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# Examining Equality: The Fair Employment Act (NI) 1989 and Its Review.

by

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## **Summary**

The Fair Employment (NI) Act 1989 is the UK's most extensive equality legislation and was introduced to combat religious and political discrimination in Northern Ireland. It is currently the subject of a government sponsored review, a review which is bound to focus on the many criticisms levelled at the Act in its five years of operation. This article examines the background to the legislation and the issues which relate to its operation.

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## **Contents**

[Introduction](#)

[Religious and Political Discrimination in Northern Ireland: The Context](#)

[The Fair Employment Act \(NI\) 1976](#)

[The Fair Employment Act \(NI\) 1989](#)

[The Review](#)

[Issues](#)

[Complaints](#)

[Affirmative Action](#)

[Policy Initiatives](#)

[Conclusion](#)

[Bibliography](#)

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## **Introduction**

The Fair Employment Act (NI) 1989 ("the 1989 Act") has been in operation in Northern Ireland for more than five years and is currently the subject of a government sponsored

review, aimed at evaluating the effectiveness of the legislation. Much criticism has been aimed at the 1989 Act and much controversy has focused on the impact of the legislation.

## Religious and Political Discrimination in Northern Ireland: The Context

Since partition in 1922 discrimination has been a controversial issue in Northern Ireland. In the minority nationalist community there was widespread belief in structural and endemic bias whether in the allocation of houses or the distribution of jobs. This was always denied by the leadership of the majority unionist community and was an issue largely ignored by the government in Westminster. Northern Ireland was from 1922 until January 1972 governed largely by a locally elected Parliament sitting in Stormont. Westminster reserved some matters to itself for legislation, but much power was transferred to the Stormont Parliament (Hadfield 1989). Several academic studies since the 1960s have lent support to the view that discrimination was practised against the Catholic minority community (Whyte 1983). The civil disturbances of 1968/9 led to a number of initiatives and the establishment of an enquiry into the reasons for the unrest. The report of this enquiry, known informally as the Cameron Commission, supported to an extent the nationalist view that discrimination was rife -

"we are satisfied that all these Unionist controlled councils have used and use their power to make appointments in a way which benefited Protestants". (para 138)

The government's response - for the next half dozen or so years - was to try to resolve the problem largely through a series of political initiatives, all of which foundered. Religious and political discrimination, having been the motivating force behind much of the unrest, was identified by nearly all sides as an urgent concern. In 1973 the report of the Ministry of Health and Social Services Working Party set up to investigate the issue was published (the Van Straubenzee Report). Out of its recommendations grew the Fair Employment (NI) Act 1976 ("the 1976 Act")

### The Fair Employment Act (NI) 1976

The Fair Employment (NI) Act 1976 set up the Fair Employment Agency (FEA), a forerunner of the Fair Employment Commission (FEC) which was established in 1989 and empowered it, inter alia, to carry out investigations of individual complaints of discrimination. The Act outlawed discrimination on the grounds of religious belief or political opinion, defining it in s 16(1) as:

"treating someone less favourably on the ground of his religious belief or political opinion than the person would treat someone else in the same circumstances."

This formulation is close to what has come to be known as "direct discrimination". The 1976 Act did not outlaw "indirect discrimination" - the imposition of a condition or

requirement which adversely impacts upon one group, and a concept which had successfully been imported into the sex discrimination legislation from the US. This sex discrimination is the Sex Discrimination Act 1975 (for Great Britain) and the Sex Discrimination (NI) Order 1976 (for Northern Ireland). It did however prohibit victimisation, defining it in s 16(2) as treating someone less favourably because s/he had made a complaint, given evidence in the hearing of a complaint etc. The procedure for taking a complaint of discrimination under the 1976 Act was similar in many respects to other complaints in connection with employment. Time limits were set for the lodgement of a complaint and the Act contained a list of occupations exempt from the legislation. However the method of adjudicating upon the complaint was quite different. Instead of, as in complaints of unfair dismissal and complaints of sex discrimination in employment, the complaint being heard by a tribunal it was heard by the FEA itself, which was also responsible for investigating the complaint. Despite the fact that two different sections of the FEA investigated and adjudicated complaints, respondents (and often complainants) quite understandably criticised the procedure.

The procedure and remedies available once a finding of discrimination had been made by the FEA were also different. The Agency was first to attempt a settlement, dependant upon the agreement of the respondent, then to make recommendations. If these negotiations failed the FEA had the power to take action in the county court to enforce the findings and seek damages up to the then county court maximum (the county court is a civil court where less serious and expensive civil disputes can be litigated; more costly matters are dealt with in the High Court). Injunctions could also be sought.

