

E 7 AUG 1989

PS/MINISTER (B&L)

cc Secretary

Mr Burns (NIO-L)

Mr Gowdy (O/R)

Mr Cowper-Coles (British
Embassy, Washington)

Mr G Fergusson (British Embassy,
Dublin)

Mr Thomas (NIO-L)

Mr Kirk (NIO-L)

Mr Blackwell (NIO-L)

Mr T George (FCO - Republic of
Ireland desk)

Mr R Spence (Central Secretariat)

Dr Harbison (Central Secretariat) 30/8.

Mr Wood (NIO-L)

FAIR EMPLOYMENT (NI) ACT 1989

DR MCCRUDDEN'S "IRISH TIMES" ARTICLE

1. The Minister asked for briefing on our position on the criticism expressed in Dr McCrudden's recent "Irish Times" article.
2. Dr McCrudden is very able and erudite. He is an academic lawyer with a well established reputation in the fair employment field and a flair for self publicity. As the Opposition's main adviser on this legislation, he has exhibited a pedantic obsession with arcane legal detail, disingenuity in presenting his case, and a subjective distrust of anyone - whether Parliamentary Counsel, legal adviser or departmental official - who legitimately takes a different approach to his own. (Mr Hume is understood to have referred to Dr McCrudden as a "theologian": the analogy is apposite. Sean Farren (SDLP) is reported as accusing Dr McCrudden of an "over-legalistic" approach). As a former member of SACHR, and the primary author of its

influential and most commendable report on fair employment, he is a close confidante of Mr Seamus O'Hara -a former SACHR Chairman and one of the ROI suggested nominees for membership of the new Fair Employment Commission. It is not unlikely that Dr McCrudden has political ambitions closely allied to the fortunes of the Labour Party.

3. Dr McCrudden's recent "Irish Times" Article exhibits familiar characteristics

- (i) it is erudite, but pedantic
 - the points of criticism (with the possible exception of the Section 42 issue) are matters of different legal interpretation

- (ii) it is disingenuous
 - while it recognises that Government has met the Opposition during passage of the Act, it underplays both the extent to which Government and Opposition are agreed on basic policy issues and the positive response that Government has made to Opposition concerns on points of detail

- (iii) it is subjective
 - the attack on DED (like those inspired by Dr McCrudden and delivered by Mr McNamara and Lord Prys-Davies) is

vitriolic, ignoring the fact, of which Dr McCrudden is well aware, that policy and subsequent drafting of the legislation emerged from a collective process involving Ministers, DED and NIO officials, Parliamentary Counsel and Legal Advisers.

4. Attached, as requested, please find

tabbed "A" - a paper which indicates (1) the extent to which Government and Opposition are agreed on the main policy thrust in the Act; (2) the issues on which Government met the Opposition during passage of the Act and (3) the further commitments given about implementation of the Act

tabbed "B" - a paper which responds to the specific points in Dr McCrudden's article

tabbed "C" - a commentary on, and a copy of, the Labour Party policy document on Northern Ireland of 21 September 1988. It indicates how close are Government and Opposition on the broad thrust of fair employment policy as reflected in the Act and the Opposition's policy document.

5. Three final points are worth drawing to the Minister's attention. First, the sustained public attack on DED has a purpose. The objective is to ensure that responsibility for fair employment policy is transferred eventually from

DED to either the NIO, or a centrally based unit in Central Secretariat. Secondly, this attack will continue. Dr McCrudden can be expected to write articles criticising both the Act and the DED in legal journals, the "Equal Opportunities Review" (a quarterly dealing with fair employment issues), and a forthcoming book on "Public Policy and Fair Employment" (scheduled for publication by QUB early in 1990). Thirdly, criticism of the Act is the safest bet for Dr McCrudden. Making progress on fair employment is very difficult and takes time - even when an economy is expanding. Our scope for dramatically changing the unemployment differential between both communities is limited. This limitation could be exposed when the Act is reviewed in five years, if not before then. At that point Dr McCrudden will claim prescience, ignoring the fact that even legislation framed in accordance with his wishes, and those of the Opposition, will not produce dramatic change without increased investment and job creation.

