Fair Employment For All

A Submission by the
Committee on the Administration of Justice

to the
Standing Advisory Commission on Human Rights
Employment Equality Review

CAJ

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Committee on the Administration of Justice

The Committee on the Administration of Justice (CAJ) is an independent civil liberties organisation formed in 1981 to work for the highest standards in the administration of justice in Northern Ireland.

CAJ's membership is drawn from both sections of the community and includes lawyers, students, community workers, trade unionists, unemployed people and academics. The Committee takes no position on the constitutional status of Northern Ireland and is opposed to the use of violence for political ends.

By carrying out research, holding conferences, lobbying politicians, issuing press statements, publishing pamphlets, circulating a monthly bulletin and alerting the international human rights community, the CAJ hopes to stimulate awareness and concern about justice issues in Northern Ireland and encourage the adoption of urgently-needed safeguards.

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Table of Contents

Preface		1
Chapter One	**The Fair Employment Review**	2
1	Human rights and the fair employment review	2
1.2	The review process	3
1.3	Government responses	4
Chapter Two	**Assessing the impact of fair employment policies**	5
1	Unemployment	6
2	Economic activity and inactivity	8
3	Employment	9
4	Gender and Community differentials	9
5	General remarks	10
Chapter Three	**Assessment of anti-discrimination legislation**	12
	Introduction - Concepts of equality	12
	Assessment of the fair employment legislation	14
1	Affirmative Action	14
1.1	Definition and Scope of Affirmation Action	14
1.2	Affirmative Action and the Code of Practice	17
1.3	Specific affirmative action measures targeted at the long-term unemployed	17
1.4	Affirmative Action and the 1987 SACHR report	18
2	Contract Compliance	19
3	Exceptions	23
3.1	Section 42: the legislative context	23
3.2	The factual situation	24
3.3	The case for repeal	25
4	Goods and services	26

Chapter Four	**Assessment of the fair employment institutions**	**29**
	Introduction: A holistic view of the implementation of the Fair Employment Act	**29**
	The impact of human resource management	**30**
1	**The Fair Employment Commission (FEC)**	**31**
1.1	**Fair Employment Commission - monitoring**	**31**
1.2	**Self-review by employers (section 31 of the Act)**	**33**
1.3	**Investigatory Authority (section 11 of the Act)**	**35**
1.4	**Periodic review**	**36**
2	**The Fair Employment Tribunal (FET)**	**36**
Chapter Five	**Beyond the legislation - government programmes to combat discrimination**	**39**
	Introduction	**39**
1	**Policy Appraisal and Fair Treatment guidelines (PAFT)**	**39**
1.1	**The circulation of PAFT guidelines**	**41**
1.2	**Implementation of PAFT**	**41**
	• **by government departments**	**41**
	• **by Non-Department Public Bodies (NDPBs)**	**43**
	• **by contracted-out services**	**43**
1.3	**Resources & PAFT**	**44**
1.4	**Legal status of PAFT**	**45**
1.5	**Recommendations regarding PAFT**	**45**
2	**Targeting Social Need (TSN)**	**46**
2.1	**Agreed indicators**	**47**
2.2	**Monitoring of TSN**	**47**
2.3	**Targeting of Programmes and Resources**	**48**
2.4	**Taking of remedial actions**	**49**
2.5	**General commentary**	**50**
2.6	**Recommendations regarding TSN**	**51**
Chapter Six	**Summary of recommendations**	**53**
Selected Bibliography		**59**
List of acronyms frequently used in the text		**61**

Preface

This submission to the Standing Advisory Commission on Human Rights has been produced by the Committee on the Administration of Justice (CAJ) in response to the current review of the fair employment legislation. The review was first announced at the time of the passage of the Fair Employment (Northern Ireland) Act 1989 and is being co-ordinated by the Standing Advisory Commission for Human Rights (SACHR), the body with statutory responsibility in this area. We hope that this study, which draws on CAJ's extensive experience in the realm of anti-discrimination work, as well as interviews, seminars, and information exchanges with government departments, community groups, and legal experts, will contribute to a strengthening of the government's policies and practices to secure equality of opportunity.

The executive committee of CAJ wishes to thank the "Fair Employment and Economic Justice" sub group of the organisation for producing this publication. In particular, it would like to express its appreciation to the following who worked directly and indirectly in the sub-group's deliberations: Maggie Beirne, Christine Bell, Kevin Burke, Rose Connolly, Tim Cunningham, John Driscoll, Barry Fitzpatrick, Angela Hegarty, Shane Hughes, Rachel Hutton, Stephen Livingstone, Liz Martin, Vinnie McCormack, Ciara McIlhone, Martin O'Brien, Eileen Regan, and Claire Tunney.

The executive would also like to thank the speakers who contributed to a series of seminars organised by the Committee on the Administration of Justice - that is, Professor Celia Davies, Norma Heaton, Dr. Chris McCrudden, and Professor Bob Rowthorn. We draw extensively on these presentations at different points throughout this document.

February 1996

Chapter One

The Fair Employment Review

1 Human Rights and the Fair Employment Review

The Committee on the Administration of Justice (CAJ) was founded in 1981 and is an independent cross community group concerned to ensure the highest standards in the administration of justice in Northern Ireland.

As a civil liberties group with a broad remit, we operate within the framework of international human rights law which requires respect for the "inherent dignity and the equal and inalienable rights of all members of the human family" (Universal Declaration of Human Rights, preamble). The rights outlined in international human rights law are to be enjoyed "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Accordingly, CAJ has worked actively over the years to ensure that the government introduces, and then monitors closely, effective legislative and other measures aimed at tackling discrimination.

In the course of the last few years, we have developed a detailed proposal for a Bill of Rights, which is in our opinion a necessary framework for any society seeking to develop a more explicit culture of rights. Such a Bill of Rights would specifically prohibit all forms of discrimination. Awaiting such an all-encompassing structure for the protection of rights, and indeed in addition to it, CAJ has urged that measures to counter specific forms of discrimination be introduced or, where they exist, strengthened. We have campaigned actively for the introduction of anti-racism legislation in Northern Ireland, worked on the issue of women's rights, challenged discriminatory provisions relating to sexual orientation, and sought to have the rights of people with disabilities fully respected.

It is against this broad framework of our concern to protect and promote human rights, and to oppose all forms of discrimination, that our particular efforts in the area of religious and political discrimination should be seen. Since our establishment in 1981 we have sought to promote programmes to counter religious and political discrimination: in particular we made submissions to the Standing Advisory Commission on Human Rights' (SACHR) last major review of the fair employment legislation, and in relation to the government's proposals which were to lead eventually to the passage of the Fair Employment (NI) Act 1989. Many of the remarks made subsequently in this submission will reiterate concerns raised frequently in the past in our exchanges with government officials and others. We are, however, grateful to have the opportunity of a major review undertaken by SACHR in order to raise these issues more formally. We sincerely hope that this process will contribute to a re-thinking of several aspects of current government policy and practice.

2 The Review Process

Prior to commenting in detail on different aspects of the legislation and the government programmes to counter religious and political discrimination, we would like to comment on the review process itself.

CAJ to date has found the review process very useful in enabling us to work in a concentrated way on the kinds of legislation and government programmes necessary to establish a greater culture of equality in Northern Ireland. The existence of the review led us to:

- organise a series of meetings with government departments;
- undertake a survey of the literature;
- initiate specific research projects;
- host a series of seminars;
- participate in the specialist seminars organised by SACHR and others.

All of these measures allowed us to deepen our understanding of the complex issues involved. Even more importantly, they allowed us, if only to a limited degree, to extend public debate around questions of religious and political discrimination. **That public debate has not, in our opinion, gone far enough and we recommend that SACHR when issuing its report will give some thought as to how a broader public debate around issues of discrimination can be facilitated.** Public education and information is central to ending discriminatory behaviour and attitudes; insufficient efforts have so far gone into creating a culture of fairness and rights which would greatly assist in making discrimination a thing of the past.

It is also worth noting that the necessity of a review of the fair employment legislation was not initially self-evident to the government: it is our understanding that the review was conceded by government in return for securing passage of the highly-criticised 1989 legislation. Furthermore, the review was initially to be carried out by an internal government department. Our own findings, which we comment in detail on below, are that much remains to be done; that the government has not acknowledged the enormity of the problem facing it; and that legislation must be complemented by other measures if we are to remedy past ills, and provide a future of equality for everyone. While welcoming the fact that the past five years of legislative activity has increased public consciousness of equality issues, we would like to see the review turn this consciousness into a practical reality. **We appreciate the opportunity of the review to allow such conclusions to be drawn, and we urge that this undertaking not be seen as a one-off event, nor as a purely mechanistic procedure.** If government is to take seriously its responsibility to secure equality of opportunity for all, then it should regularly review whether its objectives in this realm are being met and, if not, what additional or alternative strategies are required.

3 Government Responses

This submission will deal in detail with assessing government legislation and programmes intended to address discrimination in the workforce. It will also urge a series of measures which need to be undertaken if we are to tackle the problem of fair employment more effectively in future. It seems appropriate, however, even at this early stage to say that we are drawn to the conclusion that there is insufficient government commitment to the eradication of religious and political discrimination in Northern Ireland.

The initial announcement of the review by the Secretary of State, Sir Patrick Mayhew, in the press in July 1994 (see **Irish News** and **The Newsletter** dated 21 July 1994) exemplifies our reservations. Our submission will show in due course that legislation and government programmes have not secured the fair participation and equality of opportunity one might have hoped for. The community differentials remain, according to the government itself, extremely large and are not easily amenable to change. One might have hoped, therefore, that the announcement of the review would be presented by the Secretary of State as an important and necessary opportunity to assess the shortcomings of government policies to date, to elicit a public and open debate on the need for yet stronger anti-discrimination measures, and to harness the energies of civil society in general and the churches, unions, and business in particular, with a view to more effectively tackling discrimination. Instead the review was presented in mechanistic terms. It seemed to be motivated solely by the government's commitment undertaken five years previously, not by any conscious recognition that it is vitally necessary to assess the reasons for the lack of progress in tackling discrimination.

Similarly, CAJ has looked in vain for regular and public commitments by government representatives to the goal of ending inequalities. In the run-up to the Washington investment conference in 1995 for example, CAJ urged Sir Patrick Mayhew and Baroness Denton (Minister with responsibility for economic development and fair employment issues) to devote significant and explicit attention to the issue of inequalities in their speeches; they did not. Surely it is only in recognising how serious the problem is, in committing all our energies to a common programme to rectify these inequalities, and in encouraging others to join in the monumental task, that we can hope to be successful?

No-one at the time of the passage of the 1989 legislation, and the decision at that time to undertake a review, could have imagined how serious the problems would still be five years later. We earnestly hope that this review by SACHR will both oblige government to bring its political will more actively to bear on the complex problems of discrimination, and will provide it with an extensive programme of concrete measures against which that political will and concrete progress can be measured in the years to come.

Chapter Two

Assessing the impact of fair employment policies - measuring change

While we must bear in mind that we have had some twenty years of legislation outlawing religious and political discrimination in Northern Ireland, an essential purpose of this current review must be to measure what change, if any, has occurred in the more than five years since the passage of the 1989 Fair Employment Act. Unfortunately even a cursory examination of the case-law coming before the Fair Employment Tribunal shows that sectarianism in the workplace is still a serious problem. This chapter will not, however, examine the instances of workplace sectarianism that regularly come before the Fair Employment Tribunal because, although such examples provide an important insight into the continuing experience of direct and indirect discrimination, the problems are not confined to such individual instances of unequal treatment or injustice but range much more widely.

In absolute terms, Northern Ireland suffers from very serious levels of deprivation: the region has consistently suffered from higher levels of unemployment and greater economic deprivation than the UK generally. Moreover there remains clear evidence that, across a range of different criteria, this deprivation is experienced unequally by the two main religious communities. Apart from the clear differentials in unemployment figures which are addressed below, recently published statistics show, for example, that a far greater number of Catholic children are living in poverty than Protestant children. Taking entitlement to free school meals as the criterion, some 87,000 schoolchildren in Northern Ireland are living below the poverty level, of whom 58,000 (nearly two thirds) are Catholic (**Irish Times,** December 28, 1995).

Indeed in a leaked government memo three years into the legislation (1992) it was noted that: "On all the major social and economic indicators, Catholics are worse off than Protestants. Catholics are more likely to experience long term unemployment. Catholics are significantly less likely than Protestants to hold professional, managerial or other non-manual positions. More Catholics than Protestants leave school lacking any formal educational qualifications. Significantly fewer Catholic pupils follow science subjects to 'A' level. There is greater provision of grammar school places for Protestant than Catholic children. Significantly more Catholics than Protestants live in public sector housing and experience overcrowding. Catholic households have a lower gross household income than Protestant households. Almost double the proportion of Catholic households are dependent on social security than are Protestant households. Catholics suffer from higher levels of disability and ill-health". The memo concludes that: "an analysis of the key area of employment suggests that the unemployment differential is unlikely to alter significantly over the next decade in spite of strengthened fair employment legislation" (Confidential memo from the Department of Economic Development - DED - dated 3 September 1992).

While it is difficult to get detailed statistics in all of these areas to facilitate a direct comparison between the situation in 1992 and in 1996, we have no reason to believe that the situation described in this leaked memo has changed to any great extent. The one specific statistic that is given - i.e. that in 1992 there were "almost twice as many" Catholic households on social security, had apparently deteriorated by 1994, when the figure according to the Irish Times article cited above was 2.2:1.

Indeed, subsequent detailed analysis of these measures of the differential between the two communities has often served to highlight the multi-layered nature of deprivation. For example, in a fascinating survey by Shuttleworth (**An Analysis of Community Differences in the Pilot NI Secondary Education Leavers' Survey**), he shows that the issue of school leavers' qualifications cannot be disassociated from questions of socio-economic class and of educational standards. Thus, if one controls for class, and the type of school attended (i.e. grammar versus comprehensive), the important denominational differences between school leavers noted in the DED memo disappear: middle class Catholics attending grammar schools show no discernible difference from their Protestant counterparts in either the level or the nature of their qualifications. The fact therefore that there continue to be important differences in the level and type of qualifications achieved by Catholic and Protestant school leavers (which clearly in turn will have an important impact on their future employability) appears due to the disproportionate representation of Catholic schoolchildren in lower socio-economic groups and attending non-grammar schools.

As noted earlier, employment and unemployment statistics cannot be usefully isolated from other measures of deprivation, in human terms at least. Nevertheless, the main purpose of the fair employment legislation is to address the issues surrounding community differentials in the labour force and, accordingly, it is worth looking more closely at those areas to see how important indicators in these realms have remained largely unchanged in spite of the 1989 Act.

1. Unemployment

The unemployment differential - that is, the ratio of Catholic:Protestant unemployment - has the advantage of being a simple measure and has therefore been taken as one of a number of measures of Catholic disadvantage in the job market. It is obviously of great concern that despite more than five years of implementing the 1989 legislation (and twenty years of anti-discrimination legislation overall), Catholics remain twice as likely to be unemployed as Protestants, and twice as many Catholics as Protestants are unemployed for more than four years.