By the mid eighties it was clear that the regime was not working (O'Hara & McCormack 1990). Criticism focused upon the methods of investigation and adjudication, the absence of a legal prohibition upon indirect discrimination and the glaring statistic that Catholic males were still two and half times more likely to be unemployed than Protestant males. All of these issues and more were taken up by Irish-America, which had developed a highly effective Irish-American lobby in the US, placing the issue of religious discrimination on the agenda of most US politicians. Several state legislatures were persuaded to endorse the "MacBride Principles", named after one of the principal signatories, Sean MacBride, a Nobel Peace Laureate. These are a set of somewhat controversial regulations designed to address the issue of fair employment in Northern Ireland. They are designed to persuade American investors to invest only in Northern Irish companies which practice fair employment (Bertsch 1991).

All of this was added to by the development within the nationalist community in Northern Ireland of a number of very effective voices campaigning around justice and equality issues, voices which placed fair employment firmly at the heart of the agenda for change. In 1985 the UK and Irish governments signed the Anglo-Irish Agreement which set up an inter-governmental conference where many issues, including religious discrimination, could be raised. By the late eighties the momentum for new legislation was unstoppable and the Standing Advisory Commission on Human Rights' 1987 report on religious discrimination led in 1988 to the publication by the government of a paper looking at possible new strategies in the equality field generally (DED 1986). Hard on the

heels of this came the government's own White Paper on fair employment (DED 1987) which led in turn to the Fair Employment (NI) Act 1989.

## The Fair Employment Act (NI) 1989.

The 1989 Act established the Fair Employment Commission to carry out a number of tasks - eg receive monitoring returns, produce affirmative action programmes, assist with complaints. The Act introduced measures requiring employers to undertake a number of actions - registering with the FEC, monitoring the composition of their workforce (those in the public sector and those with 10 or more employees), monitoring applications for posts (those with 250 employees or more), conducting a review of recruitment, training and promotion practices at least once every three years, using the Code of Practice as a guide, carrying out limited affirmative action where "fair participation" does not exist, and considering setting goals and timetables.

There are disagreements about what is meant by affirmative action and it is around this issue that much of the debate around the review has centred. The legislation specifically exempts three examples of such action from allegations of discrimination. These are: encouraging applications from under represented groups; targeting training schemes at specific groups, so long as those groups were not identified specifically by religious belief; and negotiated redundancy schemes.

The FEC itself took one of these routes relatively recently when advertisements for staff were placed in local newspapers and applications were specifically invited from members of the Protestant community. Ironically it was much criticised for this and has lately been sued for discrimination by Catholics alleging that less qualified Protestants had been appointed in their stead (eg *Doyle v FEC*, *Belfast Telegraph*, 27 April 1995).

Crucially the 1989 Act outlawed, for the first time, indirect discrimination on the grounds of religious belief or political opinion (s 16(2)(b)) in similar terms to those in the sex discrimination legislation. The Act also altered the way in which individual complaints of discrimination in employment were decided. Specifically it set up the Fair Employment Tribunal to adjudicate such complaints. The remedies which may be awarded to a successful applicant are similar to those available to a successful sex discrimination litigant. The 1989 Act set a limit upon the amount of compensation which could be awarded - despite a number of suggestions that an unlimited amount should be available. The ceiling was placed at £30,000 - at the time three times the limit in sex discrimination cases. It was later raised to £35,000 (on 31 March 1994) and in the wake of the European Court of Justice ruling in *Marshall* (Case C-271/91, *Marshall v Southampton and South West Hampshire Area Health Authority (no 2)* [1993] IRLR 44) was lifted altogether (Fair Employment (Amendment) (NI) Order 1994).

Whilst the Act was proceeding through Parliament, as a Bill, it was much criticised and after a great deal of pressure the government announced that a "comprehensive review" would take place of the legislation after five years (McCrudden 1991). This review is currently underway.

## The Review.

At the time the review was announced the government made it clear that the responsibility for the review would be that of the Central Community Relations Unit (CCRU) a government department at Stormont. As the review period neared much criticism was levelled at this decision by a range of organisations including voluntary bodies, political parties and church groups. The criticism centred on the lack of independence of this mechanism. Critics argued that it was impossible for a truly independent review to take place which was conducted by a government body. This criticism was compounded by the fact that the initial thrust for much of the 1989 Act had come from the SACHR Report. However quite a number of the specific recommendations made by SACHR were not incorporated into the 1989 Act (see below, in relation to affirmative action) and, although parts of the essential analysis of the report were accepted, the Act remained the object of a great deal of disquiet (McCrudden 1991).

