



# CURRENT LAW STATUTES

ANNOTATED

1989

VOLUME THREE

EDITOR EMERITUS

PETER ALLSOP, C.B.E., M.A.  
*Barrister*

CURRENT LAW EDITORIAL TEAM

GLYNIS DYSON  
CAROLINE EADIE  
BARBARA GRANDAGE  
PHILIPPA JOHNSON  
FRANCES MELVIN  
CLARE TURNER

*LONDON*

SWEET & MAXWELL

STEVENS & SONS

*EDINBURGH*

W. GREEN & SON

1990

*Published by  
SWEET & MAXWELL LIMITED  
and STEVENS & SONS LIMITED  
of South Quay Plaza, 183 Marsh Wall, London,  
and W. GREEN & SON LIMITED  
of St. Giles Street, Edinburgh,  
and printed in Great Britain  
by The Bath Press,  
Bath, Avon.*

ISBN This Volume only : 0 421 42630 6  
As a set : 0 421 42640 3

*All rights reserved.  
No part of this publication may be  
reproduced or transmitted, in any form  
or by any means, electronic, mechanical, photocopying,  
recording or otherwise, or stored in any retrieval  
system of any nature, without the written permission  
of the copyright holder and the publisher, application  
for which shall be made to the publisher.*

**CURRENT LAW STATUTES ANNOTATED**  
**1989**

**VOLUME THREE**

AUSTRALIA

The Law Book Company Ltd.  
Sydney : Melbourne : Brisbane : Perth

CANADA

The Carswell Company Ltd.  
Toronto : Calgary : Vancouver : Ottawa

INDIA

N. M. Tripathi Private Ltd.  
Bombay  
*and*  
Eastern Law House Private Ltd.  
Calcutta  
M.P.P. House  
Bangalore

ISRAEL

Steimatzky's Agency Ltd.  
Jerusalem : Tel Aviv : Haifa

PAKISTAN

Pakistan Law House  
Karachi

## CONTENTS

<i>Chronological Table</i>	. . . . .	page v
<i>Index of Short Titles</i>	. . . . .	vii

## CHRONOLOGICAL TABLE

### VOLUME THREE

#### STATUTES

- c.32. Fair Employment (Northern Ireland) Act 1989
- 33. Extradition Act 1989
- 34. Law of Property (Miscellaneous Provisions) Act 1989
- 35. Continental Shelf Act 1989
- 36. Brunei Appeals Act 1989
- 37. Football Spectators Act 1989
- 38. Employment Act 1989
- 39. Self-Governing Schools etc. (Scotland) Act 1989
- 40. Companies Act 1989

**FAIR EMPLOYMENT (NORTHERN IRELAND) ACT 1989\***

(1989 c. 32)

## ARRANGEMENT OF SECTIONS

## PART I

THE FAIR EMPLOYMENT COMMISSION, THE FAIR EMPLOYMENT TRIBUNAL AND THE FUNCTIONS  
OF THE COMMISSION AND THE TRIBUNAL*The Fair Employment Commission for Northern Ireland*

SECT.

1. The Fair Employment Commission.

*The Fair Employment Tribunal for Northern Ireland*

2. Constitution of the Tribunal.
3. The President and Vice-President.
4. Remuneration and allowances.
5. Tribunal procedure.
6. Complaints involving matters within the jurisdiction of industrial tribunal.

*Code of practice*

7. Code of practice for the promotion of equality of opportunity.
8. Contents of the code.
9. Approval of code.

*Identification of patterns and trends of employment, etc.*

10. Survey of employment etc., patterns.

*Investigation of practices*

11. Investigation of employment etc., practices.

*Undertakings or directions for promoting equality of opportunity*

12. Undertaking following investigation under section 11.
13. Voluntary undertakings.
14. Directions under sections 12 and 13.

*Appeals and legal proceedings in relation to undertakings and directions*

15. Appeal to Tribunal against directions under section 12 or 13.
16. Order of Tribunal to enforce undertaking or directions.
17. Failure to comply with order of Tribunal.
18. Appeal to Court of Appeal from certain decisions of Tribunal.