The figures overleaf look at the trends in this area during the period of the fair employment legislation. We had hoped in this submission to provide statistics relating to all five years of the operation of the legislation. However, no published material appears to be yet available for 1994 or 1995; this clearly seriously restricts our ability to comment definitively on the impact of the legislation.

Unemployment Ratio, Catholic-Protestant, 1990-1993 (Labour Force Survey)

Group	1990	1991	1992	1993
Male	2:1 (20:10%)	2.6:1 (23:9%)	2.4:1 (24:10%)	2.2:1 (23:11%)
Female	1.3:1 (9:7%)	1.8:1 (11.6%)	1.4:1 (10:7%)	1.6:1 (11:7%)
All	**1.6:1 (16:9%)**	**2.3:1 (18:8%)**	**2:1 (18:9%)**	**2:1 (18:9%)**

It should be noted that the government has made frequent changes to the statistical base on which unemployment is measured. No-one to our knowledge has examined if these changes have had any differential impact on the two communities, thereby distorting possible comparisons over time. In the absence of such a detailed study, however, we can only conclude that the legislation has brought about little improvement in the direction of greater equality in relation to the unemployment ratio. What must be a particular cause for concern in relation to the review is the repeated prediction that, under present policies, the figures are unlikely to change significantly. The consistency of the differential over time requires that the recommendations emerging from the review focus particularly on the unemployment differential and how it can be changed. It is especially important, given the fact that unemployment figures are dropping and that employment is increasing, to attack the differential. As long ago as 1988, Rowthorn and Wayne (**Northern Ireland: The Political Economy of Conflict**) noted that Catholics had borne the brunt of the soaring unemployment of the early eighties. It would be unfortunate, to say the least, if the gap did not narrow significantly when employment opportunities are improving.

The "ratio" as a valid indicator of lack of equality of opportunity has evoked some controversy. However, it is still being used by the Labour Force Survey (LFS) which refers to it as the unemployment differential. There is of course much academic disagreement as to the extent to which this differential can be blamed on direct discriminatory practices. It has for example been argued that the differential is due largely to factors such as educational level, birth rate, migration, location and so on, rather than discrimination per se. The in-depth study by Smith and Chambers (1991), however challenged this assertion. They developed a logistic regression model which accounted for religious denomination, socio-economic group, number of children per household, age, travel-to-work area, and professional or academic qualifications and concluded that

> *"the model shows that there is a strong relationship between religion and the chance of being unemployed, after taking account of the other five factors. The relationship is statistically significant at a very high level of confidence... it must be concluded that Protestant and Catholic men have substantially unequal opportunities for employment in Northern Ireland".*

SACHR in its 1990 report added further factors to those examined by Smith and Chambers (such as the chill factor and employment within the security services) and decided that:

> *"although there were difficulties in measuring the contribution of religion to the unemployment differential, the evidence showed that other factors left a large part of the differential unexplained ... (and) that a person's religion was an important determinant of his chance of being unemployed".*

Moreover, CAJ does not consider helpful the debate which rages around the proportion of disadvantage that is to be blamed directly on discrimination and that which is due to other factors. Deprivation is complex and multi-layered. It has proved impossible to date to disaggregate the effects of current or past discriminatory behaviour from apparently "independent" factors such as educational attainment, birth rates, migration, location etc. and there is clearly a deep inter-action involved. One of these factors - namely birth rates - was examined in a paper given at a CAJ seminar by Professor Rowthorn where he suggested that differential birth rates between the two communities have been given insufficient attention in explaining the unemployment ratio. In isolating any one factor, however, one risks overlooking the multi-faceted nature of the problem. Indeed Professor Rowthorn's work illustrates all too dramatically the scale of the problem to be tackled.

In our opinion, the figures speak for themselves: the unemployment differential is large, it is essentially unchanging despite the existence of what the government has frequently described as the "toughest anti-discrimination legislation in Western Europe", and this is a totally unacceptable state of affairs.

2. Economic activity and inactivity

The Labour Force Survey (LFS) notes that the prevalence of employment within a community depends upon both the unemployment rate and the rate of economic activity within the community. The figures for 1993 show that 74% of Protestant males were economically active, while only sixty-one percent of Catholic males were economically active. Particularly in relation to this indicator it is not valid to compare experience across genders. However, the figures for women are: Catholics - 44%; Protestants - 55%. Thus for both men and women, Catholics are significantly less likely to be economically active.

It is worth noting that in the period 1971-1991 Catholic participation in the economy declined by 1% per annum on the average. Over the same period Protestant participation declined by a somewhat greater margin, namely 1.105% per annum. Thus Protestants have been "withdrawing" from the economy at a somewhat greater rate, but Catholics, both male and female, are still much more likely to be economically inactive, and therefore not to appear in the unemployment statistics.

It is clear from the study of the 1991 census by Cormack, Gallagher and Osborne (1993) that a major reason for this is that larger numbers of Catholics, in absolute terms, are in higher education. Noting that Catholics now form a majority in this position they say that "this has clear implications for the target figure for fair participation by Catholics in those sectors of employment requiring high educational qualifications". Of course, no such target figure has been given, and we address this issue elsewhere in this paper.

They also note that there has been a large decrease in women categorised as "looking after the home", but that this decrease has been particularly marked among Protestants. They comment: "this is in accord with previous evidence that more Protestant than Catholic women work" (i.e. in paid occupations outside the home). This, of course, begs the question "why?".

3. Employment

It is evident from the statistics kept by the Fair Employment Commission that a number of important improvements have taken place in recent years in the statistics relating to employment. In its sixth annual report, the FEC notes that whilst the Roman Catholic share of the economically active population, that is those available for work, is 40% and their actual position in the monitored workforce is only 37.3%, this denotes a significant improvement over recent years. Thus in 1990 the figures showed that 65.1% of the monitored workforce was Protestant, and 34.9% Catholic; by 1994, the same comparison shows 62.7% Protestant and 37.3% Roman Catholic, i.e. an increase in the Roman Catholic proportion of 2.4 percentage points. The FEC goes on to note that : "Overall the Roman Catholic proportion in every occupational group between 1990 and 1994 has increased, with the largest increase being in managerial and professional occupations". It adds further: "...about half the under-representation of Roman Catholics in employment and more than half the under-representation in the two top SOCs (Standard Occupational Categories) has been eliminated in the four years of monitoring". On the other hand, the FEC notes that "the probable growth in the Roman Catholic share of the population during these four years means that the picture is not quite as encouraging as this would suggest".

4. Gender and community differentials

It is noted earlier that comparisons across gender in the statistics relating to employment and unemployment are sometimes misleading. Unemployment statistics based on the claimant count will seriously underestimate the numbers of women looking for work, since many will choose not to register as unemployed when they are not eligible for benefit and many women hesitate to apply the term unemployed to themselves, even though they are looking for work and would be interested in a suitable job if one became available. Regarding the monitoring of women who are in employment, there are serious problems both due to the fact that the Standard Occupational Categories do not reflect the diversity of women's work, and that labour studies concentrate on male rather than female working

patterns. This makes it fairly commonplace in labour studies to have women's work presented as an appendix to male patterns, and to be seen as "exceptional" or as not being "normal". Given that women now constitute almost half of the workforce in Northern Ireland (46.7%), and two thirds of women of working age are now economically active, it is vital that labour force studies reflect the diversity of female and male working patterns.

An interesting report by the Equal Opportunities Commission 1995 (**A Matter of Small Importance?**) which sought to compare the situation of Catholic and Protestant women in the workplace found that many of the comparisons were difficult to carry out, since the monitoring systems established by the fair employment legislation were - possibly quite unconsciously - geared to the situation of men in the workforce. Thus, part-time workers are not included in the Fair Employment Commission's monitoring systems, and women are disproportionately represented among the part-time labour force. Moreover, monitoring does not take place for firms with ten or fewer employees; again, women are disproportionately represented in such enterprises. The legislation specifically excludes teachers - a profession in which women are particularly numerous. Elsewhere in this submission reference is made to the need to look at the multi-layered nature of deprivation and discrimination. The overlap between gender and community differentials is a case in point. In the albeit limited study the Equal Opportunities Commission (EOC) carried out, they discovered that:

- Catholic women are consistently more likely to be unemployed than Protestant women, regardless of age, marital status, residence, age and number of dependent children;

- For those living outside Belfast, 44% of Catholic women are in employment, compared to 59% of Protestant women;

- More Protestant women work in clerical jobs, whereas more Catholic women are in personal service jobs; clerical work provides significant full and part-time work whereas personal service work is often part-time;

- There were more Catholic than Protestant women in the lowest earning bands for both full-time and part-time work; there were also more Catholic women in the higher income bands.

The EOC report illustrated that the agenda for understanding women's employment is longer and more complex than for men. Avoiding such issues only serves to perpetuate a disservice to the need to tackle discrimination whether it be on the grounds of gender, political, or religious discrimination, or - as may well be the case - a combination of these factors.

5. General remarks

A number of significant improvements have been recorded in the employment situation and are commented on above. At the same time, however, the most

recent FEC report notes that "while 40% of the economically active are Roman Catholic, over 50% of the male unemployed are Roman Catholic and almost 65% of the long term unemployed are Roman Catholic". Taken together with the picture of continuing community differentials in areas other than employment, one can only conclude that government legislation, policies and programmes have failed to have sufficient impact on the most economically deprived sections of our society. Clearly unless resources are more appropriately targeted, the community differentials will not change in the near future and indeed, the government itself has acknowledged that, without radical measures, and in spite of its fair employment legislation, these differentials are difficult to alter.

In order to ensure such change, therefore, the review has to concern itself with what is necessary both in terms of legislation and policy; and with overall targets and timetables to produce such change. CAJ has argued that the review should not be a mechanical exercise, but should attempt to identify those factors which contribute to the continuing existence of these inequalities and strategies to eliminate them. We would point out that the situation described above occurs in spite of very high levels of government subsidy. While strong fair employment legislation is clearly one element in tackling these structural inequalities, it is clearly not proving to be enough. Government policies such as Policy Appraisal and Fair Treatment (PAFT) guidelines and Targeting Social Need (TSN) and their full implementation must be a vital complement to the legislation (see Chapter Five).

Above all, what is required is that equality is placed at the heart of decision making. Discrimination and exclusion from equal participation in economic life have played an important part in maintaining the conflict in Northern Ireland and it is therefore both essential and urgent that a culture of equality is increasingly fostered by and reflected in government action. Such a culture of equality is best signalled by establishing specific equality goals to change the situation on the ground, and the introduction of appropriate measures and funding to ensure that these goals can be met within a clearly defined time scale.

Chapter Three

Assessment of anti-discrimination legislation

Introduction: Concepts of equality

Any study of the legislation governing fair employment encourages comparisons with legislation dealing with other forms of discrimination in society. However, one is quickly drawn to the conclusion that there is no uniformity of approach, still less conceptualisation, across the gamut of anti-discrimination measures. In part, the dilemma lies in the fact that the aim of all such legislation is to create some form of equality, but the very concept of equality is a contentious one. If we are to develop an equality culture in Northern Ireland, and not just procedural responses which in reality largely focus on individual instances of discrimination, we need to develop a more explicit set of objectives. Indeed, how else can we monitor what progress, if any, is being made?

To take a very specific example, some seem to think that the fair employment legislation was intended primarily to ensure equality of treatment, and have accordingly focused almost exclusively on the fairness of the procedures surrounding recruitment and appointment. Equality of treatment, in this sense, might be understood to exclude or at least greatly circumscribe the need for measures such as affirmative action. If one's objective, however, is to secure a greater equality of outcome, it would not be sufficient to introduce a series of fair procedures and, while creating proportionate employment opportunities might be considered sufficient, it is even more likely that measures would need to be introduced to redress actively inequalities which cannot be redressed in any other way.

But beyond the problem of agreeing common and explicit objectives, there are a number of other problems. Firstly, there is no uniformity regarding the importance accorded by government to legislative safeguards guaranteeing equality in different spheres. Thus, legislation was introduced some time ago to deal with religious, political, and sexual discrimination, and more recently on the grounds of disability; however, discrimination on grounds of race or sexual orientation have not to date elicited a legislative response from government.

Secondly, even in those areas where legislation has been thought useful, the focus of anti-discriminatory measures has been very different. Thus the Fair Employment Act is the only legislation which deals with discrimination exclusively for employment; indeed this makes it not only unique in the United Kingdom, but - to

CAJ's knowledge - unique in the world. Legislation dealing with discrimination on the grounds of sex and disability, on the other hand, deals with the world of work, but also ranges more widely.

Thirdly, the legislation which does exist uses different concepts and applies different standards. Thus the Fair Employment Act is meant to cover both religious and political discrimination. In reality, however, the monitoring systems it relies upon for assessing discriminatory practices are almost entirely focused on the question of people's religious affiliation. Sex discrimination legislation on the other hand has nothing like the concept of "fair participation" mentioned in the Fair Employment Act and few of the important mechanisms established by that Act for monitoring and regulating abuses.

Last but not least, the government has introduced a number of important equality-proofing guidelines by which to measure and formulate its programmes and policies. These Policy Appraisal and Fair Treatment (PAFT) guidelines do not merely cover those forms of discrimination which are illegal, but extend to other forms of discrimination which the government intends to legislate against (i.e. discrimination on grounds of race), and even to other forms of discrimination where there are no obvious plans to introduce legislation in the near future (i.e. discrimination on grounds of sexual orientation, marital status, age, and number of dependants). Elsewhere in this document CAJ urges that these equality proofing guidelines be placed on a statutory footing(see page 40). This would at least give some uniformity of approach to government policies in the different realms of discriminatory behaviour.

One might of course wonder if this diversity of approach is problematic: perhaps the nature of the discrimination is so different in these different spheres so as to merit totally different governmental legislative and programmatic responses? At the very least, CAJ would argue that a debate around this question would be helpful.

The diversity of anti-discrimination approaches also encourages a compartmentalisation of identity which is problematic. This compartmentalisation can hide important conceptual problems from view, and can prevent broad strategies being developed to respond to what is often a multi-faceted issue. Elsewhere in this submission we comment explicitly on the issue of gender because it became clear during the course of our research that the focus exclusively on religious and political discrimination led us quite unwittingly into a focus on male employment and unemployment issues. Any understanding of the dimension of religious and political discrimination in our society cannot exclude over half the population. Separating discrimination into distinct categories may make it appear easier to counter, but ignores its complexity and thereby risks rendering our responses ineffective.

Elsewhere (see page 3), CAJ recommends that the fair employment legislation be reviewed periodically; **accordingly, we also recommend that in the interim period, prior to the next formal review, research be commissioned by SACHR to examine the wisdom of the currently fragmented approach to anti-discrimination legislation and programmes.** Such research would examine if

anti-discrimination legislation and programmes could be strengthened by any harmonisation of institutional, legislative and programmatic measures. It is important to emphasise, however, that such a review should not be used as an excuse to delay action on other recommendations which emerge from the current review.

