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MR *Felly*

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Head of the Northern Ireland
Civil Service
Sir Kenneth Bloomfield, KCB

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D. Quigley
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Sir Derek Oulton KCB QC
Permanent Secretary
Lord Chancellor's Department
House of Lords
LONDON
SW1A 0PQ

2 November 1987

Dear Derek,

EQUALITY OF OPPORTUNITY IN EMPLOYMENT IN NORTHERN IRELAND

I am writing to seek an early discussion with you on matters, in which the Lord Chancellor's Department will have a very major interest, which arise from a current issue of serious and urgent political concern in Northern Ireland - the more effective practice of religious equality of opportunity in employment.

A short synopsis of the background may prove helpful: in 1985, Government statistics and research revealed that our current legislation (the Fair Employment (NI) Act 1976 (copy and Guide attached) and the enforcement body which it established - the Fair Employment Agency - had made little impact on the wide employment differential between the Roman Catholic and Protestant communities. Catholics remain two-and-a-half times more likely to be unemployed than Protestants. There are many reasons for this; but continued discrimination, compounded by the lack of effective practice of employment equality in both public and private sectors, is an identifiable significant factor. A Government Consultative Paper (copy attached) was published in September 1986 setting out proposals for the reform of our existing statutory and administrative arrangements; and in July 1987, the Secretary of State for Northern Ireland indicated that he would bring forward definitive legislative proposals after he had received a report from the foremost human rights body in Northern Ireland - the Standing Advisory Commission on Human Rights (SACHR). That Report, on which SACHR has been working for over 2 years, was published on 29 October as Cmnd 237, and, as you may have seen, received very wide publicity both locally and nationally.

Its publication increases the pressure for an early Government response. Urgent work is now in hand on the preparation of new legislation and we would hope to obtain collective Ministerial approval for the introduction of such legislation in the 1988/89 session. That in itself imposes a formidable timetable upon us

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In the light of responses to the Consultative Paper, it is clear that a key consideration will be the structure of new institutional arrangements designed to promote and enforce the more effective practice of equality of opportunity in Employment. In that context, the future separation of the investigatory and quasi-judicial functions (currently married in the present Fair Employment Agency) has emerged as a significant issue. This separation (one form of which was canvassed in the Consultative Paper) has also been recommended in the SACHR Report.

Our present thinking, which has advanced somewhat since we published the Consultative Paper, is that we should set up a new body, a Fair Employment Commission, which would replace the existing Fair Employment Agency and subsume many of its powers and functions. The Commission would deal with the promotion of employment equality and carry out the broad investigatory functions of the present Agency, ie the processing of individual complaints of religious discrimination; registration of employers willing to adopt fair employment practices; audit of the pattern of employment practice by employers, leading first to advice, but subsequently, if need be, the issue of directions to employers who are considered to be failing to use best endeavours to offer equality of opportunity in employment; and recommendation that failure to observe such a direction be enforced, or penalised.

The Commission, however, would have very limited decision-making powers, and we consider it necessary to have in place a judicial body which could

- (a) hear individual complaints of discrimination in both the public and private sectors, make findings on such cases and award damages; and
- (b) decide upon whether directions to employers issued by the Commission, if reasonable, are being implemented; and if it finds against, impose significant fines upon employers, and direct them to be "de-registered" as fair employers, until such time as those employers can demonstrate that, by adopting the directions of the judicial body, they may merit re-registration.

We have it in mind too that the Secretary of State will be endowed with powers to withhold both Government grants and public sector contracts from de-registered employers. The judicial body may also have a role in enforcing fair employment in public sector bodies.

We have been considering various options as to how such a new judicial body might be structured. The first possibility would be to utilise the existing Industrial Tribunal system. This proposition, advanced by a number of respondents to our Consultative



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Paper, including SACHR, has a number of attractions. It would be on all fours with the processing of sex equality cases in Northern Ireland and race and sex equality cases in Great Britain. It would make use of an existing court structure and expertise; and integrate the religious issue into the now well established and well regarded procedure for dealing with industrial relations matters. But there are also problems with such an approach. The religious issue in Northern Ireland has an acute and very divisive political dimension which does not obtain in the general run of sex discrimination, equal pay and industrial relations matters normally dealt with by Industrial Tribunals. It would, to that extent, intrude a potentially disturbing political element into a structure that is well regarded on both sides of the community, and indeed both sides of industry, in the Province. Furthermore, a cogent case can be made for building up and concentrating expertise in the contentious area of religious discrimination and equality of opportunity, in a single dedicated judicial body; that would be difficult to achieve through the use of Industrial Tribunals.

I should add that initial soundings on the matter with Judge John McKee, President of the Industrial Tribunals in Northern Ireland, and a number of his co-Chairmen, have established that there would be very considerable reluctance to considering this possibility on the grounds that it would take the Industrial tribunals into sensitive political territory where trespass could disturb the harmonious state of employer/trade union co-operation that obtains within the Tribunal structure. Moreover, in order that the new legislation on religious equality should be no weaker than the present 1976 Act, any Industrial Tribunal dealing with such matters would have to exercise the enforcement powers currently exercised by the County Court. Our legal adviser has raised doubts as to how far this would be practicable.

We had indeed considered, as a second option, the general use of the County Court itself, but we believe that this would run contrary to the need to build up expertise in a single judicial body in this very sensitive area.

Accordingly, our minds are currently moving rather strongly in the direction of establishing a new "Employment Equality Court", which would specialise in religious discrimination cases. It could be structured on the lines of the Industrial Tribunals, with a County Court Judge presiding, accompanied perhaps by two lay assessors. Its functions would be as described above in the section on the role of the judicial body.

I appreciate that to contemplate the establishment of a new Court of this kind would be a very major step indeed, and one on which the view of the Lord Chancellor's Department (and, I expect, the Lord Chief Justice in Northern Ireland) will be of most significance. I



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therefore thought it essential to put this idea of a possible new "Employment Equality Court" before you as soon as it emerged, even though it has not yet been thought through in fully developed form.

I hope that you find this indication of the current direction of our thinking helpful, and as I have noted, I would be most grateful if we could have a very early discussion about it. I fear, however, that we are working under exceptionally tight deadlines with mounting political pressures for action, and I would appreciate it if you could let me have an urgent response.

I am copying this letter for information to Robert Andrew and to Eddie Simpson, Director of the Northern Ireland Court Service.

*Yours
Ken*

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