*Confidentiality of information*

19. Confidentiality of information.

*General*

20. Meaning of "equality of opportunity".
21. Interpretation of Part I.

---

\* Annotations by P. L. Bateson, LL.B., LL.M., Barrister-at-Law and Deshpal Panesar, Research Assistant.

## PART II

## NEW DUTIES OF EMPLOYERS IN RESPECT OF THEIR WORKFORCES

*The register*

SECT.

- 22. The register of concerns in which people are employed.
- 23. Employers to apply for registration.
- 24. Rectification of the register.

*Public authorities*

- 25. Power to specify public authorities by order.
- 26. Certain public authorities to be treated as employers.

*Monitoring the workforce*

- 27. Monitoring returns.
- 28. Regulations as to monitoring.
- 29. Monitoring applicants.
- 30. Confidentiality of monitoring information.

*Review of recruitment, training and promotion practices*

- 31. Periodic reviews by employers.

*Enquiries, undertakings and directions*

- 32. Enquiries by the Commission.
- 33. Undertakings in connection with monitoring and reviews.
- 34. Directions.
- 35. Application of sections 15 to 18.

*Goals and timetables*

- 36. Notices about goals and timetables.
- 37. Power to secure further undertakings or issue further directions.

*Employers in default and connected persons: restrictions on dealing with them or giving them financial assistance*

- 38. Employers in default: notice stating they are not qualified.
- 39. Notice stating that connected and other persons are not qualified.
- 40. Appeals against decisions of Tribunal under sections 38 and 39.
- 41. Restriction on execution of works, etc. by unqualified persons.
- 42. Enforcement at instance of Commission and actions for breach of duty.
- 43. Denial of financial assistance to unqualified persons.

*General*

- 44. Offences by bodies corporate and partnerships.
- 45. Additional powers of Commission to obtain information.
- 46. Procedure in case of default by Crown bodies.
- 47. Interpretation of Part II.
- 48. Index to Part II.

## PART III

## DISCRIMINATION

- 49. Meaning of "discrimination".
- 50. Complaints of unlawful discrimination.
- 51. Power of High Court to revise contracts.
- 52. Discriminatory advertisements.
- 53. Provision of training.
- 54. Redundancy.
- 55. Measures to encourage applications etc. from under-represented community.



## PART IV

## MISCELLANEOUS AND GENERAL

## SECT.

- 56. Restriction on proceedings for contravention of legislation.
- 57. Regulations and orders.
- 58. Meaning of "affirmative action".
- 59. Minor and consequential amendments and repeals.
- 60. Citation, commencement and extent.

## SCHEDULES:

- Schedule 1—Conduct of investigations by the Commission.
- Schedule 2—Minor and consequential amendments.
- Schedule 3—Repeals.

An Act to establish a Fair Employment Tribunal for Northern Ireland and offices of President and Vice-President of the Industrial Tribunals and the Fair Employment Tribunal; to amend the Fair Employment (Northern Ireland) Act 1976; to make further provision with respect to the promotion of equality of opportunity in employments and occupations in Northern Ireland between persons of different religious beliefs; and for connected purposes. [27th July 1989]

## PARLIAMENTARY DEBATES

*Hansard*, H.C. Vol. 143, col. 1110; Vol. 146, col. 196; Vol. 153, col. 1155; Vol. 157, col. 1092; H.L. Vol. 509, col. 795; Vol. 510, cols. 100, 147, 623, 998.

The Bill was considered in Standing Committee B from February 7, 1989 to March 21, 1989.

## INTRODUCTION AND GENERAL NOTE

Unemployment has always been a contentious subject. Governments are continuously aware that an unsuccessful employment policy will be taken as a sign of the government's failure to provide a fundamental right to its population, work. Thus in Northern Ireland where the highest unemployment rate in Britain is compounded with massive under-representation of Catholics in the workforce, effective fair employment law is, as described by Lord Lyell, "The crucial objective of equality of opportunity is first, to create such an opportunity in employment; secondly, to secure fair participation in employment and, thirdly, to ensure a more representative distribution of jobs between the communities. That very positive objective is what we are discussing in this clause and in the entire Bill." (*Hansard*, H.L., Vol. 510, col. 113; July 11, 1989).