Assessment of the fair employment legislation

It is not our intention to comment in systematic detail on the Fair Employment (NI) Act 1989, but rather to highlight particular issues of concern. In addressing such issues, and in later chapters dealing with the institutions created under the legislation (the Fair Employment Commission and the Fair Employment Tribunal), we cover the main substantive elements of the 1989 Act.

We should however comment in passing on the growing complexity of this legislative area. Currently, any assessment of parliamentary intentions in the area of religious and political discrimination requires close study of the NI Constitution Act (1973), the Fair Employment (NI) Act 1976 and the amendments and additions introduced to it by the Fair Employment (NI) Act of 1989. The transparency of government policy in this important area is not facilitated by such a web of inter-locking legislative measures. CAJ would recommend that, as a result of the changes to the legislation necessitated by this current review, the opportunity be taken to consolidate the legislation overall.

The particular areas of concern in the fair employment legislation examined below are:

- affirmative action
- contract compliance
- section 42
- goods and services

1 Affirmative Action

An article in the Columbia Journal of Law and Social Problems (see bibliography) reports in detail a study carried out for CAJ by Kevin Burke, one of its US legal interns, in 1994. In the context of the current review we have looked again at his findings and have concluded that there are a number of very specific issues and recommendations which we would like to bring to the attention of SACHR.

1.1 Definition and Scope of Affirmative Action

Given the emotiveness that can often surround the issue of affirmative action, and particularly the publicity which has been given in Northern Ireland to the "backlash" being experienced in the US because of affirmative action measures there, it is important to be clear about definitions if we are to avoid serious misunderstandings.

In the United States, affirmative action can include measures such as the use of "quotas", set-aside grant provisions for minority businesses, and steps taken to eliminate a possible disparate impact on different sectors of the community. In a powerful speech in July 1995, about the significance of affirmative action in securing greater equality of opportunity in the US, President Clinton spoke of a major review that he had had commissioned on the impact of affirmative action on US employment practices and he concluded: "affirmative action has not always been perfect, and affirmative action should not go on forever... (but) affirmative action has been good for America".

Affirmative action in the context of fair employment legislation in Northern Ireland, however, has a specific meaning which is different in important respects from the equivalent phrase in US fair employment legislation and in race and sex discrimination legislation in the UK.

The Fair Employment (NI) Act 1989 defines affirmative action as follows:

> *"s.58 (I) In this Act, affirmative action means action designed to secure fair participation in employment by members of the Protestant and members of the Catholic community in NI by means including*
> *(a) the adoption of practices encouraging such participation;*
> *(b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation."*

Interestingly, in the field of fair employment the term "affirmative action" is used more restrictively than its usage in the sex discrimination provisions. For example, under sex discrimination legislation, training schemes may be established exclusively for the benefit of women where they are under-represented in a particular area of employment. Fair employment legislation on the other hand specifically identifies (and protects from claims of reverse discrimination) only three forms of affirmative action, and then insists that any action taken in furtherance of these three protected measures cannot be confined for the benefit of one community only. They are contained in Sections 37 (a), (b) and (c) of the 1976 Act, as amended by the 1989 Act which permit:

- targeted advertising to attract applicants from an under-represented group;
- special training to enhance limited or non-existent skills amongst members of the under-represented community;
- adoption of alternative redundancy procedures designed to ensure that attempts to recruit members of the under-represented community into the workforce are not dissipated (e.g. by not applying Last-In-First-Out in a redundancy situation).

There are three specific problems with these protected forms of affirmative action:

Firstly, their existence, and the fact that only these three forms of affirmative action enjoy protection from claims of reverse discrimination, suggest that other forms of action are not favoured and are vulnerable to reverse discrimination complaints. As a consequence, employers have felt inhibited from taking other affirmative action measures because of fears of challenges to their legality.

Secondly, although indicated to be affirmative action measures the exceptions cannot be used exclusively for the benefit of one community only. In other words, although employers are adopting such measures for the purpose of increasing the number of Catholics, or as the case may be, Protestants, in their workforce, the class of persons to benefit from such actions cannot be limited to one or other community. This tends to dissuade people from taking such action and, as noted earlier, is contrary to the practice developed in the area of sex discrimination.

Thirdly, they address only recruitment into employment and termination of employment and do not address the need to secure fair participation within employment - in terms of work benefits that are available, access to promotion, bonus payments, and the experience of a genuinely neutral and harmonious working environment.

This last omission is a particularly serious one because unless affirmative action measures are taken to secure equality for both communities particularly within the workplace, and whilst at work, the improvements to the selection process will have limited effect and members of the under-represented community who are recruited may be reluctant to stay. After all, one of the significant aspects of the case-law emanating from the Fair Employment Tribunal to date has been the public exposure of instances of quite severe sectarian harassment within the workplace, particularly in departments where individuals are the sole representatives of their community or one of a very small group eg - Neeson v Securicor PLC; Magill v Barney UK; Brennan v Shorts PLC; Rowan v Charles Hurst PLC; Duffy v EHSSB.

To overcome these difficulties, and to encourage employers to be more assertive in taking affirmative action, the legislation needs to be amended to provide that any bona fide affirmative action measure taken in furtherance of an affirmative action plan will be protected from complaints of either direct or indirect discrimination.

CAJ believes that stronger affirmative action measures could constitute a real engine for change. Measures need to be introduced which move Northern Irish society towards greater equality of opportunity, allow the redressing of inequalities which cannot be redressed in any other way, and which ultimately seek to create proportionate employment. To this end, CAJ recommends that :

- **The definition of affirmative action (and that of fair participation) in the legislation should be amended to indicate that its function is to secure a more equal participation of Protestants and Catholics within the workforce and in all aspects of employment in Northern Ireland, as opposed to merely securing fairness in a procedural sense.**

- **The existing protection from claims of direct and indirect discrimination for three specific forms of affirmative action should be extended to cover any bona fide affirmative action measure taken in furtherance of an affirmative action plan designed to secure fair participation within a particular workplace.**

1.2 Affirmative Action and the Code of Practice

The Code of Practice should emphasise that affirmative action measures are needed not merely to ensure fair access to employment but also to ensure equal treatment of Catholics and Protestants in their terms of employment.

Affirmative action measures should therefore be devised to cover:

- **access to employment;**
- **benefits including promotion, training, bonuses, perks and advancement generally within employment;**
- **the provision of a neutral working environment where no-one feels inhibited or apprehensive on account of their religious or political beliefs**

CAJ recommends that the Code of Practice be amended as necessary to reflect the need for affirmative action measures broad in scope and impact as indicated above. (We have not looked systematically at the Code of Practice, and there may well be other issues requiring change in the light of recommendations from ourselves and others).

1.3 Specific affirmative action measures targeted at the long-term unemployed

The position of the long term unemployed requires specific attention. This group has suffered and continues to suffer particular disadvantage and it is the case that Catholics are disproportionately represented amongst the long term unemployed. The most recent Labour Force Survey (1993) indicates that while 16% of Protestant unemployed males have been seeking work for four years and more, 30% of Catholic unemployed males fit into this category. The problem of the long term unemployed is, therefore, a fair employment problem also. However, under present legislation, any measures designed specifically for the benefit of the long term unemployed could be vulnerable to complaints of indirect discrimination, both under fair employment and indeed also under sex discrimination legislation.

These clearly are problems which can be overcome by changes to the legislation. However, the long term unemployed also are likely to lack the skills training, and previous work experience, to be able to compete realistically in the employment market. Incentives (most practically financial) therefore, need to be introduced to encourage employers to recruit from the long term unemployed, and to make such employment an attractive proposition for members of that group. Such incentives might include: paying employers a premium to set up training schemes in particular skills for the long term unemployed; and/or paying employers a proportion of the unemployment benefit which the unemployed person would have received to enable them to recruit directly from the unemployed and to provide those persons with particular training; and/or reducing the employers' national insurance contributions for those newly-recruited from the pool of long term unemployed people.

Accordingly, in relation to long term unemployment, CAJ proposes

- **that legislation should be amended to ensure that measures aimed at active recruitment amongst the long term unemployed should be protected from indirect discrimination suits;**

- **that specific (financial) incentives should be made available both to encourage employers to recruit from the long term unemployed and to enable the long term unemployed to compete on a realistic basis for employment opportunities.**

1.4 Affirmative Action and the 1987 SACHR report

Looking back at the influential and extremely important SACHR report of 1987, it is interesting to note that there are several issues discussed in relation to affirmative action. In some cases, possible measures were considered but were put to one side in the hope that other measures proposed would be sufficient. However, explicit reference was made to the fact that these ideas should be revisited again if sufficient progress had not been made. It is clear from the material presented in chapter 2 of this report that insufficient progress has been made, and consideration should therefore be given to some of the earlier proposals:

(a) goals and timetables: The legislation requires the setting of goals and timetables where "fair participation" is not being afforded, and allows the FEC to impose them where they feel it appropriate in the wake of a section 31 investigation. In practice, however, the ambiguity surrounding the concept of "fair participation" has meant that this provision of the legislation has not been as effective as it might otherwise have been. **It is to be hoped that a clarification of terms will enable goals and timetables to be set more rigorously in future. It is also important that once set, goals and timetables should be made public. For example, the annual report of the Civil Service Commission should outline the goals and timetables set for recruitment to**

posts within the government service and report annually on the extent to which the goals have been met. This procedure should also apply to other public services where representation from across the community is lacking. In particular the government should set for itself specific and public goals and timetables in the achievement of lesser differentials in unemployment figures (see recommendation 15.5 of 1987 SACHR report). The setting of explicit goals and timetables allows change on the ground to be monitored more effectively, and facilitates a discussion of the measures which are required should the goals and timetables not be achieved.

(b) The FEC was asked to advise after three years of the operation of the legislation whether a "tie break" (i.e. selecting on the basis of religion from among candidates who meet the requirements of the job equally well) would be a helpful mechanism. We are not sure if they did so advise, and what their advice was, and would be interested in some further consideration of this mechanism. CAJ believes that, if properly managed, this mechanism need not necessarily undermine the rigorous application of objective job selection criteria. Indeed, such a measure might help to remind people of the purpose of such rigorous criteria, given that their purpose seems now all too frequently reduced to a mechanistic avoidance of litigation.

Another measure discarded at the time by SACHR was that of "reverse discrimination". Para 4.20 of the report says that reverse discrimination was found "unacceptable at this time. Until ... these measures (are shown to be) ineffective, reverse discrimination should remain unlawful". CAJ contends that the statistics of continuing community differentials show that the measures contained in the 1989 legislation have proved insufficiently effective. While there may be a natural unease in engaging in something called discrimination (of whatever description), we wonder what the drafters of the SACHR report had in mind when they raised this possibility. What measures did they consider and discard? What is meant by the term "reverse discrimination"? **Which, if any, of such measures might people consider acceptable given the failure of other measures to date to impinge on community differentials? We believe that these questions should be revisited.**

2. Contract Compliance

One of the key measures of the fair employment legislation is the obligation which can be placed on contractors to comply with fair employment practices. Sections 38 to 43 of the 1989 Act give the Fair Employment Commission power to declare someone an "unqualified person" in two possible situations i.e. (1) Where an employer has failed to register or submit a monitoring return where they are required to by the legislation, or (2) Where the Commission has sought to enforce a post- Section 11 undertaking regarding ensuring equality of opportunity, has secured an order of compliance from the Fair Employment Tribunal and a finding from the Tribunal that the employer is in breach of that order.

Where someone is declared "unqualified" then any "public authority" (as defined by the Fair Employment (Specification of Public Authorities) Order (Northern Ireland) 1989) should refrain from entering into a contract with them. Certain exceptions are contained in Section 41 (7) where the Secretary of State indicates that the contract is necessary or desirable for the purpose of safeguarding national security or public order, where the works, goods or services could not otherwise be obtained without disproportionate expense or where it is in the public interest. The FEC is given power to enforce this prohibition on contracting by injunction. Also under Section 43 a Northern Ireland government department "may" refuse to give grants or other financial assistance to an unqualified person.

Since the legislation was introduced in 1989, the disqualification provisions have only been utilised on one occasion and then only for a short period. This occurred after an employer failed to register. However, the employer registered quickly thereafter and the disqualification was lifted. As no Section 17 non-compliance findings have been made by the Fair Employment Tribunal no opportunity has arisen to utilise that route of disqualification. The fact that recourse has only been made to the disqualification provisions on one occasion does not mean that these provisions have had no impact however. Contract compliance does much of its work as a deterrent and the threat of disqualification may have been one factor which led so many companies to register and send in monitoring returns.

When the 1989 Act was under consideration CAJ noted, as did many others, that contract compliance can function as a penalty scheme (where grants and contracts are removed after evidence of discriminatory practice) or an incentive scheme (whereby to be eligible for a grant or contract one must demonstrate compliance with equality goals or good practice). We were disappointed to see that the government had chosen the former. As an incentive scheme, as utilised in the United States and by some local authorities in England (prior to the 1988 Local Government Act), contract compliance has proved a very successful tool for increasing the proportion of an under-represented group in the workforce, thus advancing the goals of equality of opportunity. For a review of this see Morris (full reference in bibliography). **CAJ remains convinced today that moving to an incentive approach could turn contract compliance into a more effective means of securing equality goals.**

Under an incentive approach those seeking a government grant or public contract over a certain amount (it is difficult to specify this figure but it would presumably need to be less than the average grant or contract amount to achieve widespread coverage) would have to receive a positive certification on equality grounds before they could receive such a grant or contract. At the very least to qualify they would have to present their monitoring return, self evaluation and indication of what they aim to do to ensure fair participation. A more exacting standard, similar to that which currently exists in Federal Contract Compliance schemes in the United States, might require the filing of an affirmative action scheme whereby the employer would commit themselves to certain goals and timetables. Such a development would obviously go hand in hand with a revised definition of affirmative action which we have proposed elsewhere in this submission. Moving to an incentive approach to contract compliance might create considerably more work

for the FEC. However, it could be that officials within the grant or "contract-giving" departments could administer this scheme, subject to guidelines worked out by the FEC to ensure that employers do not face inconsistent regulatory requirements. Also if certificates were issued for a number of years the administrative burden would be lessened.