J E Wolstencroft

J E WOLSTENCROFT

4 August 1989

cc Mr Lavery (O/R)

Mr Taggart

Dr Smyth

Mr McAleer (DED, Press Office)

(A) Extent to which Government has met the Opposition

(1) Key Policy Points on which Government and Opposition Agree

- . The key points in the Bill - have all drawn support from both Government and Opposition. There is agreement on (i) compulsory monitoring; (ii) registration; (iii) compulsory review; (iv) the need for affirmative action; (v) goals and timetables; (vi) criminal penalties; (vii) the need for economic sanctions (the denial of business and grants) - and the imposition of monetary penalties by the Tribunal; (viii) a new Fair Employment Commission and a new Fair Employment Tribunal; (ix) a new Code of Practice to be drawn up by the new Commission; (x) the processing of individual cases of discrimination on the industrial Tribunal model.

(2) Issues on which Government met Opposition During Passage

- . In addition to agreement between Government and Opposition on the need for these points we have met the Opposition on a wide range of other points now reflected in the Bill: namely:-

1. Goals/Timetables

- (a) specified on face of the Bill (Section 36)
- (b) related to both employees and applicants (Section 36(21))
- (c) Commission given power to require information on progress with goals/timetables (Section 36(4))

- (d) and to proceed to enforcement without the need for a fullscale Section 11 investigation (Section 37(2))
- (e) and where affirmative action necessary following an employer's review the employer must consider setting goals/timetables (Section 31(3)(a))

2. Affirmative Action

- (a) strengthened definition to cover both practices which encourage fair participation and modification/abandonment of practices that restrict or discourage such participation (Section 58(1)(a) and (b))
- (b) protection of affirmative action measures to encourage applications from both direct and indirect discrimination (Section 55)
- (c) and protection of affirmative action training from both direct and indirect discrimination (Section 53 - though Opposition would prefer a different wording)
- (d) and we protected group based affirmative action from accusation of the denial of individual equality of opportunity (Section 20(3))

3. Monitoring

- (a) making provision for use of the residuary method where the principal methods, because of "collusion", fail to provide the relevant information (Section 28(3))

- (b) making it clear that the monitoring of applicants is not be restricted to advertised vacancies (Section 29(1))
- (c) Department of Economic Development placed under a statutory obligation to consult with the new Commission in drawing up the monitoring regulations (Section 28)

4. Compulsory Reviews

- (a) making it clear that employers reviews cover both the composition of workforces and the practices operated within them (Section 31(1))
- (b) making it clear that the review has a double purpose (i) to determine whether members of each community are enjoying, or are likely to continue to enjoy, fair participation; and (ii) to determine on the appropriate affirmative action necessary (Section 31(1))

5. Fair Employment Tribunal

- (a) made provision for appointment of President and Vice-President and the panel of Chairman of the Tribunal by the Lord Chancellor (Section 3)
- (b) to assist Tribunal, have placed duty on Department to issue questionnaires to individuals taking discrimination cases (Section 49 new section 28)
- (c) made provision requiring the Tribunal to give reasons for its decision (Section 5(3))

6. Individual Cases of Discrimination

- (a) maximum compensation level raised to £30,000 (Section 49 new section 26(4))
- (b) duty on the Commission to give advice and assistance to all individuals who request it in writing (Section 49 new section 29(1))

7. Miscellaneous Issues

- (a) given regulatory power to the Department of Economic Development to adjust the "16 hour" threshold for the definition of employee (Section 47(2))
- (b) protection given for gender specific "positive action" training from indirect religious discrimination (Schedule 2 paragraph 29)
- (c) protection for redundancy undertaken as part of affirmative action from accusation of direct and indirect discrimination (Section 54) - though Opposition are unhappy about this it certainly appears to be what Mr McNamara asked for in Committee
- (d) provision that Commission can form an opinion, following an individual case of discrimination before the Tribunal, that there has been a failure to afford equality, inform the employer, and seek an undertaking (Section 13(1)) - though Opposition would prefer that the Tribunal had this power