Much was hoped for from the Fair Employment (Northern Ireland) Act 1976 which was a result of the Van Straubenzee report (Report and Recommendations of the Working Party on Discrimination in the Private Sector of Employment under the Chairmanship of Mr. W. Van Straubenzee; Belfast, H.M.S.O. 1973). (An excellent account of the 1976 Act is found in the *Encyclopaedia of Northern Ireland Labour Law and Practice*, Vol. I, s.3; published by the Labour Relations Agency for Northern Ireland). This Act created a Fair Employment Agency for Northern Ireland, made provisions to enable registration of Equal Opportunity Employers and Organisations, made provision to monitor patterns and trends of employment, designated certain acts as unlawful discrimination and gave a right of action in the county court in respect of unlawful discrimination. The 1976 Act was limited, however, in that it was largely voluntary for employers and other organisations to subscribe to the principle of equality of opportunity, it is negative in form in terms of what constitutes unlawful discrimination and does not allow for affirmative action. The principles underlying the 1976 Act were entirely laudable but it was soon realised that it contained insufficient provisions to effectively encourage equality of opportunity. This was graphically illustrated by the Act's total failure to redress the imbalance in unemployment trends. Catholic male unemployment remains two and a half times greater than Protestant male unemployment. Criticism of the 1976 Act culminated in the 1987 report of the Standing Advisory Commission on Human Rights which called for urgent reform of the Fair Employment Law.

It is important to note that the Fair Employment (Northern Ireland) Act 1989 amends and does not replace the 1976 Act and as such the two should be read together.

The 1989 Act represents not only a strengthening of the 1976 Act but a change in the philosophy underlying it. The 1989 Act introduces two new bodies with extended powers of

scrutiny and direction of employment policy. They are the Fair Employment Commission for Northern Ireland and the Fair Employment Tribunal for Northern Ireland. The Fair Employment Agency and the Fair Employment Appeals Board are abolished. The Commission and the Tribunal are not reliant on voluntary co-operation as were the bodies established under the 1976 Act. All but a few of the rules, regulations and duties imposed by the Act are enforceable by a fine of up to £2,000 (level 5 of the standard scale) and a *per diem* fine of £200 on conviction for continued non-compliance. Directives from the Commission or the Tribunal carry even greater financial and criminal sanctions to ensure compliance. Non-compliance can be punished by a penalty of up to £30,000 or certification to the High Court. Practical and effective enforcement has been given necessary emphasis in the 1989 Act. It is hoped that such measures will ensure that the laudable principles of the 1976 Act can be put into practice.

In addition to increased sanctions for non-compliance the bodies established by the 1989 Act have considerably greater powers than their predecessors. The Commission, in relation to the powers which the Fair Employment Agency had to monitor employment trends, can now enforce monitoring returns with sanctions, investigate in detail how those returns were compiled and issue and enforce goals for improvement. A powerful weapon in the Commission's armoury is the ability to serve and publicise notice that an employer is discriminating and thus bar that employer from receiving public contracts. The publicity alone should be a powerful incentive to change.

The Tribunal, as well as acting in an appellate capacity to the Fair Employment Commission, can also determine individual cases of discrimination. The Tribunal may order penalties or damages of up to £30,000 or may certify to the High Court. Thus the bodies entrusted with establishing equality of opportunity have potent and practical weapons to call upon that they did not under the 1976 Act.

The 1989 Act is divided into four parts.

Pt. I replaces the Fair Employment Agency (established under the 1976 Act) with the Commission and establishes its powers to survey patterns and trends of employment. This is done by means of monitoring returns (filled out by employers) and investigative powers to seek further information. The Commission is also given the duty of promoting equality of opportunity. To aid itself in this task the Commission is given the right to take and enforce undertakings and to give directions enforceable with fines and criminal penalties.

Pt. II imposes duties on employers to monitor the composition of their workforces and regularly review their employment practices. This part of the Act also lays down procedures for the enforcement of these duties including restriction in dealing with employers on whom notice of default has been served, fines and the denial of financial assistance.

Pt. III amends the meaning of discrimination laid down in the 1976 Act, extending its definition to cover indirect discrimination, a concept well established in the area of sex discrimination and racial discrimination law. Pt. III also transfers the power to determine individual complaints of discrimination to the Fair Employment Tribunal and protects affirmative action schemes from prosecution.