Eventually, and in the face of this criticism, the government relented, in late 1994, announcing that the review would in fact be conducted by SACHR. Initial progress had been made by CCRU, with some research completed (McCormack & McCormack 1994). SACHR are currently in the process of deciding upon their own research agenda for the review and indications are that the review will be completed sometime in 1996.

The initial battle over independence having been won, a number of concerns still remain, principally that whatever conclusions SACHR come to about the effectiveness of the 1989 Act and whatever proposals it makes for change, these might yet be partially ignored by government. A key consideration for those campaigning for change in the legislation is that SACHR's report be as robust as possible, but that it also be taken up by government, in contrast to the fate of much of the 1987 report. Furthermore it is vital that the review process itself be open and transparent. One concern of those critical of the decision to locate the review in CCRU was the danger that the process itself might not be as democratic as it might be. The signs are that SACHR is certainly prepared to open the process up and out, but there is no doubt that a review which is anything other than accessible will lack some credibility.

## Issues.

There are many matters with which any review of the 1989 Act ought to be concerned - such as precisely what justification remains for the national security exemptions in the Act (ss 42, 52 and 57). Similar provisions exist in the Sex Discrimination (NI) Order, but the European Court of Justice took the view in *Johnston v Chief Constable of the RUC* (Case 224/84, [1986] ECR 1651), that the unavailability of judicial review to challenge such exemptions was a breach of European law and the law was amended accordingly (see Sex Discrimination (Amendment) (NI) Order 1988).

A larger question must also be why the government has committed itself to a review of the Fair Employment legislation but not the sex discrimination and equal pay laws and why it has taken quite so long to announce proposals for anti-racist legislation (which it did only on 26 April 1995).

However, the most pressing issues with which the Review may well be concerned are essentially three: complaints and the work of the Tribunal; affirmative action; and the impact of government initiatives like PAFT (Policy Appraisal and Fair Treatment) and TSN (Targeting Social Need).

## Complaints.

The review will need to take a long hard look at how effectively the legislation is working in relation to individual complaints. Given the shortcomings of the 1989 Act on affirmative action (see below) it is complaints which have been the cutting edge of the legislation. The decision to set up the Fair Employment Tribunal was welcomed, but it has been cautious in carving out a jurisprudential niche for itself. The high ceiling on awards was certainly an advance on the original proposed by the Bill - £8,500 (McCrudden 1991) but no ceiling at all might have better served the needs of individual cases and the disparity between fair employment and sex discrimination cases was invidious. Despite high profile cases like *Duffy v EHSSB* [1992] IRLR 251 - in which the highest ever award of damages in a UK discrimination case was made - the Tribunal did not award, on average, especially large amounts (Hegarty & Keown 1994). The Tribunal has, however, tried to develop a bolder line on damages (for example in *McQuoid v North Down Borough Council*, Case no 61/90 FET, where it awarded exemplary damages). Alas, this attempt was curtailed by the NI Court of Appeal, applying the English dicta in *Deane v London Borough of Ealing* [1993] IRLR 209 that exemplary damages are not available in discrimination cases. Much of the Tribunals' first year of work was disrupted by the debacle over s 30 of the Act and the resultant amendment. This involved a dispute over the confidentiality of monitoring returns and whether or not such material was disclosable in legal suits. The issue was finally resolved by the Fair Employment (Amendment) (NI) Order 1991 which established that the material was available in legal proceedings. The increasing tendency to large out-of-court settlements, although welcome from the point of view of the complainants, did little to help the Tribunal establish a firm jurisprudential line.

The implication of the UK's international legal commitments and the relevance of international human rights law are also important, although not generally understood in the domestic equality field. The impact of the UK's membership of the EU has of course been instrumental in changes in sex discrimination and equal pay legislation but there is no prohibition on discrimination on the grounds of religious belief or political opinion in the Treaty of Rome. The possibility of the application of the non-discrimination provision in relation to nationality may, however, be worth exploring. There is some protection in the European Convention against discrimination, but it is quite limited and parasitic upon the other rights contained in the Convention. Very little attention has been given to the UN Treaties and in particular to the UN Covenant on Civil and Political Rights which

contains an extensive article on non discrimination, including religious belief. Whilst the UK has not ratified the Optional Protocol to the Covenant which would permit individual petition, many other countries have and there is consequently considerable jurisprudence on the matter.

