



FAIR EMPLOYMENT

In Northern Ireland

Code of Practice

NB Please see important notice on Page 2 regarding changes to Fair Employment legislation since this Code was first published

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IMPORTANT NOTICE - CHANGES TO THE FAIR EMPLOYMENT LEGISLATION

Fair employment legislation has changed significantly since this Code of Practice was first published. While much of the good practice outlined in the Code remains valid, it must be interpreted in the context of the revised legislation. Readers should ensure that they take advice from the Equality Commission (or another professionally qualified source) about important legislative changes since this Code was published.

The Fair Employment Acts 1976 and 1989, which outlawed discrimination in employment on grounds of religious belief and political opinion, were repealed and their provisions re-enacted, brought together and added to in the Fair Employment and Treatment (Northern Ireland) Order 1998, which came into operation on 1 March 1999. The 1998 Order was subsequently amended by the Fair Employment and Treatment Order (Amendment) Regulations (NI) 2003 to implement the EU Framework Employment Directive.

All references in this Code to the Fair Employment Acts 1976 and 1989 now relate to the Fair Employment and Treatment Order 1998, as amended. Also, the powers and functions of the Fair Employment Commission (referred to in the Code) were taken over by the Equality Commission for Northern Ireland in October 1999.

A number of 1998 and 2003 changes have implications for the advice given as regards employment in this Code of Practice and a few of these changes are highlighted below. This is not an exhaustive list nor is it a detailed statement of the law, and further information and guidance can be provided by the Equality Commission – contact Enquiry line 028 90 890 890.

- Employers are now permitted to recruit specifically from those who have not been in employment for a specified period of time, which should be borne in mind in considering the main exceptions outlined in Chapter 7 of this Code.
- Of particular relevance to that part of Chapter 6 which deals with Affirmative Action measures is a provision in the amended legislation permitting employers to undertake training particularly targeted on members of an under-represented religious community in certain circumstances, and following approval by the Equality Commission.
- The 1998 Order also introduced changes to the Monitoring provisions and new Monitoring Regulations were published (effective from January 2001).
- Other key changes introduced in 1998 include the extension of legal protection against discrimination to the provision of goods, facilities and services and the sale, letting or management of premises, including land; and discrimination by partnerships and by, or in relation to, barristers.
- The 2003 amendments to the 1998 Order included changes to the definition of indirect discrimination and the inclusion of an explicit definition of harassment.

Further information and advice

Employers can get further information on any aspect of the law and latest good practice advice on fair employment matters (and on the legislation covering sex, race, disability, sexual orientation and age discrimination) from the Equality Commission. Please contact our Enquiry line – 028 90 890 890. The Commission's advice is free and confidential.

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Introduction

1.1 COLLECTIVE AND COMMON ACTION NEEDED

1.1.1 Equality of opportunity in employment is a basic right and must be given the priority it deserves by all involved in the labour market in Northern Ireland. As such, it requires action by employers and all other interests.

1.1.2 Employers need to:

- identify any practices which do not provide equality of opportunity;
- take remedial action to open out recruitment, training and promotion opportunities;
- ensure that selection criteria are entirely job-related; and
- select for employment or promotion on the basis of merit.

They should also work with the Fair Employment Commission¹ in its activities.

1.1.3 Other groups and individuals need to:

- recognise the essential importance of equality of opportunity in the workplace;
- work with employers in actively promoting equality of opportunity and eradicating discrimination; and
- support the Fair Employment Commission in its activities.

1.1.4 In anticipation of the requirements of the Fair Employment (NI) Act 1989, many employers in the province have already addressed fair employment as an integral part of their personnel procedures. Of course the practice of fair employment needs to be continuously reinforced and must be seen to be enforced when necessary, if it is to be fully effective. This Code, and the legislation to which it relates, are intended to assist in ensuring both these objectives.