Pt. IV contains miscellaneous provisions and general provisions.

#### ABBREVIATIONS

1976 Act	: The Fair Employment (Northern Ireland) Act 1976.
1989 Act	: The Fair Employment (Northern Ireland) Act 1989.
the Code	: The Code of Practice.
the Commission	: The Fair Employment Commission for Northern Ireland.
the Tribunal	: The Fair Employment Tribunal for Northern Ireland.

## PART I

### THE FAIR EMPLOYMENT COMMISSION, THE FAIR EMPLOYMENT TRIBUNAL AND THE FUNCTIONS OF THE COMMISSION AND THE TRIBUNAL

#### *The Fair Employment Commission for Northern Ireland*

#### **The Fair Employment Commission**

1.—(1) The body corporate established by section 1 of the Fair Employment (Northern Ireland) Act 1976 with the name of the Fair Employment Agency for Northern Ireland shall be known instead as "the Fair Employment Commission for Northern Ireland"; and in this Act the Fair Employ-

ment Commission for Northern Ireland is referred to as "the Commission".

(2) In section 1(1) of the Fair Employment (Northern Ireland) Act 1976 (general duties of Commission) after paragraph (a) there is inserted—

"(aa) promoting affirmative action;"

(3) References in the Fair Employment (Northern Ireland) Acts to the Commission include, in relation to any time before the commencement of subsection (1) above, references to the Fair Employment Agency for Northern Ireland.

#### GENERAL NOTE

The effect of this section is to amend s.1 of the 1976 Act and the two should therefore be read together.

#### *Subs. (1)*

This subsection replaces the Fair Employment Agency created by the 1976 Act with the Fair Employment Commission. Subsequently any references to the Fair Employment Agency are to be construed as referring to the Fair Employment Commission (subs. (3)).

The Commission has, under subs. (2), further to the powers laid down in s.1 of the 1976 Act, the additional duty of promoting affirmative action. Affirmative action is defined in s.58(1) as:

"action designed to secure fair participation in employment by members of the Protestant or members of the Roman Catholic community in Northern Ireland by means including

- (a) the adoption of practices encouraging such participation and
- (b) the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation."

### *The Fair Employment Tribunal for Northern Ireland*

#### **Constitution of the Tribunal**

2.—(1) The Department shall by regulations provide for the establishment of a tribunal, to be known as the Fair Employment Tribunal for Northern Ireland (in this Act referred to as "the Tribunal"), to exercise the jurisdiction conferred on it by the Fair Employment (Northern Ireland) Acts.

(2) Regulations under subsection (1) above may provide for the jurisdiction of the Tribunal to be exercised by a single tribunal or by two or more tribunals.

(3) The Fair Employment Appeals Board established by section 4 of the Fair Employment (Northern Ireland) Act 1976 is hereby abolished.

(4) Any appeal that has been made to the Fair Employment Appeals Board under Part II of the Fair Employment (Northern Ireland) Act 1976 and has not been determined before the commencement of this section shall be determined by the Tribunal; and the provisions of that Part relating to appeals have effect in relation to such an appeal as if references to the Board were references to the Tribunal.

#### GENERAL NOTE

This section establishes the Fair Employment Tribunal which will take over the appellate jurisdiction of the Fair Employment Appeals Board (abolished by s.2(3)). The Tribunal as well as hearing appeals from the Commission, will determine individual cases of discrimination under the powers conferred upon it in Part III of the 1976 Act as amended by Part III of this Act.

The Tribunal and the considerable punitive powers conferred upon it by Part III of this Act represents the shift in emphasis towards enforcement of fair employment policy and away from the voluntary principles that undermined the effectiveness of the 1976 Act.

**The President and Vice-President**

3.—(1) There shall be—

- (a) a President of the Industrial Tribunals and the Fair Employment Tribunal (in this Part of this Act referred to as “the President”),
- (b) a Vice-President of the Industrial Tribunals and the Fair Employment Tribunal (in this Part of this Act referred to as “the Vice-President”), and

(c) a panel of chairmen of the Fair Employment Tribunal, who shall each be appointed by the Lord Chancellor and shall exercise the functions respectively conferred on them by or under the Fair Employment (Northern Ireland) Acts or any other enactment.