Although the requirements in the 1989 Act to monitor workforce composition (and in some cases applications), undertake reviews and consider appropriate action - all backed up by FEC oversight - have put in place requirements very similar to those which might be achieved by a contract compliance incentive scheme we still believe that such a scheme might considerably strengthen the effectiveness of fair employment law. The main reason for this is that it would provide a greater incentive to make the employer's Section 31 periodic reviews effective. Currently it is up to the FEC to request such reviews (though many employers have submitted them without request) and, only after this has been done, to consider whether the review has been an adequate one. An incentive approach would place the burden on the employer to establish that an adequate review had been conducted and adequate measures to ensure fair participation adopted. The extent of government spending via grants and contracts makes this a very important means of influencing employment practices in the private sector. Although obtaining precise figures in this area is difficult we estimate that spending on grants and contracts by central government (without including Health and Social Service Trusts) currently exceeds £750m or over 10% of all government spending. When Health and Social Service contracting is included, the figure must be in excess of £1000m. Moreover much of this expenditure, such as that on capital projects by the Department of the Environment (DOE) or the Northern Ireland Housing Executive (NIHE), or on training by the Training and Employment Agency (T&EA) is in areas of currently high unemployment or where steps are being taken to create employment opportunities. It is in such areas that government may be able to have a direct impact on the unemployment differential.

Even if it does not recommend the adoption of an incentive-based approach to contract compliance, we would recommend that the review examine to what extent equality considerations are taken into account by public entities, such as DOE, T&EA, the Industrial Development Board (IDB), Local Enterprise Development Unit (LEDU), and the NIHE which exercise significant powers to make grants or award contracts, and whether pressures towards greater "value for money" and cost reduction in the public sector have led to the marginalisation of equality concerns when grants or contracts are awarded.

Although our preference is for the adoption of an incentive-based approach to contract compliance we feel that, failing this, more use could be made of this technique as a penalty. The possibility of disqualification could be added as a potential remedy under Section 24 of the Fair Employment Act 1976 where if the Tribunal is satisfied in an individual complaint that there has been gross or persistent discrimination it can order the employer to take action to prevent discrimination within a specified period. If the employer fails to do so they can be disqualified. This would make the deterrent of disqualification for maintenance of

discriminatory practices a more visible one than it is under the present cumbersome provisions.

Contract compliance and European Law: A new factor since 1989 is the strengthening of European Community law on Public Procurement. This has been reflected in a number of Statutory Instruments giving effect to European Directives. The main thrust of these changes is to require the advertising of all public contracts over a certain amount in the Community Official Journal and a prohibition of any conditions for the granting of contracts which might discriminate against contractors from other member states. In terms of general Community policy and compliance with Articles of the Community Treaty, conditioning the grant of financial assistance or public contracts on certain policy considerations is not prohibited, providing that those conditions can equally be met by entities from other member states.

However, the tightening of public procurement requirements in a series of EC Directives in 1992-3 may pose a more difficult challenge to any contract compliance policy, particularly one which is incentive-based. These now indicate that all public contracts over a certain size (i.e. more than 750,000 ECU) should be advertised in the Official Journal and that for contracts worth more than 200,000 ECU, a contract should go to those who make the lowest bid, providing certain (non-discriminatory) technical and quality thresholds are met. Bidders may be excluded only on a number of limited grounds, such as conviction of a criminal offence or "grave misconduct" in relation to the business. It would need to be tested in law, but this latter exclusion would presumably be enough to allow for the current disqualification conditions in the Fair Employment Act 1989. There is, however, some ambiguity around whether or not these requirements allow for more broad policy-based reasons being given for exclusion. In an article in Law Quarterly Review (1995), Arrowsmith suggests that such requirements may not be exhaustive and cited certain decisions of the European Court of Justice in support of this interpretation. For example, the article comments on the case of **Beentjes v. Netherlands**, in which a Dutch scheme which permitted preference to be given to bids which provided work for the long term unemployed was upheld. It also reports however that the relevant UK legislation to implement the Directives, the Public Supply Contracts Regulations 1995 (SI 201), appears to interpret the European legislation very narrowly. CAJ believes that effective contract compliance measures could be very beneficial in securing greater equality of opportunity in Northern Ireland. **Accordingly, it urges that SACHR seek assurances that contract compliance incentive schemes are compatible with the relevant EC Procurement Directives and, if necessary, propose appropriate amendments to the UK regulations.**

Regarding government grants, EC law allows for an incentive approach as long as such financial assistance is given on terms which do not discriminate against companies from other EC member states, or can be justified under the State Aids exceptions. Alternatively, European law provides for an expanded use of a penalty approach inasmuch as it includes the capacity to exclude bidders on the grounds of "grave misconduct". As noted already, **CAJ recommends the former incentive-based approach, but notes that either appears possible under European legislation.**

3 Exceptions

The Fair Employment (Northern Ireland) Act 1976 made certain exceptions to its provisions which were then reiterated, with little change, in the 1989 legislation. A key exception in terms both of the number of people affected, and of the likely differential impact as between genders, is that of "employment as a teacher in a school". The legislation requires that this exception be kept under review, but it is not clear to CAJ whether such reviews are regularly undertaken and, if so, what conclusions have been reached. **We have not had an opportunity to canvass opinion widely on this issue, and would therefore welcome some examination being made of the need, if any, for this continuing exception**.

We have, however, frequently expressed reservations about another exception cited in the legislation, that is section 42 - which provides that the legislation does not apply to situations of national security - and we comment upon this in some detail below.

3.1 Section 42: the legislative context

In effect, Section 42 prevents aggrieved people from proceeding with complaints arising out of a range of employment-related circumstances covered by Sections 17-23 of the 1976 Act. These can include, for example, the refusal of employment or contracts, dismissal from employment or removal from lists of tenderers for particular contracts where the complainant believes that he or she has received less favourable treatment on the grounds of religious belief and/or political opinion. Section 42(1) describes the grounds on which the exception may be invoked by an employer. It states that the protections under the fair employment legislation may not apply to "act[s] done for the purpose of safeguarding national security or protecting public safety or public order". Where such a ground or grounds exist, an employer may apply to the Secretary of State for a certificate that effectively immunises the employer for his/her disputed action. The certificate signed "by or on behalf of" the Secretary of State is conclusive evidence that the employer's disputed act was done for reasons of national security, public safety or public order.

Section 42 is broad in scope and may be invoked on any of three grounds, i.e. "national security", "public safety" or "public order". National security is the ground most often relied upon but it is nowhere defined in the Fair Employment Acts (nor indeed are the other two grounds). The process by which a Section 42 certificate is actually obtained is also unclear as there appear to be no defined procedures. It is clear, however, that a Section 42 certificate is only applied for when a formal complaint alleging religious and/or political discrimination has been initiated. Furthermore, the person alleging discrimination has no effective redress since one cannot access, and therefore seek to challenge, the information which led to the Secretary of State's decision.

3.2 The factual situation

Overall, according to the records of the Fair Employment Commission, and interesting research carried out by Druscilla Hawthorne (see bibliography), thirty-nine Section 42 certificates have been issued. The breakdown of the thirty-nine certificates is as follows: in terms of religious affiliation, six of the thirty-nine certificates were issued against Protestants, and the remaining thirty-three against Roman Catholics. In terms of the type of complaint made -

- thirty concerned refusal of employment (26 Catholics, 4 Protestant);
- three concerned dismissal (2 Catholics and 1 Protestant);
- three concerned denial of an apprenticeship (all Catholic);
- and one denial of a contract (Catholic).

(Two of the cases were not broken down into any of these categories). On the basis of the above statistics, it would appear that Section 42 has a particularly adverse impact upon the Roman Catholic community. This raises serious questions as to the possibly discriminatory use of Section 42 certificates.

Further study of the thirty-nine cases reveals the ground or grounds upon which a Section 42 Certificate was issued in each case. In six of the thirty-nine cases certificates were issued on national security grounds alone; in five solely on public safety grounds; in three on both public safety and public order grounds; in three on national security and public safety; four cases are uncategorised and in the remaining eighteen cases, certificates were issued on all three grounds of national security, public safety and public order grounds.

The above statistics cover only those complaints of unlawful religious and/or political discrimination that have been brought to the attention of the Fair Employment Commission and went on to the Tribunal level. They do not cover complaints that settled at the Commission or Tribunal level, nor those that settled prior to going to the Commission. More importantly, the above statistics do not include situations where an individual withdrew his/her complaint in light of the respondent-employer's application for a Section 42 certificate. Nor do they cover those individuals who never contacted the Fair Employment Commission, or those who may have sought other legal advice, despite the possibility that they were security vetted and subsequently refused employment or dismissed from employment or not promoted for security related reasons.

Observers have accordingly often expressed the view that the number of certificates issued amounts merely to "the tip of the iceberg". Many people may assume that they have been denied a particular job because of their religious, or more likely perceived political, persuasion, but would not bring any charges because they do not wish to have formal and public confirmation that they are considered to be a security risk. Most people who fear that they may be considered a security risk are likely to feel that this decision is taken as a result of their political beliefs. The existence of Section 42, and the threat it poses of someone being publicly adjudged a threat to national security, creates a very

serious "chill factor" , and the statistics given above in no sense describe the true extent of the problem.

3.3 The case for repeal

A Section 42 certificate effectively prevents an individual, who is wishing to pursue a complaint of unlawful religious and/or political discrimination, to have his/her case heard by the Fair Employment Tribunal. If a complainant brings his/her case to the Tribunal, and the respondent-employer successfully applies to the Secretary of State for a Section 42 certificate, the complainant is completely blocked from pursuing the claim any further. There is no right to challenge the information upon which the certificate was issued. Moreover, he/she has no knowledge of the nature of the information that was the basis for the certificate.

In addition to precluding Tribunal hearings on individual complaints of unlawful religious and/or political discrimination, Section 42 could theoretically prohibit Fair Employment Commission investigations into such matters. This is because Section 42 applies to the whole of the fair employment legislation. As with Tribunal hearings, when the Fair Employment Commission's investigation into an individual's complaint is prohibited, such a person would have no means to challenge the information underlying the certificate. Nor would he/she have any knowledge of the nature of such information.

The non-review and non-disclosure dimensions of Section 42 raise serious issues in terms of equality and natural justice. First there is the issue of basic human rights. The Secretary of State is not required to give reasons for the issuance of a certificate, and there are no publicly accessible or legally enforceable criteria. Power can therefore be exercised in an arbitrary manner. Second, a basic principle of natural justice requires that an individual have a right to appeal: however there is no effective mechanism for challenging the Secretary of State's decision. The fair employment legislation fails to provide an explicit appeals procedure; furthermore, the normal appeal process available through the courts is inadequate, given that the judiciary has proved unwilling to challenge executive decisions pertaining to national security. This infringement of basic rights is exacerbated by the fact that mistakes have been known to occur in security vetting. The Fair Employment Commission and its predecessor have frequently referred to the fact that mistakes can occur in relation to security information. The third issue concerns the scope of security vetting and its impact. Imprecise language and guidance permit the broad use of security vetting. Even in the Prime Ministerial statement of July 24th 1990 on security vetting, reference is made to vague concepts of "association" with someone who may have been involved in terrorism, and of people being "susceptible to pressure". Such broad definitions of subversion risk placing individuals who use lawful means to attain their objectives, and who clearly constitute no threat to national security, within the ambit of the vetting system.

CAJ therefore recommends that section 42 of the legislation be repealed with immediate effect.

4. Goods and services

As noted earlier, Northern Ireland's fair employment legislation is the only anti-discrimination legislation CAJ knows of which applies only to employment. An important omission from the legislation is protection in the realm of "goods and services". It is accordingly quite legal to discriminate against someone on religious or political grounds as long as such discrimination does not affect their employment. This is clearly a highly unsatisfactory state of affairs.

In order to determine whether protection against discrimination on religious/political grounds should be extended in Northern Ireland to include the provision of goods, facilities or services, a useful starting point would be an examination of the protection afforded in this area by other anti-discrimination legislation. According to section 20 of the Race Relations Act (1976) in Britain and section 29 of the Sex Discrimination (NI) Order (1976), it is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public, to discriminate against a person who seeks to obtain or use those goods, facilities or services, by refusing or deliberately omitting to provide them, or as regards their quality or the manner in which or the terms in which he/she provides them.

The following are cited in both pieces of legislation as examples of the facilities and services to which these provisions apply:

- access to and use of any place which members of the public or a section of the public are permitted to enter;
- accommodation in an hotel, boarding house or other similar establishment;
- facilities by way of banking or insurance or for grants, loans, or credit facilities or finance;
- facilities for education, instruction or training;
- facilities for entertainment, recreation or refreshment;
- facilities for transport or travel;
- the services of any profession or trade, or any local or public authority.

Unfortunately, case law in this area is not as developed as in the field of employment, although it is worth looking at nonetheless, and indeed often has implications for employment (given the importance of social events for furthering business and other professional contacts).

Quite a number of cases brought under the Sex Discrimination legislation fall into the "facilities for entertainment, recreation or refreshment" category. These tend to relate to instances where women have been prohibited from using a snooker table in a pub, have been denied access to a certain area of a pub/bar or have been

denied access to or membership of various sporting clubs/societies. The other main category involves "facilities by way of banking or insurance or for grants, loans, credit or finance". Examples have included women who have been required to obtain their husband's signature on a mortgage application, or have been charged higher premiums for an insurance policy than a man. It is worth pointing out that the latter is not unlawful if the difference in treatment was based on "actuarial or other data from a source upon which it was reasonable to rely". Several other cases involve what might be termed "retirement" benefits, where men from the ages of 60-65 have challenged charges for access to Council leisure facilities and for prescriptions.

Looking at case law in relation to the Race Relations Act, again the "facilities for entertainment, recreation or refreshment" category features heavily. Here there are numerous examples of pubs, restaurants etc. either being found guilty of blatant direct racial discrimination, or such premises having indirectly discriminatory dress codes e.g. no beards, no male headwear etc. Another area which featured in several examples was that of "facilities for transport or travel" where taxi or minicab companies had refused to carry passengers from minority ethnic groups. There were also several examples of estate agents falling within the "sources of any profession or trade" category by discriminating as regards advising clients where they might wish to purchase property. Banks and Building Societies which did not provide mortgages for certain properties on the grounds that the property was "high risk" or "not of high enough value" were on occasion found to be indirectly acting in an discriminatory manner, on the grounds that the areas affected tended to be largely populated by ethnic minorities. Other interesting cases as regards the scope of the legislation include **Ransani v. IRC** (1981, 2WLR 636 CA) where the actions and procedures of the Inland Revenue are taken to fall within the definition of services; and in **Alexander v. Home Office** (IRLR 190 CA 1988), the actions of the prison service are deemed to fall within the definition of services.

So far as extending protection against discrimination on religious or political grounds to the area of goods, facilities, or services in Northern Ireland, part of the problem seems to be the lack of available research data. Most commentators have tended to concentrate on what were seen as being the three major sources of grievance for the minority community in the 1922-1972 period (i.e. prior to Direct Rule) namely jobs, electoral practices, and housing. Thus with the passage of the 1976 and 1989 Fair Employment Acts, the creation of the Northern Ireland Housing Executive, and reform of the electoral system, religious or political discrimination in other areas of Northern Irish society seems to have escaped close scrutiny.

