



NORTHERN IRELAND OFFICE

Security Vetting Review

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17 May 2004

Dear [Ossie]

FAIR EMPLOYMENT LEGISLATION: 'NATIONAL SECURITY' EXCEPTION

I should be grateful for your comments, and those of copy addressees, on the attached self-explanatory draft paper for the SVR on Fair Employment legislation in Northern Ireland. I would welcome any comments - especially any additional material or detail on the relevant NI and GB legislation - by Thursday 3 June, so this paper can go to the Security Vetting Review's June meeting.

I am copying this letter to Denis McCartney and Mary Bunting, OFM/DFM; to Martin Sterling, Cabinet Office; to Sara Sternberg, HOLAB; and to David Mercier, PSNI; as well as to Alan Whysall and Anita Bharucha.

[Signed]

Christine Collins

Christine Collins
Security Vetting Review

LJ33

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- consider the amendment of the 'national security' exception in Northern Ireland's Fair Employment legislation and other legislation relevant to Northern Ireland's employment practice, to bring it into alignment with that used elsewhere in the UK;
- agree that Ministerial approval should be sought to the process being taken forward through the current OFM/DFA consultation on the single Equality Bill.

Background

2. Since 1976, Northern Ireland's Fair Employment legislation has provided the exception, (originally under Section 42 of the Fair Employment (NI) Act 1976; now HELPE) (Annex A), to the provisions covering fair employment, in a slightly different terminology from that used in analogous UK legislation. Northern Ireland has used the formulation 'for the purpose of safeguarding national security or of protecting public safety or public order' to cover the same territory that is covered elsewhere in the UK by the simple 'national security' term.

3. It is not clear why this extended formulation was first adopted in Northern Ireland - it may be that it was simply a precaution at a time when it was unclear what interpretation the European Court of Human

DRAFT PAPER ON FAIR EMPLOYMENT LEGISLATION: 'NATIONAL SECURITY' EXCEPTION

The **purpose** of this Paper is for the Security Vetting Review to:

- note the need to meet the Good Friday Agreement undertaking to 'a review of the national security aspects of the present fair employment legislation at the earliest possible time.'
- consider the amendment of the 'national security' exception in Northern Ireland's Fair Employment legislation and other legislation relevant to Northern Ireland's employment practice, to bring it into alignment with that used elsewhere in the UK;
- agree that Ministerial approval should be sought to the process being taken forward through the current OFM/DFM consultation on the single Equality Bill.

Background

2. Since 1976, Northern Ireland's Fair Employment legislation has provided the exception, (originally under Section 42 of the Fair Employment (NI) Act 1976; now HELP!) (Annex A), to the provisions covering fair employment, in a slightly different terminology from that used in analogous UK legislation. Northern Ireland has used the formulation 'for the purpose of safeguarding national security or of protecting public safety or public order' to cover the same territory that is covered elsewhere in the UK by the simple 'national security' term.

3. It is not clear why this extended formulation was first adopted in Northern Ireland - it may be that it was simply a precaution at a time when it was unclear what interpretation the European Court of Human

Rights would place on the phrase 'national security' or it may be that it was a reassurance put in place in attempt to address any unknown concern that might originate from Northern Ireland's domestic terrorist campaigns.

4. Concern was expressed from a fairly early stage about the possible implications and confusion arising from having two differently worded 'exceptions' in the UK law. In addition, there are problems when trying to decide which particular element(s) of the exception are applicable and being relied upon in any particular case, ie. does the exception fall under the element of national security, or protecting public safety, or public order or a combination of all three?

Current Position

5. Developing case law and experience in handling the issues over time have demonstrated that, in those cases where the exception needs to be claimed and where justification is necessary, the 'national security' element threshold is always met - and alone has proved acceptable to the European Court.

6. It is difficult to imagine cases where reliance could be placed on the protecting 'public safety' or 'public order' elements of the exception to justify excluding an individual from appointment, where it would not be proper to permit open challenge and examination of the issues in a Fair Employment Tribunal. The continued existence of the two 'additional' Northern Ireland elements in this area is a potential cause of confusion and possible further embarrassment.

7. The existence of the exception, and the way in which it has been used, has been the subject of controversy and pressure in the past. Most notably, the cases of Tinnelly and McElduff and Devlin which were pursued through Judicial Review and eventually to the European Court of Human Rights, showed that the original procedures in the Fair Employment legislation, under which there was no possibility of challenge to the Secretary of State's certificate, were not ECHR compliant. Legislation was introduced, under Section 91 of the Northern Ireland Act 1998, to provide a mechanism for the Secretary of State's certificates to be challenged before a special tribunal. The Strasbourg cases also highlighted the desirability of a single UK wide norm in this national security area.

Next Steps

8. The appeal procedures against the Secretary of State's certificates which have been introduced, and which are believed to be ECHR compliant, arguably meet part of the undertaking in the Good Friday Agreement to carry out 'a review of the national security aspects of the present fair employment legislation'. However, there is a need to consider the terms of the exception itself. This is a matter for the NIO. We need to consider whether we can safely change the wording of the exception in the relevant Northern Ireland legislation to match that used in the equivalent GB legislation. For the reasons outlined above, there seems no reason why we should not make this change.

9. The question then turns to one of handling. It may well be that simply removing the wording 'or of protecting public safety or public order' as grounds for exception, will be insufficient to meet the wishes of some critics, who will want to see no exception in place at all. This will have to be resisted firmly - especially in the current context of international as well as domestic terrorism. However, the compromise of the NI wording to be aligned with the GB norm is a reasonable one, which could be taken forward in an unforced way in the context of OFM/DFM's current ongoing consultation on the single Equality Bill.

Conclusions

10. The SVR is asked to:

- note the need to consider amending the 'National Security' exception in the Fair Employment legislation and also in other allied legislation;
- note the desirability of having a single, UK wide norm in this national security area;
- note the need to meet a Good Friday Agreement undertaking; and
- agree that Ministerial approval should be sought to the process being taken forward, through the current OFM/DFM consultation on the single Equality Bill, [by the SVR Team in consultation with OFM/DFM].

FAIR EMPLOYMENT (NORTHERN IRELAND) ACT 1976

Chapter 25
Arrangement of Sections

Part V
EXCEPTIONS

Acts done to
safeguard
national
security etc.

42. - (1) This Act shall not apply to an act done for the purpose of safeguarding national security or of protecting public safety or public order.

(2) A certificate signed by or on behalf of the Secretary of State and certifying that an act specified in the certificate was done for a purpose mentioned in subsection (1) shall be conclusive evidence that it was done for that purpose.

(3) A document purporting to be a certificate such as is mentioned in subsection (2) shall be received in evidence and, unless the contrary is proved, shall be deemed to be such a certificate.