(2) A person is not qualified for appointment under subsection (1) above unless he is a barrister or solicitor of not less than seven years' standing.

(3) The President and Vice-President may each resign his office at any time by notice in writing to the Lord Chancellor and shall each vacate his office at the end of the completed year of service in which he attains the age of seventy-two.

(4) If, in the opinion of the Lord Chancellor, the President or Vice-President is unfit to continue in office or is incapable of performing his duties, the Lord Chancellor may revoke his appointment.

(5) A person appointed under subsection (1)(c) above to a panel of chairmen shall hold and vacate office as provided by or under regulations under section 2(1) of this Act.

(6) The functions of the President or Vice-President may, if he is for any reason unable to act or during a vacancy in his office, be discharged by a person nominated for that purpose by the Lord Chancellor.

(7) Regulations under section 2(1) of this Act may provide for specified functions of the President and Vice-President (including functions under sections 6 and 17 of this Act) to be exercised in specified circumstances by a person appointed, under subsection (1)(c) above, to a panel of chairmen.

(8) Until the first appointment under subsection (1)(a) above takes effect, the President of the Industrial Tribunals shall be the President.

(9) For Article 30(2)(a) of the Industrial Training (Northern Ireland) Order 1984 (remuneration of the President of the Industrial Tribunals) there is substituted—

“(a) the President and Vice-President of the Industrial Tribunals and the Fair Employment Tribunal;”.

**GENERAL NOTE**

This section creates the offices of President and Vice-President of the Fair Employment Tribunal and lays down the rules as to how they shall be appointed as well as their terms of office.

When first drafted this section provided for the President to be appointed by the Department of Economic Development. However, both in the House of Commons and the House of Lords it was mooted that it was wholly inappropriate for the president of an independent tribunal to be appointed by the Department of Economic Development.

First, it was thought that if employers were to be fully confident of the impartiality of the Tribunal it was vital that the President of the Tribunal be independent from the Department of Economic Development, or indeed from any Northern Ireland government department. However unfounded such fears of covert government influence might be it was considered that public confidence in the integrity of the Tribunal was paramount. Secondly, the post of President of the Tribunal is a senior judicial one since the only appeal against his decision is on matters of law to the Court of Appeal. It was thought that only the Lord Chancellor's department had the necessary knowledge of solicitors' and barristers' ability, to make such an appointment.

Thus the Lord Chancellor's department, having both the prerequisite knowledge of barristers' and solicitors' ability and relative impartiality from government influence, was nominated to appoint the President and Vice-President of the Tribunal.

## Remuneration and allowances

### 4. The Department may pay—

- (a) to members of the Tribunal, other than the President and Vice-President, such remuneration, fees and allowances, and
- (b) to any other persons, such allowances for the purposes of, or in connection with, their attendance at the Tribunal,

as the Department may, with the consent of the Department of Finance and Personnel, determine.

## Tribunal procedure

5.—(1) The Department may by regulations make such provision as appears to it to be necessary or expedient with respect to proceedings before the Tribunal.

### (2) The regulations may in particular include provision—

- (a) for determining by which tribunal any appeal, question or complaint is to be determined where the jurisdiction of the Tribunal is being exercised by more than one tribunal,
- (b) for parties to proceedings to be represented by such persons as may be determined by or under the regulations,
- (c) for requiring persons to attend to give evidence and produce documents,
- (d) as to the admissibility of evidence,
- (e) for authorising the administration of oaths to witnesses,
- (f) for granting to any person such discovery or inspection of documents or right to further particulars as might be granted by a county court,
- (g) for enabling an officer of the Tribunal to determine matters arising prior to a hearing,
- (h) prescribing forms to be completed by the parties to a complaint under Part III of the Fair Employment (Northern Ireland) Act 1976 before any hearing before the Tribunal,
- (j) for enabling the Tribunal to review its decisions, and revoke or vary its orders or awards, in such circumstances as may be determined in accordance with the regulations,
- (k) for the award of costs or expenses,
- (l) for taxing or otherwise settling any such costs or expenses (and, in particular, for enabling such costs to be taxed in the county court), and
- (m) for the registration and proof of determinations of the Tribunal.