However, even a cursory examination of District Council records, of complaints brought to the attention of the ombudspersons and of various judicial review decisions, would suggest that the scope for discriminatory treatment (either direct or indirect), does extend into other fields. For example, the decision by some Councils to refuse facilities to a Gaelic games team and/or to retain restrictive Sunday opening hours, and the Department of Education's (DENI) refusal to fully fund Irish Language secondary schools are all examples of cases where allegations of discrimination in the provision of goods, facilities or services have been made. Other examples include alleged discriminatory treatment in the allocation of play

parks, and there are no shortage of examples of community groups who have been refused funding as a result of alleged "political" associations. Denial of access to certain premises to some political organisations, or indeed by community groups who are alleged to have had political associations, has also been a contentious issue.

Similarly there is no mechanism whereby someone can gain relief if they feel they have been discriminated against on grounds of their religious or political beliefs when seeking finance/credit whether it is for business or personal purposes. One can certainly imagine instances in Northern Ireland where banks/building societies argue that loans for property in certain areas are not commercially viable, and where such decisions might indirectly discriminate against certain sections of the community. One might also argue that since several of Northern Ireland's high street banks have regularly been criticised over their employment records, it is time to afford the same protection to someone seeking a loan as it is to someone seeking a job.

CAJ recommends that the legislation in the field of religious and political discrimination should be extended beyond the remit of employment. While recognising that there may be some difficulty in drafting legislation which would cover all the possible forms of religious and political discrimination, we feel that some interim measures should be introduced. In particular, **we believe that anti-discriminatory provisions should be made to apply in the financial services area, and to the provision of public goods and services**. One way of tacking the latter point is to ensure that current government equality proofing guidelines are given a statutory basis (see Chapter Five regarding PAFT).

Chapter Four

Assessment of the fair employment institutions

This chapter deals with the Fair Employment Commission (FEC) and the Fair Employment Tribunal (FET) which were established to monitor and uphold the fair employment legislation. While there are distinct issues involving each institution there are also a number of general issues which cut across them both.

Introduction

A holistic view of the implementation of the Fair Employment Act

It is important that the present review seek to establish whether everyone has equal protection under the legislation, since the Act would not be achieving its goals if only some people were in a position to assert their rights but others had no realistic prospect of doing so. It is also important to examine the issues which do and do not come before the FEC and the FET. If the final objective of the legislation is to establish a regime whereby employers scrutinise their employment decisions for inequality, a fragmentary series of issues coming before the FEC and the FET provides no incentive for a comprehensive review of working practices. Indeed, short-term competitive pressures might even dissuade some employers from following an equality conscious approach if they believe competitors are failing to do so, and not suffering any adverse consequences.

CAJ believes that a significant aspect of an analysis of the effectiveness of the FEC and the FET would involve establishing a 'labour market profile' of those who are complaining to them, the issues upon which they are complaining and the level of support in terms of resources and expertise which they are receiving.

This is not a study CAJ has been able to undertake but we would hope some assessment of this aspect of the work of the fair employment institutions would arise from the review process or, if not, would be placed on the agenda by SACHR for further study at a later date. Despite the capacity of the FEC to support individuals before the Tribunal, the system is still one driven by individual grievances. It might be anticipated that only certain categories of applicants can take advantage of the possibility of litigation, for example those who are never recruited and those who have been dismissed rather than those who are still in the course of their employment. Similarly, amongst the latter category, those in relatively secure employment are more likely to take the litigation route than those in precarious employment. A labour market profile should also provide information on the sector from which the applicants do and do not come, the level of unionisation in their workplaces, the number of employees and the geographical location.

For example, given the evidential and legal complexities of equality litigation, it is vital to examine the resources and expertise upon which an applicant can call in order to pursue a case. An applicant with FEC or trade union backing would appear to be in an appreciably stronger position than one without. A further significant aspect concerns the extent to which such supporting organisations have a strategy towards FET litigation. Such a strategy would, of necessity, be curtailed by the individual complaint model upon which access to the FET is based. Nevertheless, it should be possible to establish whether any litigation strategy exists and whether it is reactive (i.e. a means of rationing resources in response to a flow of complaints) or is proactive (i.e. seeking out appropriate cases upon which to base litigation aimed at a strategic target). **In this context, an assessment of the interaction between the issues which are brought before the FET and the strategic role expected of the FEC in the formal investigations which it instigates is needed.** Do the formal investigations replicate or complement the issues raised before the Tribunal?

The outcome of such an analysis would create a picture of which aspects of labour market inequality were being addressed by the FEC and the FET and which were not. Such an analysis would have a vital impact both upon questions of the broadening of standing before the FET and upon the strategy of the FEC towards supporting applicants and also conducting formal investigations. In particular, it would be useful in measuring the extent to which questions of personalised discrimination during the course of employment, and structural discrimination generally, are being brought before the FET in proportion to their apparent prevalence in the Northern Irish labour market.

The impact on human resource management

A vital question which some of the SACHR-commissioned research may address is the extent to which human resource management is driven by a desire to establish a comprehensive regime of equality within an undertaking and/or by a desire to keep the undertaking out of litigation. CAJ believes that the ultimate purpose of the fair employment legislation must be to create an atmosphere of equality consciousness in the workplace, so that all aspects of working conditions from recruitment through the course of employment to dismissal are monitored and audited and corrective measures taken.

There is a danger that the response to the FEC and the FET will be a bureaucratic one and not one which actually develops a comprehensive regime of equality consciousness in the workplace. This danger is intensified if the FEC and the FET are only addressing certain categories of controversies and are only being utilised by certain categories of applicants and if there is uncertainty as to the content of its rulings. Hence the FEC and the FET may have virtually no impact in parts of the labour market where employment is precarious, where unionisation is low or where the FEC may prefer not to place its resources. More particularly for a comprehensive regime of equality consciousness, the absence of litigation upon indirect discrimination may neutralise a significant impetus towards equality

monitoring, even in parts of the labour market where prospects of litigation are higher.

There is a risk that partial coverage of potential controversies within the FET, combined with the highly visible legislative objective of harmonising labour market participation rates, may lead to a focus on questions of recruitment rather than on wider questions of access to training and promotion, pay differentials, allocation of tasks and hours of work etc. Indeed, a bureaucratic response by human resource managers to equality law may result in elaborate and unduly rigid systems of recruitment in the belief that an 'all-risks' insurance policy against litigation lies in 'playing by the (perceived) rules' of the FET. In this context, the central objective of seeking to encourage comprehensive equality consciousness could be lost.

1. The Fair Employment Commission (FEC)

Turning to an examination of the individual institutions which are responsible for implementing and monitoring implementation of the Act, we note that the Fair Employment Commission has several important functions:

- to publish a Code of Practice for the promotion of equality of opportunity
- to keep under review patterns and trends in employment to ascertain whether equality of opportunity is being provided
- to make public a register of all public authorities and employers with more than ten employees
- to oversee and enforce employers obligations to (a) prepare an annual return setting forth the religious composition of their workforce; (b) review employment practices; (c) and adopt affirmative action measures
- to secure undertakings or issue directions to ensure equality of opportunity;
- to conduct investigations into the composition and practices of employers and other employment related bodies to see what action to promote equality of opportunity should be taken by them.

In the context of this review, the Fair Employment Commission facilitated the work of CAJ greatly by giving generously of its time in a series of extensive interviews carried out by a CAJ legal intern from the US. Several of the functions of the Commission were discussed in detail during these interviews, and the most important issues arising from these exchanges are commented upon below.

1.1 Fair Employment Commission - monitoring

With regard to the obligation to register with the Commission and to submit an annual report as to the religious composition of the workforce, the Commission's work clearly has been successful. For the first period during which monitoring was required, 1,828 out of 1,835 private employers and all public authorities submitted the required information to the Commission.

There are however certain limitations to the monitoring exercise which derive from the legislation the Commission is operating within and which should be amended.

CAJ accordingly recommends:

- **Currently the 1989 Act does not include in its definition of employee those persons who are normally involved in employment for less than sixteen hours per week. Considering that a comparatively high proportion of the workforce is engaged in part-time employment, and that women are six times more likely than men to be part-time workers, this provision makes it difficult to gauge whether equality of opportunity is truly being afforded, particularly to women. CAJ proposes that this exclusion be dropped.**

- **Employers with more than one site are required to submit only gross figures as to the religious composition of their workforce. This may mask segregation of the workforce between different sites. Therefore, the regulations should be amended to require such employers to report on a per-site basis.**

- All companies with more than ten employees are required to submit reports as to the religious composition of their workforce. However, only public authorities and employers with more than 250 employees are required to report on the religious composition of job applicants. Information about the religious background of applicants can be helpful in a number of ways:

  - it allows one to assess the chill factor around a particular concern;

  - it allows one to assess improvements made in attracting applicants from an under-represented group;

  - it may force companies who are reluctant participants in the move towards fair participation to confront the effects of their inaction;

  - it allows one to determine whether differentials in appointment statistics are more likely to be due to failures in attracting applicants from the under represented community or to failures in the appointment procedure.

  CAJ therefore recommends that statistics be kept on job applications as well as job appointments.

- **There is no requirement that companies collect and maintain records on the Standard Occupational Categories (SOCs) of job applicants, only appointees. Useful and important comparisons cannot therefore be made. CAJ recommends that there should be an amendment requiring monitoring of applicants by SOC.**

- **Under current regulations a person may be considered to be an appointee for monitoring purposes only if he or she is hired within the same reporting period that he/she applied. If a recruiting exercise spans two reporting periods, any person recruited will not be reported as such. Such minor administrative issues can confuse any system trying to monitor change over time. Therefore CAJ proposes that the regulations should be amended to include reporting of applicants and appointees by recruiting exercise.**

A number of the above recommendations carry administrative implications. We believe, however, that in some instances it may be easier for employers to collect data on all of their workforce without aggregating all the site-by-site information, or separating out information on the basis of the amount of hours worked. While such information should be collated by employers, means can and should be found to limit the administrative burden both on them, and on the FEC. It is, for example, not our intention to propose that all this additional data be automatically submitted to the FEC, but that it be available to enable employers to respond on request to FEC inquiries.

1.2 Self-review by employers (section 31 of the Act)

In addition to monitoring workforce composition, the 1989 Act also requires all registered concerns to perform periodic self-reviews. Specifically, the statute requires that each registered concern "from time to time review the composition of those employed in the concern and the employment practices of the concern for the purposes of determining whether members of each community are enjoying or are likely to continue to enjoy fair participation in employment in the concern". The review must be carried out within three years of registration and thereafter within three year intervals. The Act provides that if there is not fair participation, the employer shall determine the affirmative action measures (if any) that would be "reasonable or appropriate".

The Commission has put considerable effort into ensuring that employers abide by their statutory obligations and into harnessing these self-administered reviews to the goal of delivering fairness in employment. Their main strategies have been:

- to educate employers concerning their obligations to conduct reviews and the substance of such reviews, e.g. consultation with employers, self-review seminars, and the production of a manual on how to carry out self assessment;

- to obtain from employers (informally or pursuant to statutory powers) information disclosed by the reviews;

- to audit the employers' reviews and discuss deficiencies in employers' review procedures. There were problems here with major companies and public authorities failing to meet such basic requirements as analysing employee job groups. Only 70% of public authorities, 80% of private sector concerns with

more than 250 employees, and 68% of private sector concerns with more than 100 employees, determined whether there was fair participation;

- to work with employers to encourage them to adopt affirmative action plans.

The FEC has performed commendable work in these areas, but again there appear to be some changes which could usefully be made to its powers. While punitive measures must be available to deal with employers who are unwilling to bring about the necessary workplace changes, more can often be achieved through a process of incentive and self-review. Certainly in the creation of a genuine culture of equality it is valuable to encourage self-motivated efforts; accordingly CAJ recommends:

- **The statute should authorise the issuance of regulations delineating in some detail the substance of such reviews. It should be noted, for example, that the self-reviews are meant to cover the general domain of "employment practices" and not just workforce composition. This term covers a broad area potentially, and yet many of the reviews have apparently been quite insubstantial. Regulations delineating the areas to be covered would ensure the whole process was more meaningful.**

- **The statute should require a written report detailing findings and conclusions emanating from the review. While employers are obliged to carry out such a review, they are not expressly required to report on their review. Such an obligation would ensure employers take the whole process more seriously, and would greatly assist the Commission in its work.**

- **Similarly, there is no explicit provision to insist that the Commission should receive a report on such reviews. Currently the FEC wastes time making formal and informal requests for such reports; the regulations should be changed to make submission to the FEC compulsory upon request.**

- **The 1989 Act provides for the imposition of sanctions for failure to register, or to submit annual monitoring returns. Similar enforcement provisions should be established in connection with section 31 self-reviews.**

- **If an employer's self-review indicates a lack of fair participation, the Commission is under a duty to make recommendations regarding affirmative action. The legal status of such recommendations is unclear. In fact it would seem that the concern involved can ignore them with impunity. The legal status of such recommendations should be clarified and strengthened.**

Overall, the provision for self-reviews is a positive one and the FEC has pursued it actively. Nevertheless, there should be some strengthening of the provisions since they are currently so weak that they provide ample opportunity for cynicism on the

part of those who doubt the government's commitment to fair employment. Changes along the lines suggested will make the provisions more effective, and indeed their revision should facilitate rather than increase the administrative responsibilities of employers.

1.3 Investigatory Authority (section 11 of the Act)

According to the 1989 Act, the FEC may conduct investigations into the activities of several entities - employers, employment agencies and vocational organisations - with a view to deciding on action necessary to promote equality of opportunity. The investigation can cover the practices affecting recruitment, admission to membership, access to benefits, terms of employment or the like.

In such instances, the Commission is required to serve notice on the employer that it intends to investigate, and provide written particulars of the scope and purpose of the investigation. The employer must be given the opportunity to comment on the matters being investigated, and to give oral or other evidence. The investigation must be conducted in private. Otherwise the Commission is given wide powers to obtain information "from such persons...and in such a manner as it thinks fit". It has the same powers as the High Court to require the attendance and examination of witnesses, and the production of documents. If, after investigation, the Commission considers that an employer should take action to promote equality of opportunity, it must use its best endeavours to ensure that the employer takes whatever such action is appropriate and reasonable and, if appropriate, secure a written undertaking from the employer that such action will be taken. If such an undertaking is not given, the Commission must serve a notice on the employer issuing directions but it is open to the employer to appeal such a notice to the Fair Employment Tribunal. Where a tribunal determines that an employer still has not complied with an order, the employer will have this failure certified to the High Court and the person will be treated as though guilty of contempt of court (an offence which is punishable by an unlimited fine or imprisonment).

It is not clear from the FEC's most recent annual report how many investigations under article 11 have been instituted overall. The report does, however, record that written and binding agreements about affirmative action programmes have been completed with twenty concerns and another ten will be finalised early in 1996. As noted earlier, it is unclear to outside observers if this emphasis in resource allocation on securing voluntary compliance is entirely justified. Nevertheless, the Commission has, particularly in comparison to other similar regulatory bodies, covered a large number of concerns and has elaborated with employers comprehensive affirmative action plans.

