoid legal challenges but that a suitable amendment be made to its associated provision in relation to the use of violence to achieve political ends, as identified in paragraph 15 to close a potential loophole.

What does "belief" mean in the Directive, and does "religious belief or political opinion" in FETO equate to "religion or belief" in the Directive?

17. The lack of any definition of "belief" in the Directive means that decisions need to be made whether or not to define "belief" in the domestic legislation or leave it to the courts to decide in the event of a challenge. The risk of such a challenge prompts a need for a radical look at the concept.
18. "Belief" in today's secular society must be held to be wider than a religious belief. **The European Convention on Human Rights**, Article 9, appears to be all embracing providing for everyone to have the right to freedom of thought, conscience and religion, including a right to change religion or belief. There is also a right to manifest one's religion or belief in worship, teaching, practice and observance.
19. The Court of Human Rights has indicated that belief should go further than "..... mere opinions or deeply held feelings" towards "...a holding of spiritual or philosophical convictions which have an identifiable formal content". So, for example, someone holding to a view from a human rights viewpoint could be covered under this interpretation.
20. Conversely, does it, or could it be interpreted in the future to cover, for example, someone who has no formalised beliefs at all, or someone who believes in vague concepts such as "the good life", "the family", "earn money and spend it", etc. etc.
21. Given the difficulty to sufficiently cover all the many facets to this concept it is considered prudent not to attempt a definition in the legislation but to leave it to the courts to decide. In the meantime no action should be taken to remove existing cover in legislation which could conflict with "belief".

Recommendation

It is recommended:

- (i) that the implementation of the Directive's ground of discrimination by "religion or belief" in domestic legislation should not be limited by defining the concept in the Bill but it should be left to the courts to determine in the event of a challenge. The concept of "political opinion" should remain either directly or indirectly in the Bill.
- (ii) that the supplementary provision in FETO dealing with "political opinion" which relies on the use of violence to achieve its objectives should be amended as described in paragraph 12 .

DETAILS OF THE INITIAL COMPLAINT

- Respondent lodged complaint with FET on 21/5/06. Grounds for complaint – discriminated against because of religious belief & political opinion & victimised in not being appointed to the post.
- Respondent withdrew complaint of victimisation rather than have the matter adjourned for the furnishing of particulars (by him).
- Respondent did not pursue the issue of religious belief at the FET.
- Respondent advanced an "anti-racist approach" during the interview & held that this was the reason for his lack of success.

FET JUDGEMENT – DETAILS

- The FET based on the evidence heard felt that this (Point 4 above) constituted a "political opinion" (p10/11)
- FET concluded that the respondent, despite being better qualified / more experienced than Mr Yu was treated less favourably. Furthermore, NICEM afforded no explanation for the less favourable treatment. FET inferred that this treatment was due to the respondent's political opinion & concluded that NICEM unlawfully discriminated against the respondent on the grounds of his political opinion.
- The FET would not permit NICEM to call additional witnesses to that of the Chair of the Panel.

ANNEX 2

PRÉCIS OF THE HIGH COURT JUDGEMENT BY LORD JUSTICE CARSWELL IN THE CASE OF WHYED GILL (RESPONDENT) AGAINST NICEM (APPELLANT)

BACKGROUND

- Appeal against decision of FET on 2/12/99 against NICEM that "*it discriminated against the respondent on the **grounds of his political opinion** in failing to appointment him to a post of co-ordinator in February 1996*".
- NICEM advertised the post on 12/1/96 listing 21 main duties in the job description and 22 person specification requirements as **essential** with only 1 as **desirable**. Weightings equal.
- 4-man panel all NICEM, selected Mr Yu and placed the respondent as reserve. Scores – Mr Yu (372) & respondent (353). Mr Yu scored higher in 10 criteria, equal on 5 and the respondent ahead on 5 criteria.

DETAILS OF THE INITIAL COMPLAINT

- Respondent lodged complaint with FET on 21/5/96. Grounds for complaint – *discriminated against because of religious belief & political opinion & victimised in not being appointed to the post.*
- Respondent withdrew complaint of victimisation rather than have the matter adjourned for the furnishing of particulars (by him).
- Respondent did not pursue the issue of religious belief at the FET.
- Respondent advanced an "anti-racist approach" during the interview & held that this was the reason for his lack of success.

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- The FET would not permit NICEM to call additional witnesses to that of the Chair of the Panel.

- NICEM solicitors asked for FET to review the decision, the President refused to do so on 24/3/2000.
- NICEM appealed on "points of law" to the High Court.

HIGH COURT JUDGEMENT – DETAILS – 3 SECTIONS

Less Favourable Treatment

- In concluding that the respondent was less favourably treated than Mr Yu the FET **must** have taken the view that he was the better candidate but was passed over on the grounds of his political opinion. ***In our opinion this conclusion was unsustainable.***
- The High Court did not agree with FET that the respondent was the better candidate because Mr Yu "indisputably" scored higher than the respondent. Furthermore, the FET honed in on 2 criteria (qualifications & experience, 1 mark higher in each than Mr Yu) and concluded that the respondent had been less favourably treated. ***We do not see any justification for this conclusion.***
- FET did not take account of the other Panel members' evidence and the conclusions to be drawn from it – material appended to the NICEM submission.
- ***We consider that NICEM did not treat the respondent less favourably than it treated other persons.***

Political Opinion

- FET concluded that the respondent's views on anti-racism constituted a political opinion & cited a passage from *McKay** v NIPSA 1994*.
- ***This court held that the meaning of the term was not restricted in the manner accepted by the tribunal & that it was not confined to Unionists – Nationalists politics.***
- We believe that the remarks in ** + the dictionary definition (p20) quoted by him give us the most useful guidance for present circumstances.
- We believe that the type of political opinion in question must be one relating to the conduct of the government of the state or matters of public policy.
- ***It might be possible to describe such a difference as constituting a divergence of political opinion, but we do not think that this is the type of political opinion intended by Parliament in enacting the fair employment legislation.***

Calling further witnesses

- FET refused to allow counsel for NICEM to call further witnesses (post Chair), although it took into account in its judgement that NICEM did not call further witnesses to give evidence.
- **In our considered opinion this was unfair in the extreme & perpetrated a serious injustice, which we can only deplore.**
- However, as this is an appeal on a point of law the High Court cannot say whether or not the FET acted outside its jurisdiction, or that it committed an error in law. Finally, had this FET judgement been made today then it would most likely have been in breach of Article 6(1) of the European Convention on Human Rights.

Overall, the High Court allowed the NICEM appeal and dismissed the respondent's complaint.

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