### (3) The Tribunal shall give reasons for its decisions.

(4) In relation to proceedings on a complaint under Part III of the Fair Employment (Northern Ireland) Act 1976, the regulations shall include provision for postponing the hearing of a complaint for such period as may be determined in accordance with the regulations for the purpose of giving an opportunity for the complaint to be settled by way of conciliation and withdrawn.

(5) Without prejudice to subsection (1) above, the regulations may enable the Tribunal to sit in private for the purposes of—

- (a) hearing evidence which in the opinion of the Tribunal relates to matters of such a nature that it would be against the interests of national security, public safety or public order to allow the evidence to be given in public,
- (b) hearing evidence from any person which in the opinion of the Tribunal is likely to consist of—

(i) information which he could not disclose without contravening a prohibition imposed by or under any enactment,

(ii) information which has been communicated to him in confidence or which he has otherwise obtained in consequence of the confidence reposed in him by another person,

(iii) information the disclosure of which would cause substantial injury to any undertaking of his or in which he works, or

(iv) information the disclosure of which would create a substantial risk that he or another individual would be subject to physical attack or sectarian harassment.

(6) The regulations may include provision authorising or requiring the Tribunal, in circumstances specified in the regulations, to send notice or a copy of any document so specified relating to any proceedings before the Tribunal, or of any decision, order or award of the Tribunal, to any person or body so specified.

(7) The Arbitration Act (Northern Ireland) 1937 does not apply to any proceedings before the Tribunal.

(8) Any person who without reasonable excuse fails to comply with—

(a) any requirement imposed by the regulations by virtue of subsection (2)(c) above, or

(b) any requirement with respect to the discovery or inspection of documents imposed by the regulations by virtue of subsection 2(f) above,

is guilty of an offence.

(9) A person guilty of an offence under subsection (8) above—

(a) is liable on summary conviction to a fine not exceeding level 5 on the standard scale, and

(b) if without reasonable excuse the failure continues after conviction, is liable on a second or subsequent summary conviction to a fine not exceeding one-tenth of level 5 on the standard scale for each day on which the failure continues.

(10) Where the Tribunal sits in private in accordance with any provision included in the regulations by virtue of subsection (5) above, the Tribunal may make an order prohibiting the disclosure of specified information, except so far as the disclosure is necessary—

(a) for the purposes of the proceedings,

(b) for communicating to any person the decision of the Tribunal in the proceedings and for communicating the reasons for the decision to any person to whom the Tribunal is required by the regulations to communicate them, or

(c) for the purposes of any criminal proceedings or to comply with the order of a court.

(11) If a person discloses any information in contravention of an order of the Tribunal under subsection (10) above, he is guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale.

#### GENERAL NOTE

S.5 empowers the Department of Economic Development to make regulations with respect to the running of the Fair Employment Tribunal. Non-compliance with these regulations can result in a fine of up to £2,000 (level 5 of the standard scale). A *per diem* fine of one tenth of that amount is enforceable for continued failure. These fines were introduced after the White Paper stage of the Act and are indicative of the emphasis placed on practical enforcement in the Act.

Subs. (2) establishes the legality of all procedures necessary to the Tribunal to hear appeals including the power to vary its orders. The Tribunal must, under subs. (3), give the reasons for its decisions and, under subs. (4), allow opportunity for arbitration.

#### Subs. (5)

The most contentious aspect of s.5 is the right of the Tribunal to hear cases in private as set out in this subsection. This section provoked much opposition at the committee stages

of the Act from members of Parliament and members of the House of Lords fearing that employers might use it to avoid one of the most important weapons that the Act could bring to bear; publicity. However in light of the sensitivity of the situation in Northern Ireland it was felt that such a provision was necessary to the practical effectiveness of the Act lest discrimination go undetected because employers were too intimidated to speak out.

### **Complaints involving matters within the jurisdiction of industrial tribunal**

6.—(1) This section applies where a complaint has been made to the Tribunal under Part III of the Fair Employment (Northern Ireland) Act 1976 and it appears to the President or Vice-President that the complaint is one in respect of which—

(a) a complaint could be made to an industrial tribunal on the ground that—

(i) the complainant has been unfairly dismissed within the meaning of Part III of the Industrial Relations (Northern Ireland) Order 1976, or

(ii) a person has committed an act of discrimination against the complainant which is unlawful by virtue of Part III of the Sex Discrimination (Northern Ireland) Order 1976, or

(b) a complaint has been made to an industrial tribunal on that ground, but the proceedings under the Industrial Relations (Northern Ireland) Order 1976 or the Sex Discrimination (Northern Ireland) Order 1976 have not been disposed of.