Given the importance of this article in the legislation, **CAJ's main recommendation in regard to these detailed investigations concerns the importance of keeping under review both the value in expending extensive resources in securing voluntary commitments from employers rather than in litigation efforts, and the nature and representativity of the firms which are selected for particular attention**.

1.4 Periodic review

Elsewhere, we argue the value of instituting periodic reviews of the legislation and government programmes aimed at tackling inequalities of opportunity. It is worth emphasising at this point that the primary focus of the FEC since 1989 has had to be the registering of employers and the establishment of monitoring procedures. Accordingly, it is only now beginning to use the full reach of its authority under the Act. Companies, for example, were given three years to complete their initial self-review. Negotiations between the Commission and these companies then ensued regarding appropriate affirmative action campaigns, and the FEC has to give the company adequate time to implement the suggested strategies. This may be a controversial area, and in large measure will determine the effectiveness of the Act. It is therefore imperative that there be periodic reviews so that one can return (among other things) to this as yet largely untested aspect of the legislation and make any amendments that practical experience shows to be necessary.

2. The Fair Employment Tribunal (FET)

It is important to review the practice of the FET in the context of anxieties about labour market adjudication generally. On the one hand, Industrial Tribunals (upon which, despite its uniquely specialist jurisdiction, the FET is modelled) are accused of being too legalistic and formal (see the Donovan Commission in 1968 - **Report of the Royal Commission on Trade Unions and Employers' Associations**, HMSO, Cmnd 3623). On the other hand, some argue that the Tribunals still suffer from the 'inferior' characteristics of administrative tribunals in cases in which complex issues of law and evidence are involved, most obviously equality law cases. Such anxieties centre upon concerns such as:

- the lack of legal aid for complainants even in complicated cases;
- difficulties in obtaining information from employers so that a case can be brought;
- the burden of proof lying with the complainant, even though the employer holds most of the evidence relating to the decision-making process;
- the inadequacies of individual remedies - for example, no powers to award punitive damages, and weaknesses in the type of recommendations available;
- and the even greater inadequacies of pro-active remedies such as requiring alterations to be made in working practices, or the development of equal opportunities policies.

The SACHR **Report on Fair Employment** (1987) argued for an industrial tribunal model of adjudication on several grounds saying *inter alia* 11.51(g):

> *"The industrial tribunals are required to make a detailed and public reasoned decision. This should assist the development of a coherent body of case law. This will facilitate a litigation strategy whereby important cases of principle can be tested and the meaning of discrimination clarified, thereby helping employers to amend and avoid discriminatory practices of their own accord, and encouraging victims of*

discrimination to seek remedies. The Commission believes that these arrangements will ensure that the individual complaints process has a more general impact above and beyond the resolution of isolated disputes".

In practice, however, problems are likely to arise when a case is settled by an applicant, despite the endeavours of the FEC to make a point of wider significance or to negotiate the development of an equal opportunities policy within an undertaking. Consideration should therefore be given to broadening the scope for "standing" before the FET, most obviously to the FEC but also possibly to trade unions and other expert bodies. Such a development would presuppose a more proactive range of remedies including, for example, the instigation of equal opportunities policies by employers and also a supervisory system, perhaps under the aegis of the FEC, to ensure that such proactive remedies were respected.

In this regard, CAJ recommends that:

- **Access to the FET should be improved through the provision of legal aid for applicants.**

- **Information made available to the FEC should also be discoverable by applicants and open to use by the FEC in cases brought by it.**

- **The ability of the FET to award punitive damages should be expressly provided.**

- **Standing should be extended to the FEC, trade unions and qualified interest groups.**

- **The FET should have the power to apply proactive remedies such as the instigation of an equal opportunities policy.**

Quite independently of the powers of the FET, the review provides an opportunity to study other aspects of the Tribunal's work - for example, its composition. In the context of sex and race equality litigation, concerns have been expressed that at least one lay member should be a woman in a sex equality cases and a member of an ethnic minority in race equality cases. There are also concerns about the level of training which all members of Tribunals (and appellate judges) receive in equality law questions, given their proportionately more complex nature and, what experience, if any, of discrimination law is required of Tribunal members prior to appointment.

It is important, particularly given the sensitivity of the subject-matter, that the work of the Tribunal be, and be seen to be, transparent and above reproach. In this regard, it is noteworthy that Tribunal decisions are very difficult to obtain. There does not appear to be any public collection of them, or a mailing list to which equal opportunities officers, human resource managers, small employers, Citizen Advice Bureaux workers, trade union officials and concerned individuals can subscribe. The SACHR **Report on Fair Employment** (1987) rejected the DED's proposal for

a Commission-based adjudication model on the basis that it was "not specified whether [the Commission] would have a duty to make reasoned public decisions which would assist the development of clear legal standards" (11.37). It is difficult to see how this important objective can be achieved unless the widest possible publicity is given to FET Decisions. Without such publicity, labour market reaction is more likely to be based upon newspaper clippings, rumour and vague perceptions rather than a sensible response to the FET's analysis of equality questions.

A particular concern within the context of a relatively small society such as Northern Ireland, relates to the perceived impartiality of Tribunal members. It is not enough that the Tribunal act impartially, but it must be seen to do so. It would be valuable to learn whether those who utilise the FET perceive it as being an impartial forum. Furthermore, we wonder what discussion has occurred about the ethical standards to be upheld by Tribunal members - for example the issue of having shareholdings in undertakings which might be defendants before the Tribunal, and/or the associations which FET members may hold (or may have held in the past) which could pose a potential conflict of interest. **CAJ therefore recommends that:**

- **FET decisions should be publicly available to any concerned individual or undertaking.**

- **A code of ethics should be prepared for members of the FET, and consideration should be given to a list of members' interests being made publicly available.**

It is not clear to us what debate has taken place around the Green Paper entitled "**Resolving Employment Rights Disputes: Options for Reform**" (HMSO: Cm 2707, December 1994). It would clearly be useful to draw upon any models of good practice which have secured widespread acceptance in the realm of industrial tribunals, and examine what relevance they hold, if any, for improvements to the operation of the Fair Employment Tribunal.

Chapter Five

Beyond the legislation - government programmes to combat discrimination

Introduction

The earlier part of this submission looks largely to the past. It measures the extent of change and finds that there are still very important differentials between the two communities which need to be redressed. It examines closely the legislation introduced to counter religious and political discrimination, and the institutions established to implement and monitor this legislation. A series of recommendations have been made. Improvements can certainly be made in a number of areas.

Looking to the future however, CAJ believes that what is needed is the active promotion of a culture of equality across the whole range of government policy. Accordingly, the Policy Appraisal and Fair Treatment (PAFT) equality-proofing guidelines, and the Targeting Social Need (TSN) programme, both introduced by government in recent years, are to be warmly welcomed. PAFT marks a policy shift away from anti-discrimination towards the active promotion of fair treatment, and TSN is designed to skew public spending towards areas or sections of the community in greatest need, which should reduce community differentials. Unfortunately, as our study will show, the government does not appear to have given genuine practical expression to the potential offered by these two policy tools. CAJ is of the firm view that fair employment legislation on its own will not remove existing community differentials in employment, still less in unemployment. Such legislative measures need to be complemented by a broad range of government policies, and both TSN and PAFT could be used to achieve this. As a consequence the intent of government to eliminate discrimination can be gauged by the rigour of their application of PAFT and TSN.

1. Policy Appraisal and Fair Treatment guidelines (PAFT)

According to the Central Community Relations Unit (CCRU):

> *"The aim of the PAFT initiative is to ensure that, in practice, issues of equality and equity condition policy making and action in all spheres and at all levels of government activity, whether in regulatory and administrative functions or in the delivery of services to the public. The guidelines identify a number of areas where there is potential for discrimination or unequal treatment to occur and outline steps which those responsible for the development of policy and the delivery of services should take to ensure that, in drawing up new policies or reviewing existing policies, they do not unjustifiably or unnecessarily discriminate against specific sections of the community".*

The areas of potential discrimination or unequal treatment include: differing religious beliefs or political opinions, men and women, married and unmarried people, people with and without dependants (including women who are pregnant or on maternity leave), people of different ethnic groups, people with or without a disability, people at different ages and people of differing sexual orientation. PAFT was intended to be implemented in government departments, Next Step Agencies, Non-Departmental Public Bodies (NDPBs) and organisations providing contracted-out services. PAFT is to be applied to all new policies, existing policies as they are reviewed, and service delivery.

The current PAFT guidelines became operational on 1st January 1994, after a somewhat uncertain beginning. A series of guidelines had been issued as early as March 1990 to all government departments in the form of a Central Secretariat circular. However, they were reviewed in the course of 1992, and advice from a number of organisations external to the civil service was then sought for the first time. According to the CCRU's first annual report on the implementation of PAFT, the original guidelines were amended as a result of a "programme of external consultation which was unprecedented in drawing up internal administrative guidelines". Given that three of the five bodies consulted - the Standing Advisory Commission on Human Rights, the Fair Employment Commission and the Equal Opportunities Commission - are government appointed bodies with expertise in equal opportunities and human rights issues, it is surprising to learn that consultation with them was seen to be "unprecedented". Clearly the introduction of equality-proofing guidelines was seen initially by government to be little more than a routine internal administrative question.

This uncertain launch of the PAFT guidelines might explain in part why there continues to be confusion around their significance and implementation. For example, in reply to a question in the House of Commons on July 18, 1995, relating to the applicability of PAFT guidelines in the health sector, Malcolm Moss MP, the junior NIO Minister, stated: "because it (PAFT) was policy appraisal, we deemed it appropriate that those guidelines should be the responsibility of the Health Boards and the Management Executive, and not at the operational level of Trusts". However, the second paragraph of the PAFT guidelines makes it clear that they apply to service delivery which surely takes place at the "operational level". The guidelines were eventually formally circulated to the Trusts as a result of UNISON pressure in the form of a judicial review taken against a decision of the Down and Lisburn Trust. The Trust attempted to argue that PAFT was: "a lofty aspiration at which bodies such as Trusts should aim and that failure to achieve that aspiration would be a matter of little or no consequence". It is disturbing to say the least that a publicly funded body should view a government initiative in this light.

It is essential in CAJ's opinion that the PAFT guidelines be given greater status and that, accordingly, they should be placed on a statutory footing.

1.1 The circulation of PAFT guidelines:

The circulation of the PAFT guidelines to relevant people and groups seems to have taken place with extreme tardiness. The implementation date was to be January 1994. In the case of the health service, Boards were informed in February 1994 of the existence of PAFT. Yet it was only on 6 July 1995 that the Health Trusts were issued with PAFT documentation.

As early as April 1993, CAJ had requested in its unsolicited comments on the guidelines that they be advertised to the community, especially to those who were intended to benefit from their adoption. This has not been done. Indeed the guidelines are not even included as an appendix in the first annual report on their operation, thereby seriously limiting the possibility of readers of the report making an effective critique. CAJ believes that a major government initiative of this type should be widely publicised, particularly to those who are supposed to implement it and to monitor its implementation. That this has not taken place raises questions about the government's commitment to PAFT.

1.2 Implementation of PAFT

According to the first CCRU report on the implementation of PAFT, some departments do not have the ability to adjust policies to meet PAFT concerns because of their overriding need to maintain parity with Whitehall policies. The Department of Health and Social Services (DHSS) is quoted as an example in this regard. **CAJ would expect that all policies should be examined for equality implications, regardless of whether they emanate from Whitehall or the Northern Ireland Office.**

- **Implementation of PAFT by government departments:**

According to the guidelines, each department is to produce an annual report on its implementation of PAFT and the form of these reports is to be advised upon by the Central Secretariat. The first annual report on the implementation of PAFT was issued in July 1995, and CAJ read it with some interest. Unfortunately, we found it to be inadequate both in terms of its detail and its overall organisation. It is not at all evident to the reader that any common format was proposed, still less followed; the level of detail and explanation provided by each department is far from consistent; and overall the subject appears to be treated in a rather tokenistic and superficial manner. The reader is encouraged in a foreword by Sir Patrick Mayhew to use the report to assess government progress, but as can be seen in the comments below, many questions are left unanswered. CAJ wrote in September 1995 to CCRU asking about the internal criteria circulated to departments to guide them in writing their reports, and asking for copies of certain specific detailed reviews referred to in the document. To date, we have not received a reply.

Looking at the implementation of PAFT on a departmental basis, the report co-ordinated by the CCRU indicates the following:

The **Department of Agriculture** (DANI) has circulated the guidelines to senior staff and "highlighted" them in training, Monitoring arrangements are being "considered". Three out of four policies reviewed were found to have no PAFT implications, though little detail is given as to why not. The fourth policy studied, that of rural development, was found to have PAFT implications but these implications were not made clear.

The **Department of Economic Development** (DED) - has disseminated the guidelines, appointed a lead officer and set up an equality unit in the Training & Enterprise Agency (T & EA). Awareness-raising training is taking place and T&EA and LEDU are monitoring client-usage of their programmes. No PAFT appraisal is referred to with regard either to the eight new policies or services which are reported to have been introduced, nor with regard to the seven existing policy areas which were reviewed.

The **Department of Education** (DENI) - has circulated the guidelines to senior management and NDPBs. The head of the Central Policy Division is responsible for monitoring and progressing PAFT, which is to be implemented through existing mechanisms. No training is mentioned. Consultation and policy documents were issued, but no indication is given of PAFT appraisals on these. One policy was reviewed, but the report merely states that PAFT principles were applied without giving any further details.

The **Department of the Environment** (DoE) - has circulated the guidelines to all staff and NDPBs. The Head of Central Policy and Management Unit was made responsible for PAFT. A seminar was held for senior management. Of seven new policies, six were said to have no PAFT implications: no details were given as to why they had no such implications. Of the four existing policies which were reviewed in the course of the year, PAFT implications were found to apply to three of them, and in one case substantial detail was provided.

The **Department of Finance and Personnel** (DFP) - has circulated the guidelines and appointed a lead officer. Training was not considered necessary. Apart from references to EU funding programmes, three new policies were introduced. The implications of the PAFT guidelines for such new policies are only specifically mentioned with regard to one of them - and that was in the case of a policy which was found to have no PAFT implications.

The **Department of Health & Social Security** (DHSS) - has appointed a liaison officer and is putting awareness raising in its training modules. Of two new policies introduced during the year, the report simply notes that no differential impact is expected. A review of three existing departmental policies also resulted in a finding of "no PAFT implications".

Overall, this first annual report on PAFT by CCRU proved distinctly unhelpful. The report's reports are bland with little reasoning given as to why PAFT implications are so frequently considered to be non-existent. Even in the few instances where the PAFT guidelines are found to be relevant, little information is provided by which the department's response can be assessed. We are concerned that this report

suggests that the monitoring of PAFT is merely a paper exercise. Detailed training for example appears to be virtually non-existent; extra resources are not alluded to; and there are inconsistencies between this annual report on the operation of PAFT and other governmental sources. For example, LEDU is stated in the CCRU report to be recording data on age, sex and marital status of applicants for grant aid, yet, in another government publication produced by the Department of Economic Development (**Growing Competitively**), religion is also said to be being monitored.