(3) Commitments given on Implementation

- (a) commitment that Department of Economic Development will consult with Commission and draw up a code covering the Department's information gathering functions under Section 19(5)
- (b) commitment that review of legislation will be carried out by Government's Central Community Relations Unit which reports directly to the Secretary of State
- (c) commitment that in its review the unit will seek observations from SACHR, the trade unions, employers, the new FEC and the EOC
- (d) commitment that the Units Report will be published so that all interested parties are fully informed of the consequential action proposed
- (e) commitment that in progressively evaluating the impact of the legislation there will be regular six monthly meetings between the Industry Minister and the Chairman of the new FEC

. So in addition to major areas of agreement between Government and Opposition already reflected in the Bill as published, the Government then made over 20 significant and further amendments in the Bill to meet Opposition concerns; and it gave 5 specific commitments outside the Bill in response to other concerns raised by the Opposition.

. So there can be no objective justification - none whatsoever - for any accusation of "bad faith" on the part of Government. The facts speak for themselves and prove otherwise. The reality is that Government has worked hard, consistently - and with good faith - to accommodate the Opposition on many major areas that have been of concern to it.

(B) Specific criticisms in "Irish Times" article and our responses

Criticism

Response

1. Unclear whether employers can have regard to religious imbalances in framing an affirmative action training programme

Not unclear. Hansard Col 1108 of 26 July. Secretary of State re-emphasised statement made previously on a number of occasions "religious under representation can be taken into account when targetting training an employer who intends to benefit an under-represented group is protected from allegations of either direct or indirect discrimination"
2. Definition of affirmative action as "fair participation" rather than "a more representative distribution" likely to cause problems in the future

An unsubstantiated opinion
3. Definition of indirect discrimination problematic; permits preference for friends and relations of existing employees

Decision of GB Court of Appeal in Mear and Perreira cases did not include preference in definition of "requirement or condition" for purposes of indirect discrimination. It does not automatically follow that the FET will regard such precedents as definitive in the particular context of

religious discrimination cases in Northern Ireland. Discouragement of "preference for friends" can be included as a recommendation in the Commission's Code of Practice; Commission could base a Direction upon such a recommendation; and the Tribunal shall take the Codes provisions into account if it considers them relevant in any proceedings before it.

4. Section 42 certificates

True no judicial review in religious cases whereas there is review in sex cases. But reality of NI is that security issues much more likely to arise out of religious issue than out of sex issue. Moreover Government is continuing to examine the possibility of making the Section 42 procedure more open, and has agreed to keep the House informed of progress

5. EOC concerns (i) protection from direct religious discrimination for sex specific training;
(ii) objection to the sequencing of religious cases before the FET

(i) Government has protected employers operating sex specific training from charges of indirect religious discrimination - as requested by both EOC and the Opposition - because indirect religious

discrimination is both new and complex. It has not given protection against charges of direct religious discrimination because that form of discrimination is neither new nor complex; and employers operate sex specific training at present without such protection - so there does not appear to be any need for it. (ii) Section 6 provides that where an unfair dismissal issue, or a sex discrimination issue, arise in the course of a religious case the FET President can direct that the FET (and not the Industrial Tribunal) should hear those issues. The corollary is that where a religious issue arises in the course of an unfair dismissal or sex discrimination case the President should have power to ensure that the religious issue is disposed of first. The EOC allege that this is inconsistent with EC Equal Treatment Directive 26/207/EEC and have threatened to seek the advice of the EC on this. Government's Legal Advisers have maintained that there is no contravention of the EC Directive.

3. ... protection ...
... religious ...
... specific training ...
... before the FET

6. Amendments weakening the Bill, particularly in the area of contract compliance

Government amendments in the Lords actually extended the powers of the FEC to require the disclosure of information. Previously that power operated only when the employer had submitted a monitoring return and related only to information contained in the return. Government released the FEC from both these constraints; but, in the interests of fairness and reasonableness and in keeping with rights of enquiry already in the Bill, it limited the FEC's extended powers of enquiry to six monthly intervals. The Government also provided a defence, in relation to the supply of information for an employer whose personnel records were destroyed by circumstances outside his control (eg) fire or bomb damage. Again this amendment was in the interests of balance and fairness and does not "weaken" the Bill in the area of contract compliance.

7. The redundancy amendment restricts the extent to which discriminatory practices will be removed; places employers and trade unions in an "anomalous" position; has not been discussed with the trade union movement.