(2) Where this section applies and the President or Vice-President considers that any matters which would otherwise fall to be determined by an industrial tribunal could appropriately be heard and determined by the Tribunal, he may direct that those matters shall be so heard and determined.

(3) For the purposes of complying with a direction under subsection (2) above the Tribunal shall have the jurisdiction, and may exercise all the powers, of an industrial tribunal.

#### **GENERAL NOTE**

This section confers the power on the Fair Employment Tribunal to hear complaints that would normally be heard by an industrial tribunal. Where a complainant brings a complaint before the Tribunal that would usually be heard by an industrial tribunal (e.g. a claim of sexual discrimination) the Tribunal, if the President or Vice-President deems it appropriate, may hear and determine these matters. When hearing such complaints the tribunal can exercise all the powers and jurisdiction of an industrial tribunal.

### *Code of practice*

#### **Code of practice for the promotion of equality of opportunity**

7.—(1) The Commission shall maintain a code of practice for the promotion of equality of opportunity and publish the code as for the time being in force.

(2) The Commission shall take such steps as it considers necessary to publicise the code.

(3) The Commission and the Department shall each take such steps as they consider necessary to encourage employers and vocational organisations in Northern Ireland to adopt the policies and practices recommended in the code.

(4) Where the Commission, in carrying out its functions under this Act, is considering whether or not action is required for promoting equality of opportunity, it shall have such regard to the recommendations contained in the code as it considers proper in all the circumstances.

(5) A failure on the part of any person to observe any provision of the code shall not of itself render him liable to any proceedings; but if, in any

proceedings under the Fair Employment (Northern Ireland) Acts before the Tribunal, any provision of the code appears to the Tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question.

#### GENERAL NOTE

S.7 is one of the most important sections of the Act. It provides for the publication of a Code of Practice for the promotion of equality of opportunity. This Code will in effect be the primary form of guidance to employers in employment policy and thus the front line defence against discrimination.

Under subs. (5) failure to observe any provision of the Code does not constitute an offence. This lack of mandatory compliance caused considerable dissent at the Committee stage of the Act in the Commons. A non statutory code, it was argued, could easily be circumvented by employers and was reminiscent of the voluntary and largely ineffective measures in the 1976 Act.

Rather than a list of mandatory rules, the Code is intended as an easily amended and flexible guide to employers as to how they can improve their employment practices. The Code is intended as an aid to complying with the duty not to discriminate enshrined in the Act. This approach is intended to allow employers to follow those provisions appropriate to their case. If the provisions were statutory they would firstly not be appropriate in all cases and any amendment would be extremely time consuming requiring an Act or an Order in Council. This approach establishes a detailed code of guidance under parliamentary scrutiny that remains relatively easy to amend.

Whereas the Code is not mandatory, the principles it seeks to promote are and are enshrined in the legislation (s.46 of the 1989 Act and s.16 of the 1976 Act). Furthermore the Code will be taken into account by the Tribunal when considering whether employers have been discriminating, and any part can be given statutory force by inclusion in a Tribunal directive.

#### Contents of the code

8.—(1) The guide to good manpower policy and practice having effect under section 5 of the Fair Employment (Northern Ireland) Act 1976 at the commencement of section 7 of this Act shall be the first code of practice under that section.

(2) Subject to section 9 of this Act, the Commission may from time to time revise the whole or any part of the code.

(3) The Commission shall exercise its powers under this section so that the code contains such practical guidance as the Commission thinks fit for the promotion of equality of opportunity, including the elimination of discrimination.

(4) If the Commission proposes to revise the code, it shall publish a draft of the revised code or of the amendments to the existing code.

(5) The Commission shall consider any representations made to it about the draft and may modify the draft accordingly.