- **Implementation of PAFT by Non-Departmental Public Bodies (NDPBs):**

If we have serious reservations about the implementation of the PAFT guidelines at the level of government departments, CAJ believes that implementation at the level of Non-Departmental Public Bodies has been even more patchy, if not non-existent.

It was 6 July 1995 (i.e. 18 months after their introduction) before Health Trusts received documentation about the PAFT guidelines. In communications with CAJ as late as November 1995, a number of Trusts indicated that they had still not made any decisions about implementing PAFT. For example, North Down and Ards Community Trust indicated that they were still studying the documentation; Causeway Trust was seeking clarification; North and West Belfast Trust indicated that they had to refer our inquiry to the Management Executive for advice. The Eastern Health and Social Services Board reply seemed to suggest that they believe that PAFT does not apply to contracted-out services, though the guidelines clearly say that departments should work to secure compliance with PAFT by those performing contracted-out services. A number of Trusts have still to reply to our inquiries. As noted earlier, some confusion on the topic is hardly surprising when government signals on the subject are mixed. The Minister for Health, Malcolm Moss, has stated that the Trusts only need to "consider" the PAFT guidelines, though departments are enjoined by the guidelines to "use all appropriate measures at their disposal to ensure that Non Departmental Public Bodies comply with PAFT" (Central Secretariat circular/93).

Of other NDPBs, several of the Education and Library Boards have taken action on PAFT, appointing lead officers, and circulating the guidelines to appropriate decision makers. However, even here, nearly two years after the introduction of the PAFT guidelines, one Board noted that : "The department's circular (with information about PAFT) was very complex and the status of PAFT in relation to the legislation in particular to the contracting-out of services is not clear".

No NDPB has yet seen the need to allocate additional resources to PAFT.

- **Implementation of PAFT and contracted-out services:**

Paragraph 10 of the guidelines calls for PAFT to be considered throughout the development or review of proposals, and for consideration to be given to any

discriminatory effect which attaches to a particular service delivery or policy, so that alternative approaches can be assessed. Specific reference is made to the application of these principles to contracted-out services in the cover letter sent with the guidelines wherein departments are urged "to use their best endeavours, consistent with legal and contractual obligations, to secure compliance with PAFT by those performing contracted-out services on their behalf". However, according to paragraph 2.5 of the CCRU report, departments merely seek to encourage providers of contracted-out services to be "consistent with the spirit of PAFT".

In the case of education, article 20 of the Education and Library Boards (NI) Order requires Boards to conduct contracting-out activities without reference to non-commercial matters. This clearly conflicts with PAFT and DENI, when requested for clarification by the Boards, determined that the Order takes precedence over PAFT. No explicit reference is made to this problem in the Department's entry in the CCRU annual report on the implementation of PAFT. This example highlights several problems: firstly, the quality of guidance given by the Department to the Education and Library Boards; secondly, the failure of the Department to recognise a potential contradiction and review its policies accordingly; thirdly, the apparent unwillingness of the Department to consider amending legislation where it is found to be in contravention of basic PAFT principles; and, fourthly, the need to examine the effect on contracted-out services overall in the light of PAFT. The contracting-out of services is a major governmental trend at present: if in practice, PAFT is rendered inapplicable to this realm of activity, then its usefulness is seriously diminished. Similarly, if legislation automatically takes precedence over PAFT, and it is not subject to amendment, then the whole function of PAFT, and the government's commitment to it, has to be questioned.

1.3 Resources and PAFT

No additional resources have been made available for PAFT. This again raises the question of government commitment. Resources would be needed for training. A study of the CCRU report on PAFT implementation suggests that training in PAFT is often merely added on to training already in place. Indeed one is left wondering if it consists of more than mentioning the existence of PAFT. In many cases, no training is reported to be taking place. Another area where one would expect resources to be necessary is in the realm of the technical resources, information and personnel necessary to implement PAFT. Again, those responsible for implementation of PAFT seem to have a number of other responsibilities already assigned to them. It is debatable if they will have the time or resources to devote to a thorough assessment of the implementation of PAFT. Finally, it is not clear that if an alternative policy was deemed necessary as a result of a PAFT review, additional resources would be forthcoming to fund it. Without additional resources, it must be doubted if the necessary weight will be given to PAFT in policy formulation, review and service delivery. Accordingly, **CAJ recommends that the possible resource implications of applying PAFT guidelines to current and proposed programmes be explicitly catered for in departmental expenditure plans.**

1.4 Legal status of PAFT

Paragraph 18 of the PAFT guidelines states that "where a differential impact of any policy is identified, departments must consider its justification - is the policy necessary and its differential effect proportionate to the objective which the policy is designed to achieve?" In April 1993, CAJ voiced criticisms on this point to the CCRU. We still fail to see how differences can be justified on the basis that they are "necessary" or "proportionate". Again in paragraph 19, direct discrimination is referred to as "not capable of being justified", implying that indirect discrimination may be justifiable.

CAJ believes that PAFT will not be accorded proper priority until it is properly resourced, is put on a statutory footing and is made a subject of effective public accountability. On this last point, it is constantly stated that PAFT is the responsibility of each department and then quite often each section or NDPB. As a result everybody is responsible, with the real risk being run that nobody is responsible. It is worth noting that government initiatives aimed at "marketisation " of the public sector such as Next Steps, the Citizens Charter etc. have a Cabinet Minister responsible for them and are actively promoted. It would give a stronger sense of government commitment to this programme if an NIO Minister had specific responsibility for PAFT and for overseeing that these "pro-active" guidelines are indeed actively promoted.

It is worth repeating that in principle PAFT is a extremely valuable and worthwhile policy initiative. However, we remain concerned that it is not being given the priority it should receive.

1.5 Recommendations regarding PAFT

- **The PAFT guidelines should be widely publicised.**

- **A standard reporting mechanism should be devised, and departmental annual reports should allow meaningful and detailed public scrutiny of the way PAFT should be, and has been, applied to different government policies and programmes. Departmental reports should indicate efforts made to ensure that Next Step Agencies, NDPBs, and contracted-out services working with the department are also implementing PAFT.**

- **PAFT should be placed on a statutory footing and should apply to all aspects of government policy. Where contradictions arise between the application of PAFT and current legislation, consideration should be given to how the law can be amended.**

- **The implementation of PAFT should be built into government spending plans so that if resources (financial, personnel or managerial) are required to make the equality proofing guidelines effective, provision can be made accordingly.**

- **Greater central co-ordination of PAFT is required, with the CCRU, or some other appropriate body, invested with authority to effectively monitor the implementation of PAFT. Accountability for this central co-ordination of governmental effort should be located at ministerial level.**

- **Appropriate training should be provided - both for government departments and others - so that equality proofing guidelines are properly understood and applied.**

2. Targeting Social Need

TSN was announced as a new government priority in 1991. It remains one of three public spending priorities alongside security and creating a strong economy. A definition of TSN was given by the Secretary of State to the Standing Advisory Commission on Human Rights on 10 March, 1992:

> *"The TSN initiative arose out of a concern over the extent to which the different social and economic experiences of the two main sections of the community contributed to the divisions in our society. The objective is to tackle areas of social and economic difference by targeting government policies and programmes more sharply at those in greatest need - that is, those areas or sections of the community suffering the highest levels of disadvantage and deprivation.... Since the Catholic community generally suffers more extensively from the effects of social and economic disadvantage, the targeting of need will have the effect of reducing existing differentials".*

The Public Affairs Project of the Northern Ireland Council for Voluntary Action (NICVA) identified four key features which the implementation of TSN should have and this chapter deals with each of these elements in turn. The features are:

(i) establishment by departments of agreed indicators of socio-economic need which enable them to identify the areas of greatest need;

(ii) monitoring by departments of the impact of policies and programmes on the two main sections of the community;

(iii) targeting of programmes and resources more sharply at those in greatest need;

(iv) the taking of remedial actions to address any identified unfair differential impact policies or programmes are having.

2.1 Agreed indicators

The indicators being used by government departments to assess the level and nature of need are those developed in the report "Relative Deprivation in Northern Ireland". More commonly known as the Robson indicators, they examine relative deprivation by bringing together eighteen indicators. They can identify deprivation across the 566 electoral wards and also in sub-wards.

These indicators are not without difficulties as they are more complex, and have apparently not been tested for reliability like the simpler Townsend indicators they replaced. They have been the subject of some criticism and yet have already been very influential in policy making terms (they have, for example, led to a re-classification of one of the Making Belfast Work areas). The West Belfast Economic Forum (WBEF) has, for example, challenged the theoretical underpinning of the indicators, suggesting that the statistical methods used minimise the effects of extreme values because they give all variables equal weighting. The WBEF believes that this has led to an underestimation of the extent of Catholic deprivation. Other indicators published by Interact, and some looking at the needs of young people specifically, give different measures. Given the importance that these indicators will have in determining where resources are best targeted, **CAJ sees a need for greater debate and would call for fuller discussion regarding the type of deprivation indice to be used.**

Whatever indicators are used, however, one would expect them to be vital in government determinations of need and, consequently, of investment and expenditure priorities. It is disturbing, therefore, to hear the minister responsible for economic development, Baroness Denton, in response to questions at a public meeting, state that all of Northern Ireland would qualify as an area of social need. CAJ submission comments earlier on the deprivation of Northern Ireland in comparison to Britain, but this should not allow, for example, the pedestrianisation of Bangor to be described as a TSN programme. It is clear that TSN should be about the skewing of resources to people and areas in greatest need and not merely a continuation of existing practices.

2.2 Monitoring of TSN

In order to assess the effectiveness of a policy it is critical to have a monitoring procedure in place. A number of departments have carried out research on the impact of policies and have set up information systems to record additional information relative to TSN. The DHSS plans to introduce a new resource allocation formula for Health Boards; DED agencies will prepare TSN action programmes from this year on. Despite these plans, it seems however, that, at

present, the success of TSN cannot be recorded or measured. According to Minister of State Michael Ancram in a letter to Dr Joe Hendron MP (published in the **Irish News**, 20.9.95) - "as TSN is not a specific programme, but runs as a principle through many different programmes, no separate quantifiable analysis of its impact is available".

It seems surprising that the government can announce a programme as its third public expenditure programme and then be unable to measure its effectiveness. The question which needs to be asked is can TSN be analysed, or is it just a case of the government not being prepared to invest the necessary resources in establishing a monitoring procedure? As with PAFT, it seems to be a case of everyone being responsible yet no one being responsible. **It may be that a separate budget for TSN would help establish this accountability.**

2.3 Targeting of Programmes and Resources:

Given that the central plan of TSN is to skew mainstream resources to areas of social need, it is necessary to analyse whether this is happening on a department-by-department basis.

Department of Health & Social Security: This was the first government department to introduce a TSN objective, which it did in its 1992-1997 strategy plan. This identified a need to research inequalities in health and social well-being, co-operation with other agencies, and greater lay participation. The current consultation strategy for 1997-2002 is much more detailed. It sets out additional objectives of developing capacity to assess need for health and social care, to evaluate the effectiveness of interventions, and to target resources where they are most needed. Finally, the DHSS is to publish a new formula for resource allocation across boards. Whilst the DHSS is the furthest advanced in implementing TSN, it needs to be pointed out that it has not yet produced a TSN-specific report. Moreover, the new strategy sets 2002 as the date for such reports, suggesting that shifts in resources will also need to await this date. The department appears to regard social security spending as part of TSN; CAJ would not accept that programmes to offset the effects of social deprivation can also solve that deprivation.

Department of Agriculture: This department does not have a specific TSN objective, nor a centre of responsibility. Though it has responsibility for the Rural Development Programme, which has TSN implications, this was devised prior to TSN. This bears a disturbing similarity to the department's relative inaction on PAFT.

Department of the Environment: Again, it does not have a specific TSN objective nor a centre of responsibility. It has not published any TSN related reports. The programme Making Belfast Work is the responsibility of the department and has major TSN potential; it was however developed before the TSN initiative was launched and cannot therefore be directly credited to it.

Department of Education: they did not reply to a CAJ inquiry in early 1995 so it is not clear to us if they have a specific objective or a centre of responsibility for TSN. Presumably, DENI's main contribution to the priority of TSN was the introduction of legislation enabling Voluntary Maintained Schools to receive 100% capital grants as opposed to the previous 85%, although this in fact resulted from a SACHR report on inequalities in education rather than any departmental initiative. The Department has also invested in science and technology facilities, and provided additional nursery places, and is currently involved in research related to TSN. It is worth pointing out that in DENI's recently published strategic plan specific mention is made of one of the government's spending priorities (i.e. the strengthening of the economy) but not that of "targeting social need" .

Department of Economic Development: The DED strategy document **"Growing Competitively"** devotes a considerable amount of space to TSN. The DED has a TSN monitoring group with responsibility lying with the Strategic Planning Unit. **The DED also commissioned a report on TSN from Coopers and Lybrand. This document is not public though CAJ is of the view that it should be.** As a result of this report, the DED is taking action on a number of areas. In particular TSN is to be applied to the programmes of each of the department's economic development agencies and they are to be reviewed in this light. A 3-year action plan is being prepared by each of the agencies and a 3-year monitoring report and 3 year review is to be produced. In addition, the Community Work Programme is part of the TSN initiative. CAJ welcomes these moves, while regretting that it appears to have taken some four years for these steps to be taken, and that they were only launched in the context of the May 1995 Washington investment conference.

Even more disturbing, however, is the apparent contradiction between the principles of TSN and practice on the ground. The recently announced 25% cut in ACE funding appears totally contradictory to a stated commitment to TSN. ACE work, for all the many criticisms that have been made of the programme, is vital to the maintenance of essential services in some of the most deprived communities in Northern Ireland. Its unexpected and dramatic across-the-board reduction can only serve to compound rather than to undermine inequalities in our society, and the department should explain how this decision conforms to its policies to target social need and to appraise policies to ensure fair treatment for all.

2.4 Taking of remedial actions

The policy of targeting social need should involve the skewing of mainstream government spending programmes so as to target disadvantage more effectively. So far, only DENI appear to have carried out this aspect of TSN, and this followed a report from SACHR rather than any internal audit (see reference above to the changed funding policy in relation to the Voluntary Maintained Schools). Both the DED and DHSS say they intend to move towards a skewing of mainstream spending but this commitment comes only after four years of TSN - even though it is meant to be one of the government's three public expenditure priorities.

In most cases funding has been given to non-mainstream programmes and it has not been a substantial percentage of government spending. Indeed the Department of Finance and Personnel in the CCRU report on PAFT implied that an important contribution of TSN has lain in preventing cutbacks from taking place. The West Belfast Economic Forum has reported that 19% of Making Belfast Work expenditure between 1988-1992 was spent on school maintenance, roads and the water service i.e. normal public expenditure items.