1.2 STATUS AND CONTENT

1.2.1 This Code replaces the "Guide to Effective Practice" issued by the Department of Economic Development ("the Department") in September 1987. From 1 January 1990 this becomes the first Code of Practice under the Fair Employment (Northern Ireland) Act 1989 ("the Act"), which repealed and amended parts of the Fair Employment (Northern Ireland) Act 1976 ("the 1976 Act"). The Fair Employment Commission ("the Commission") can subsequently revise this Code in whole or in part.

¹ The duties and functions of the Fair Employment Commission were taken over by the Equality Commission for Northern Ireland in October 1999

- 1.2.2 This Code of Practice is of central importance in the promotion of fair employment. Though a failure to observe any of its provisions does not, of itself, leave a person open to prosecution, the Code is given significant status under the legislation. Close regard must be paid to its provisions because:-
- (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; and also in carrying out any of its functions under the Act;
 - (b) in particular 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 reviews of recruitment, training and promotion practices;
 - (e) the Fair Employment Tribunal must take into account any provision in the Code which it considers relevant to any question arising in proceedings before it.
- 1.2.3 The Code cannot cover all the circumstances with which employers could be faced in promoting equality of opportunity. So employers should take the initiative and consult with the Commission when in any doubt or uncertainty about either their legal duties or the action they should take on the basis of the Code. Before taking such action they are encouraged to consult with recognised trade unions or workforce representatives.
- 1.2.4 Consultation between employers and the Commission, and the way it is handled, are most important. Employers will be seeking confidential and professional advice. The Commission will be able to provide it. The supply, and receipt, of such advice are central to the positive relationships that should develop between employers and the Commission. Such relationships contribute significantly to the collective promotion of equality and are mutually beneficial.
- 1.2.5 The Commission is a ready source of practical and constructive advice on the implementation of the legislation and the Code in particular work situations. All concerned with the active promotion of equality of opportunity should make use of its supportive services and resources. Enquiries should be addressed to:

Employment Development Division, Equality Commission for Northern Ireland, Equality House, 7-9 Shaftesbury Square, BELFAST BT2 7DP
Tel: 028 90 890 890 Fax: 02890 248 687 Textphone: 02890 500 589
Website: www.equalityni.org Email: information@equalityni.org

1.3 DESCRIPTION OF KEY TERMS

- 1.3.1 This Code contains a number of key terms. This list of key terms provides a brief general description with a cross-reference to the more detailed explanation within the Code.

“affirmative action”

This is a mechanism for change. The term refers to action designed to secure fair participation in employment by members of the Protestant or the Roman Catholic community by means including

- the adoption of practices encouraging such participation, and
- the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation (paras 6.5.1-6.5.23).

“catchment area”

This refers to the area from within which an employer would normally expect to recruit for the particular job in question and the proportionate distribution of both communities in that area. Its determination calls for the exercise of informed judgement by the employer and consultation with the Commission (paras 6.2.8 and 6.5.8).

“chill factor”

This term describes a problem of attitude towards, and environment within, the workplace. Members of a particular community can feel discouraged or prevented from applying for jobs in any company or undertaking perceived as being traditionally associated with the other community. The company or undertaking can feel it pointless to desist from customary and casual recruitment practices geared to a particular community on the assumption that efforts to attract the other community would be wasted. To break the circle it is necessary to change perception and habitual practice in both the community and the company or undertaking (para 6.5.10).

“disqualification”

This term refers to the fact that the Commission can serve a notice on a defaulting employer (e.g. an employer who has failed to register, failed to submit a monitoring return on time, or failed to comply with an order of the Tribunal) stating that the employer is not qualified; such a notice brings an employer within scope of the economic sanctions of loss of Government and public authority contracts and grant denial (para 3.4.2).