(6) In the course of preparing any draft for publication under subsection (4) above the Commission shall consult—

- (a) with the Standing Advisory Commission on Human Rights,
- (b) with such organisations appearing to it to be representative of employers, of organisations of workers and of persons engaged in occupations in Northern Ireland as it thinks fit, and
- (c) with such other persons as it thinks fit.

#### GENERAL NOTE

Under this section the Guide to Good Manpower Policy and Practice established under s.5 of the 1976 Act has effect as the first Code of Practice established under s.7 of the 1989 Act. The Fair Employment legislation has a dual role. It surveys employment trends and encourages and advises how any discriminatory practices revealed by such surveillance can be remedied. The Guide to Good Manpower Policy and Practice is a fit starting point for such a Code.

The Guide was produced by the Department of Manpower Services after consultation with the Fair Employment Agency, the Standing Advisory Commission on Human Rights



and representatives of employers and employees. It includes recommendations for recruitment, interview procedure, selection for promotion and guidelines on how to deal with internal complaints. The Guide's objective is to indicate to the employer how discriminatory employment policy can be avoided and to encourage a merit based recruitment process.

Under this section revision of the Code (as the Guide is now designated) entails mandatory consultation with the Standing Advisory Commission on Human Rights and representatives of employers and employees. These parties were instrumental in the reform of the 1976 Act, therefore this consultative process no doubt ensures the relevance of any revision.

Consultation with such bodies has already taken place and a draft Guide to Effective Practice/Code of Practice has been issued for consultation by the Department of Economic Development. The introduction to the draft revised Code reiterates much of what was said by Lord Lyell in the House of Lords:—

"Equality of opportunity in employment is a political priority, a social necessity and an economic imperative. It is essential to good personnel management; it promotes fairness and business efficiency; it ensures that employers make the best possible use of available manpower; and it gives all those in, or seeking employment an equal opportunity to demonstrate their talents and abilities." (Religious Equality of Opportunity in Employment—Draft Guide to Effective Practice/Code of Practice issued for consultation by the Department of Economic Development, Section 1.1.1.).

The draft revised Code continues that equality of opportunity requires both action by employers and co-operation from other interests. The Code is stated to be of crucial importance for a number of reasons. It states that "though a failure to observe any provision of the Code does not, of itself, leave a person open to prosecution:

- (a) the Commission will have such regard as it considers proper to the Code in considering whether or not action is needed to promote equality of opportunity;
- (b) the Commission can issue legally enforceable directions to employers based on the guidance in the Code;
- (c) the Commission will take whatever steps it considers necessary to publicise the Code; and both the Commission and the Department will take whatever steps they consider necessary to encourage employers and vocational organisations to adopt the policies and practices recommended in the Code;
- (d) employers must have regard to the Code in carrying out their compulsory views of recruitment, training and promotion practices;
- (e) the Fair Trading Tribunal must take into account any provision in the Code which it considers relevant to any questions arising in proceedings before it." (Section 1.2.2.).

The draft revised Code gives a synopsis of the background to and the key provisions of the 1989 Act, deals with the role of the Fair Employment Commission and the Fair Employment Tribunal, the role of employers and their responsibilities and duties, the concept of indirect discrimination, the role of trade unions, their representatives and their members and their responsibilities and the role of employees and their responsibilities. It also makes provision relating to the voluntary agreement between employers and appropriate trade unions by way of a declaration of protection for the individual employee or groups of employees. Finally, it deals with the role of employment agencies.

## Approval of code

9.—(1) This section applies where the Commission determines to proceed with the revision of the code of practice after publishing a draft under section 8(4) of this Act.

(2) The Commission shall send a draft of the revised code to the head of the Department or, if no head of the Department stands appointed for the time being, to the Secretary of State.

(3) Where the draft of the revised code is sent to the head of the Department, he shall—

- (a) if he approves of it, lay it before the Northern Ireland Assembly, and
- (b) if he does not approve of it, publish details of his reasons.

(4) If, within the period of forty days beginning with the day on which the draft of the revised code is laid before the Assembly, the Assembly so resolves, no further proceedings shall be taken on it, but without prejudice to the laying before the Assembly of a new draft.

(5) Section 41(3) of the Interpretation Act (Northern Ireland) 1954 (laying of statutory documents) shall have effect as if the draft of the