Making Belfast Work is one of the most widely quoted TSN initiatives (though it in fact preceded TSN). Whilst it has been a welcome scheme in encouraging understanding of need and involving the community, it has not committed substantial mainstream resources. The similar Londonderry Initiative has had a budget of just £3 million a year and, according to the Northern Ireland Economic Council, some of that has been used to soften other public expenditure cuts. In addition part of this programme was the Community Action Programme. According to newspaper reports, the Northern Ireland Economic Research Centre reported that this programme had received limited publicity for fear of increasing demand for assistance. It is a cause of concern that a small number of programmes seem to bear the whole weight of TSN.

CAJ is of the view that, properly implemented, TSN is a progressive initiative which can make major inroads into inequality. CAJ is also of the view that the purpose of strengthening the economy should be to remove social need, so there should be no clash between the two. In any event, the removal of the social and fiscal costs of deprivation can do nothing but strengthen the economy. To make TSN work, however, it needs to be made a major public spending objective and given the priority this entails. TSN will not succeed if it continues to be carried by a few programmes and remains marginal to the mainstream of government spending.

2.5 General commentary

It is worth emphasising the important role that the Industrial Development Board (IDB) could play in ensuring that inward investment is effectively harnessed to targeting social need. If they have not done so already, it would be vital for the IDB to develop a detailed plan of action as to how they intend to pursue the government's TSN priority. Have they for example determined which are the priority areas for investment, evolved sufficiently attractive incentives to encourage inward investment to the most deprived areas, examined the equality implications of their own programmes, and set measurable goals and timetables for their work? For example the IDB spends £3 million a year on consultancies. Such consultancies must be tendered for and allocated in such a way so as to facilitate the proposal of projects representing a good geographic, community and sectoral spread. (It is surprising for example that, according to the 1993/1994 IDB report, only nine out of 77 projects supported were located west of the Bann).

Other major investment projects, for example, those relating to the European Union's peace and reconciliation package, will also need to be monitored with a

view to assessing the extent to which they undermine rather than compound current inequalities. In this regard, it is excellent that specific reference is made to PAFT and TSN in the Department of the Environment guidelines for the District Partnerships working to disburse the European Union's so-called Delors package. The guidelines state that:

> "*The District Partnerships Sub-Programme, like all other sub-programmes in the Special Support Programme for Peace and Reconciliation, must take account of equality, equity and non-discrimination for all sections of the community.... Likewise the District Partnerships Sub-Programme will be formed within the government's policy context of Targeting Social Need (TSN) and Policy Appraisal and Fair Treatment (PAFT) initiative.*"

The implications of this, however, are that such bodies will need training and technical assistance if they are to translate the PAFT and TSN principles into practical reality on the ground.

2.6 Recommendations regarding TSN

- **There should be a review of the indices used to measure relative deprivation and a public consultation on this issue would reassure government and the public that the measures being used are appropriate, fair, and valid.**

- **The resource implications of TSN should be reviewed so that appropriate resources are made available to render the programme fully effective. Training and technical assistance should be available as appropriate for those intermediate bodies (e.g. District Partnerships) which have particular responsibility for operationalising the policy.**

- **Similar to the principle evolved with regard to PAFT, an annual report should be prepared on the operation of TSN across government departments. Such a reporting mechanism would allow easy detection of any difficulties which arise in the programme, or resource allocation, or in the priority to be accorded to the work.**

- **Some particular government agencies are potentially more affected by TSN than others. For example, the Industrial Development Board, which is responsible for attracting inward investment, will have a special responsibility to try and harmonise the objectives of private investors with the government priority of meeting social need here. The IDB should therefore report regularly on the efforts it makes to promote this government priority and, where appropriate, it should advise government on obstacles encountered which require action by other government departments. Thus, if weaknesses in Northern Ireland's transport system, or other similar infra-structural arrangements, deter investment in particularly deprived areas or**

sectors of the economy, this should be brought to the attention of appropriate departments and addressed as a matter of urgency.

- As with PAFT, it would help give more priority to TSN if a clear ministerial responsibility were assigned for its operation.

- In general terms, there needs to be greater transparency and accountability in the operation of TSN (as well as PAFT). Suggestions above include regular reporting, monitoring and allocation of ministerial responsibility.

Chapter Six

Summary of recommendations

After five years of the "toughest anti-discrimination legislation in Europe" Northern Ireland still faces serious inequalities of opportunity in its labour force. Accordingly, it is timely that the Standing Advisory Commission on Human Rights (SACHR) is now undertaking a major review of the operation of the fair employment legislation, and of government programmes aimed at eradicating political and religious discrimination and at ensuring equality of opportunity.

The Committee on the Administration of Justice (CAJ) has used the opportunity of the review to reflect on the achievements to date of government efforts to ensure employment equality, and to consider how these efforts can be made more effective in future. Below we summarise our key findings.

A. Government Commitment to Change

CAJ believes that the single most important contribution that government can make to ensuring equality of opportunity is to show by its words and its actions that it considers inequality in Northern Irish society to be totally unacceptable. It must accordingly be prepared to put energy and resources into ensuring change.

In this context, the CAJ recommends in particular:

1. **That the legislation and programmes aimed at securing fair employment be a matter for periodic review.**

2. **That a culture of equality be signalled by establishing specific equality goals along with the introduction of appropriate measures and funding to ensure that these goals can be met within a clearly defined time scale. The setting of goals and timetables is particularly important in those public services where representation from across the community is lacking. Regular reports should be made public regarding the extent to which these goals and timetables are being met.**

3. **Specific and public goals and timetables should be set in the achievement of lesser differentials in unemployment figures (as recommended by SACHR in its 1987 report).**

4. **Specific (financial) incentives should be made available both to encourage employers to recruit from the long term unemployed and to enable the long term unemployed to compete on a realistic basis for employment opportunities (see also recc 7).**

B. Legislative proposals

5. The definition of affirmative action (and that of fair participation) in the legislation should be amended to indicate that its function is to secure a more equal participation of Protestants and Catholics within the workforce and in all aspects of employment in Northern Ireland, as opposed to merely securing fairness in a procedural sense.

6. The existing protection from claims of direct and indirect discrimination for three specific forms of affirmative action should be extended to cover any bona fide affirmative action measure taken in furtherance of an affirmative action plan designed to secure fair participation within a particular workplace.

7. The legislation should be amended to ensure that measures aimed at active recruitment amongst the long term unemployed are protected from indirect discrimination suits.

8. The Code of Practice should be amended to reflect the need for affirmative action measures to be broad in scope and include:

   - access to employment;
   - access to benefits including promotion, training, bonuses, perks and advancement generally within employment;
   - the provision of a neutral working environment where no-one feels inhibited or apprehensive on account of their religious or political beliefs.

9. Contract compliance should be more actively pursued: the incentive approach provides a more effective means of securing equality goals.

10. To facilitate this, SACHR should seek assurances that contract compliance incentive schemes are compatible with the relevant EC Procurement Directives and, if necessary, propose appropriate amendments to the UK regulations.

11. Section 42 of the legislation regarding national security exemptions should be repealed with immediate effect.

12. Legislation in the field of religious and political discrimination should be extended beyond the remit of employment, and in particular it should be made to apply to the financial services area, and to the provision of public goods and services(see 21).

C. Institutional proposals

13. **A number of changes should be made to the legislation and in the practices of the Fair Employment Commission (FEC) to strengthen its monitoring function:**

- **the exclusion from monitoring of staff working less than 16 hours a week should be dropped;**
- **employers should report staff composition on a site basis;**
- **statistics should be kept regarding applicants as well as appointments;**
- **the Standard Occupational Categories of applicants as well as appointed staff should be kept;**
- **the regulations should be amended to include reporting of applicants and appointees by recruiting exercise.**

14. **Similarly a number of changes should be made to the practice of self-review by employers (article 31 of the Act)**

- **regulations should be issued delineating in some detail the substance to be covered by such reviews;**
- **a written report detailing the findings and conclusions of such reviews should be required;**
- **submission to the FEC of such reports should be made compulsory on request;**
- **the sanctions available if an entity fails to register or to submit annual monitoring returns should also be available in connection with section 31 reviews;**
- **the legal status of the FEC's recommendations arising from a section 31 review should be clarified and strengthened.**

15. **With regard to the FEC's investigatory authority, the Commission should keep under review both the value in expending resources in securing voluntary commitments from employers rather than in litigation efforts, and also the nature and representativity of the firms which are selected for particular attention.**

16. Regarding the work of the Fair Employment Tribunal (FET):

- access to the FET should be improved through the provision of legal aid for applicants;
- information which is made available to the FEC should also be discoverable by applicants and open to use by the FEC in Tribunal cases;
- the ability of the FET to award punitive damages should be expressly provided;
- standing before the Tribunal should be extended to the FEC, trade unions and qualified interest groups;
- the FET should have the power to apply pro-active remedies such as the instigation of an equal opportunities policy under the aegis of the FEC;
- FET decisions should be publicly available to any concerned individual or undertaking;
- a code of ethics should be prepared for members of the FET, and consideration should be given to a list of members' interests being made publicly available.

17. An assessment should be made of the interaction between the issues brought to the FET and the strategic role expected of the FEC in the formal investigations which it instigates.

D. Policy Appraisal and Fair Treatment guidelines:

18. All government policies should be examined for equality implications, regardless of whether they emanate from Whitehall or the Northern Ireland Office.

19. The PAFT guidelines should be widely publicised.

20. A standard reporting mechanism should be devised, and departmental annual reports should allow meaningful and detailed public scruitny of the way PAFT should be, and has been, applied to different government policies and programmes. Departmental reports should indicate efforts made to ensure that Next Step Agencies, Non-Departmental Public Bodies, and contracted-out services working with the department are also implementing PAFT.

21. PAFT should be placed on a statutory footing and should be made to apply to all aspects of government policy. Where contradictions arise between the application of PAFT and current legislation, consideration should be given as to how the law can be amended.

22. The implementation of PAFT should be built into government spending plans so that if resources (financial, personnel or managerial) are required to make the equality proofing guidelines effective, provision can be made accordingly.

23. Greater central coordination of PAFT is required, with the CCRU, or some other appropriate body, vested with the authority to effectively monitor the implementation of PAFT. Accountability for this central coordination of governmental effort should be located at ministerial level.

24. Appropriate training should be provided - both for government departments and others - so that equality proofing guidelines are properly understood and applied.

E. Targeting Social Need

25. There should be a review of the indices used to measure relative deprivation and a public consultation on this issue would reassure government and the public that the measures being used are appropriate, fair and valid.

26. That the resource implications of TSN be reviewed so that appropriate resources be made available to render the programme fully effective (a separate TSN budget might be of help). Training and technical assistance may well be required by intermediate bodies such as District Partnerships who will be responsible for operationalising TSN (and PAFT) on the ground.

27. That, similar to the practice evolved with regard to PAFT, an annual report be prepared on the operation of TSN across government departments. Such a reporting mechanism would allow easy detection of any difficulties which arise in the programme, whether in terms of resource allocation, or in the priority to be accorded to the work.

28. Some particular government agencies are potentially more affected by TSN than others. For example, the Industrial Development Board, which is responsible for attracting inward investment, will have a special responsibility to try and harmonise the objectives of private investors with the

government priority of meeting social need here. The IDB should therefore report regularly on the efforts it makes to promote this government priority and, where appropriate, it should advise government on obstacles encountered which require action by other government departments.

29. As with PAFT, it might help give more priority to TSN if a clear ministerial responsibility were assigned for its operation.

F. Follow up to the review

There were a number of recommendations made in the submission which related to the follow-up which should be given to the findings of the review, or - in some instances, issues which we recommend need further study.

30. Prior to the next formal review (see recommendation 1) research should be commissioned by SACHR to examine the wisdom of the currently fragmented approach to anti-discrimination legislation and programmes.

31. A significant aspect of an analysis of the effectiveness of the FEC and the FET would involve establishing a 'labour market profile' of those who are complaining to them, the issues upon which they are complaining and the level of support in terms of resources and expertise which they are receiving.

32. The Code of Practice should be revised in the light of all the changes forthcoming from the review.

33. Some examination should take place regarding the need, if any, for the continuing exception made in the legislation for teachers.

34. Consideration should be given to previous SACHR recommendations regarding "tie breaks" and "reverse discrimination" to see if either of these proposals are useful in current situation.

35. There needs to be a broad public debate on the issue of employment equality; SACHR when issuing its report should give some thought as to how a broader public debate around issues of discrimination can be facilitated.

Selected bibliography

The following bibliography highlights just some of the material which has been drawn upon, and explicitly cited, in the submission. CAJ has also drawn extensively on other materials produced in connection with the fair employment review, many of which have been reviewed in our occasional Fair Employment Information Service - see bulletin no. 1 (September 1995) and no. 2 (forthcoming)

Arrowsmith: **Public Procurement as an Instrument of Policy and the Impact of Market Liberalisation**; 1995, III Law Quarterly Review 235, 274-9,

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Listing of acronyms frequently used in the text

CAJ	Committee on the Administration of Justice
CCRU	Central Community Relations Unit
DANI	Department of Agriculture Northern Ireland
DED	Department of Economic Development
DENI	Department of Education Northern Ireland
DFP	Department of Finance and Personnel
DHSS	Department of Health and Social Services
DoE	Department of the Environment
EOC	Equal Opportunities Commission
FEC	Fair Employment Commission
FET	Fair Employment Tribunal
IDB	Industrial Development Board
LFS	Labour Force Survey
NDPB	Non-Departmental Public Body
NIHE	Northern Ireland Housing Executive
NIO	Northern Ireland Office
PAFT	Policy Appraisal and Fair Treatment guidelines
SACHR	Standing Advisory Commission on Human Rights
T&EA	Training and Employment Agency
TSN	Targeting Social Need

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No. 4 **Procedures for Handling Complaints Against the Police,** 1983 (updated by pamphlet No. 16)
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No. 27 **"Harassment: It's part of life here..."** Survey of young people's attitudes to and experience of harassment by the security forces, December 1994 (price £5.00)
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No. 29 **Right to Silence debate, the Northern Ireland Experience** (May 1994) (price £3.00)
No. 30 **Human Rights: The Agenda for Change**, Human Rights, The Northern Ireland Conflict and the Peace Process (includes proceedings of conference held on March 1995 in Belfast) December 1995 (price £3.50)

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S1 **Submission to the UN Human Rights Committee "Human Rights in Northern Ireland",** 1991 (price £1.00)

S2 **Submission to the United Nations Committee Against Torture,** November 1991 (price £1.50)

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S33 Submission to the **International Body**, Dec. 1995 (price £1.50)
S34 Submission to the **United Nations Committee on the Elimination of Racial Discrimination** (jointly with the Northern Ireland Council for Ethnic Minorities), March 1996 (price £1.50)
S35 Submission to the **United Nations Commission on Human Rights**, March 1996 (price £1.00)

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