All of these will be matters for debate during the review process.

## Affirmative Action.

The issue of affirmative action has long been a thorny one and the 1989 Act attracted a great deal of censure (McCormack & O'Hara 1990; McCrudden 1991; Burke 1994). The central criticism is that the Act differs and is inferior to both the White Paper and the SACHR Report in its definition of "affirmative action":

"The problem arose from the Bill's definition of affirmative action as 'the adoption of practices designed to secure fair participation by members of the Protestant, or members of the Roman Catholic, community in Northern Ireland'.... This differed from the definition of affirmative action given in the White Paper as 'special measures to promote a more representative distribution of employment in the workforce'." (McCormack & O'Hara 1990, p 66)

"Important flaws, which go to its very heart, remain in the structure of the legislation, in particular concerning the definition and scope of affirmative action...." (McCrudden 1991, p 263)

McCrudden identifies the crucial difference between the approach of the White Paper and the SACHR Report and that of the Act as the difference between result equality and formal equality. "Formal equality" requires that everyone is treated alike. The "result equality" approach is perhaps best explained by the Canadian Supreme Court in *Andrews v Law Society of British Columbia* [1989] 56 DLR (4th) 1:

"It must be recognised...that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well as that identical treatment may frequently produce serious inequality." (per McIntyre J, at p 164)

It is clear that it has been the "formal equality" which has prevailed in Northern Ireland in the past and it is equally clear that formal equality has largely failed to redress the imbalance in employment between Protestants and Catholics, despite the narrowing of the male employment gap in the past five years (Cormack, Gallagher and Osborne 1991). The review will need to devote some time and energy to considering the trenchant criticism of the affirmative action measures contained in the 1989 Act and in particular to clarifying that definition and specifically exempting such action from discrimination claims.

## Policy Initiatives.

Finally the review will be bound to examine the ambit and impact of government policy initiatives such as Targeting Social Need (TSN) and Policy Appraisal for Fair Treatment (PAFT). TSN was introduced in 1990 and finds its expression in programmes such as "Making Belfast Work". It is intended to target resources and funds on those areas of greatest social deprivation - which clearly ought to translate in Northern Ireland as those areas with the highest unemployment. These areas are largely (although not exclusively) Catholic (Smith & Chambers 1991; Cormack & Osborne 1991). The programme is particularly relevant given the increased international contributions in the wake of the cease-fires. Unfortunately it is somewhat unclear just how the monies from Europe and the US will be spent. The EU set up a committee to consider applications and the European Parliament commissioned a report from John Hume MEP, which it unanimously endorsed, but despite these measures uncertainty about the allocation of funds still reigns. How the mooted influx of funds - both public and private - from the US will be spent is even less clear. The agenda for the US Government conference in Washington, to be held in late May 1995, barely touches on the issue of fair employment, something which is hardly credible given the focus in the US on equality in Northern Ireland. Given recent figures on unemployment trends (Rowthorn 1995) it is clear that thousands of new jobs will need to be created in order to begin to redress the economic disadvantage which persists in Northern Ireland. A key method of ensuring that these new jobs are created in areas of greatest need is to effectively target inward investment in areas where the economic imbalance is strongest.

PAFT was introduced by the Government with the aim of "equality-proofing" all its policies to ensure that such policies assisted and did not at the very least conflict with equality legislation. There are concerns about how well this equality proofing is working in practice, not least in relation to how it is resourced and monitored (McCormack & McCormack 1994).

## Conclusion.

Employment discrimination has been a running sore in Northern Ireland since the foundation of the state. The imbalance between the two major communities remains a source of domestic and international dissatisfaction, which the enactment of the 1989 legislation failed to stem. The UK government's attitude to the implementation of truly effective equality laws and practice can most kindly be described as ambivalent. Throughout the evolution of equality policy improvements have only been wrung from the government after much effort from activists and campaigners. The government seems reluctant, at best, to match its words about the absolute necessity for true equality of opportunity with action which guarantees those policies in practice. Persuading the government to shift responsibility for the review from CCRU to SACHR was in itself a major battle, but perhaps only the first of many to come. It is unfortunate that the government seems to regard change as a concession to be made only after much lobbying and international pressure. As an attitude it hardly helps promote equality and as a practice it does not bode well for the implementation of the recommendations of the review - whatever they may be. Sanguine observers of the scene have not forgotten that much of the 1987 SACHR report remains unimplemented. The UK government cannot



continue to beg the question of its commitment to equality of opportunity in Northern Ireland. If it fails to act promptly and fully on the review that question will only persist.

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