“fair participation”

This term is mentioned but not defined in the Act. The determination of what is fair depends on the circumstances of each particular case i.e. each specific employment situation. The term means that employers should be working continuously, as an integral part of their personnel and management functions – and especially in consultation with the Commission – to ensure that equality

of opportunity in their employment is offered to both communities. It also means that where such equality of opportunity is not being provided employers should be making sustained efforts to promote it through affirmative action measures and, if appropriate, the setting of goals and timetables. It does not mean that every job, occupation or position in every undertaking throughout Northern Ireland must reflect the proportionate distribution of Protestants and Roman Catholics in the province. That is unrealistic (paras 6.5.106.6.6).

“goals and timetables”

These are targets and measures of expectation indicating the progress that can reasonably be expected to be made over a certain period in increasing the number of Protestants or Roman Catholics (as the case may be) in a workforce or among applicants. The Commission can specify such goals and timetables. They are not quotas (paras 6.6.1-6.6.6).

“indirect discrimination”

This refers to the application of a requirement or condition equally to persons not of the same religious belief or political opinion but which (i) has a disproportionate impact; (ii) cannot be shown to be justifiable irrespective of religious belief or political opinion; and (iii) has a detrimental impact on the individual concerned (paras 7.1.1-7.1.6).

“monitoring”

This refers to establishing the community background of employees and – in the case of a public authority employer, or a private sector employer with more than 250 employees – the community background of applicants and forwarding annual monitoring returns to the Commission (paras 6.2.1-6.5.16).

“outreach training”

This term is usually found in the context of affirmative action. It refers to training measures designed to upgrade the skills of a particular under-represented group in order to enable them to compete on an equal basis for any jobs on offer (paras 6.5.13-6.5.16).

“registration”

This refers to registration with the Commission. A private sector employer with more than 25 employees must apply to the Commission for registration when the Act comes into force – 1 January 1990; a private sector employer with more than 10 employees must apply to the Commission for registration with effect from 1 January 1992 (paras 6.1.1-6.3.16).

“under-representation”

The term is used in the context of affirmative action. It reflects the fact that a particular community, whether Protestant or Roman Catholic, is not enjoying fair participation in employment. In these circumstances the community concerned can be described as “under-represented” (paras 6.5.1-6.5.22).

2. The Act: Synopsis of Background and Key Provisions

2.1 BACKGROUND

2.1.1 The Fair Employment (NI) Act 1989 reflects the Government's determination to ensure equality of opportunity in employment for both Protestants and Roman Catholics in Northern Ireland. It embraces a clear set of positive obligations and duties, primarily but not exclusively placed on employers, backed up by a tough regime of criminal penalties and sanctions for those who default on their obligations and duties. It is designed to strengthen the existing Fair Employment (Northern Ireland) Act 1976, which, though amended, is still operative.

2.2 AIMS AND KEY PROVISIONS

2.2.1 The 1976 Act had the aims of promoting equality of opportunity and eliminating discrimination. The new Act brings in four new aims:

- the active practice of fair employment by employers;
- the close and continuous audit of that practice by new and stronger enforcement agencies;
- the use of affirmative action, and goals and timetables, to remedy under-representation;
- the use of criminal penalties, and economic sanctions, to ensure good fair employment practice.

2.2.2 The key provisions of the new Act include:

- the establishment of a new Fair Employment Commission and a Fair Employment Tribunal;
- the compulsory registration of employers with the Commission;
- the compulsory monitoring of workforces and applicants;
- the compulsory review by employers of their recruitment, training and promotion practices;
- mandatory affirmative action, and the setting of goals and timetables, as directed by the Commission;
- making indirect discrimination unlawful (direct discrimination in employment on grounds of religious belief or political opinion has been unlawful since 1976);
- the imposition of both criminal penalties and economic sanctions (loss of grants and contracts) for bad practice: fines of up to £30,000 can also be imposed and this maximum can be updated in line with the value of money;

- the award of up to £30,000 compensation for individual victims of discrimination; this maximum can be updated in line with the value of money;
- the maintaining by the Commission of a Code of Practice for the promotion of equality of opportunity.