On the contrary the Section responds precisely to what Mr McNamara asked for three times on 2 March Hansard Col 295-7

- (i) "redundancy must also be considered when an employer adopts an affirmative action programme ..."
- (ii) "redundancy is another factor that should be taken into account in affirmative action"
- (iii) "redundancy is a matter that should be considered in affirmative action programmes. The trade union movement wants affirmative action programmes. That is all I am saying in that context".

The section gives employers the flexibility to negotiate an agreed redundancy scheme with their trade unions to protect affirmative action gains. It was not discussed specifically with

the trade union movement - but it responded to what Mr McNamara (an ATGWU sponsored MP) asked for in the movements name.

8. Monitoring powers of the FEC have been reduced

This cryptic comment is particularly difficult to understand especially since the Government specifically responded very positively to three major Opposition concerns on monitoring and introduced amendments (i) to overcome the problem of "collusion"; (ii) to ensure that applications were not restricted to advertised vacancies; and (iii) to place the DED under a duty to consult with the FEC in drawing up the monitoring regulations

9. Need for effective inter-departmental policy unit (non-legislative point)

Government committed to both continuous evaluation of the Act and to its review by the Central Community Relations Unit which reports directly to the Secretary of State.

10. Doubt about Government's political will to place fair employment at centre of policy formulation (non legislative point)

The highest indication of the central importance of the issue, and of Government's commitment, is given in the Prime Minister's personal endorsement of the "Guide"; her sponsorship of the Bill; and her endorsement of publicity material on both the Bill and the Act.

TOWARDS A UNITED IRELAND - LABOUR'S PLAN FOR PEACE

(C) Summary of main fair employment points in the Labour Party's Policy Statement 21 September 1988

| <u>Labour Party policy</u> | <u>Government's position</u> |
|---|--|
| (1) The Labour Party will accord highest priority to measures designed to provide for equality of opportunity in employment, to end discrimination and remedy under-representation. | - Government repeatedly committed to this. |
| (2) Effective equality of opportunity provisions should include: | |
| (i) a wide-ranging affirmative action programme | - in the Act |
| (ii) regular monitoring to measure progress | - in the Act |
| (iii) setting of goals and timetables | - in the Act |
| (iv) effective sanctions and remedies where discrimination demonstrated | - in the Act |
| (v) an adequately resourced and empowered enforcement agency | - both financial and staffing resources of FEC <u>double</u> those of the Agency; and its powers have been increased |

- (vi) use of economic power of the State, through grant and contract compliance. - in the Act
- (3) Will review effectiveness and operation of relevant legislation and institutions, and reform, strengthen and make more active use of these to further equality of opportunity. - Government commitment to both evaluate and review legislation
- (4) Will have a contract compliance strategy which requires the effective promotion of employment equality before contracts and grants are awarded. - Government policy is to impose economic sanctions after default by employer
- (5) Present Government's approach limited by absence of clear statement of target for rapid reduction of inequalities between Catholics and Protestants. Labour Government will aim for substantial reduction in differential rates of unemployment between Catholics and Protestants without increasing the already high unemployment rate generally. Labour will establish goals to be achieved in first five years of office. - Government has resisted this because the unemployment differential is influenced by many factors of which discrimination is only one. (But no actual or specific target is given in the Labour Party policy statement; no actual commitment to SACHR target; no actual commitment to adopt SACHR target when in Government).
- (6) No quota system envisaged, or replacement of one individual by another. - this accords with Government policy

- (7) Labour administration will introduce strong additional measures to end discrimination on grounds of religion, politics, sex, sexual orientation and disability. - no Government commitment to introduce additional measures on sex or disability.
- (8) Will retain FEA, EOC, SACHR and PCC, reformed and strengthened if necessary. - Government's policy retains the bodies listed
- (9) social and economic policies in NI to be better integrated and co-ordinated by a specific unit or similar agency in NIO, responsible to Secretary of State. - doubtful what this means. Since all Departments (whether NIO or NICS) operate under the direction and control of the Secretary of State. Impact of fair employment policies in other policy areas to be reviewed by the Central Community Relations Unit.
- (10) no quota system envisaged, of replacement of one individual by another.