2.3 MAIN DUTIES ON EMPLOYERS

2.2.3 The Act places a duty to register (backed by criminal penalties for failure to do so) on those private sector employers with more than 25 employees (though this threshold will reduce from 25 to 10 after two years). Public authority employers will be treated as registered from the outset. The Act places new duties on both these groups.

Amongst these are:

- to monitor workforce composition;
- the review composition and recruitment, training and promotion practices (at least once every three years);
- to take affirmative action if fair participation is not being secured by members of the Protestant and the Roman Catholic communities;
- to set goals and timetables as part of affirmative action.

2.4 MAIN DUTIES AND POWERS OF THE FAIR EMPLOYMENT COMMISSION

2.4.1 The Commission's main duties are:

- to promote affirmative action as well as equality, and to work to eliminate discrimination;
- to maintain a code of Practice;
- to give advice, on request, to employers on their review of practices;
- to give advice to complainants who request it;
- to keep itself informed about individual complaint cases before the Tribunal.

2.4.2 The Commission's main powers are:

- to investigate any employer at any time;
- to issue legally enforceable directions – including affirmative action measures – and the specification of goals and timetables';
- to disqualify defaulting employers – bringing them within scope of economic sanctions;
- to audit the public sector's adherence to the contract compliance regime;
- to seek High Court injunctions to stop the placing of contracts with a disqualified employer;
- to audit employers' monitoring and review functions;
- to support individuals alleging discrimination before the Tribunal in a wide range of circumstances;

- to inform an employer – following an individual complaint before the Tribunal – that action is needed to promote equality, and to conclude a voluntary and binding undertaking with that employer;
- to seek written undertakings from employers.

2.5 MAIN POWERS OF THE FAIR EMPLOYMENT TRIBUNAL

2.5.1 In relation to individual discrimination cases the Tribunal's main powers are:

- to decide individual cases of alleged discrimination;
- to compensate individual victims of discrimination up to £30,000;
- to specify remedial action by employers to correct discrimination.

2.5.2 In relation to fair employment practices the Tribunal's powers are:

- to hear appeals from employers against directions of the Commission;
- to issue orders of enforcement;
- to impose cash penalties of up to £30,000 or certify the employer to the High Court (which has unlimited powers of fine and committal), for failure to obey its orders.

2.6 EVALUATION AND REVIEW

2.6.1 Given the high priority which Government attaches to the achievement of fair employment, the new Act will be both evaluated and reviewed. Evaluation will proceed through regular meetings between the chairman of the new Commission and the appropriate Government minister. Review will be undertaken by a high status central policy unit – the Central Community Relations Unit. It will report directly to the Secretary of State and it will consult with interested parties in conducting the review of the Act.

3. The Role of the Fair Employment Commission

- 3.1.1 The Fair Employment Commission has a crucial role in the implementation of the Act. It has extensive powers which will enable it to promote equality of opportunity in employment in ways which were not open to the former Agency.
- 3.1.2 The Commission has three general duties:
 - (a) promoting equality of opportunity in Northern Ireland;
 - (b) working for the elimination of unlawful discrimination; and
 - (c) promoting affirmative action.

3.2 POWERS OF ENQUIRY

- 3.2.1 All public authorities which are or are treated as employers, and all private sector employers with more than 25 employees (more than 10 from 1 January 1992) are required to monitor their workforce and submit annual returns to the Commission. When a monitoring return is submitted to the Commission it will be closely scrutinised and the Commission may require the employer to elaborate on the manner in which the return was compiled. Where necessary it has the power to direct the employer to make improvements in, or additions to, a monitoring return.
- 3.2.2 In the case of an employer's review of his/her recruitment, training and promotion practices the Commission again has power to enquire into the way in which the review was conducted and to issue directions regarding improvements to the review or the time when it is next to be undertaken.
- 3.2.3 The Commission inherits all the powers of the Fair Employment Agency in relation to the identification of patterns and trends of employment and the investigation of practices.

3.3 AFFIRMATIVE ACTION AND GOALS AND TIMETABLES

- 3.3.1 The promotion of affirmative action is a significant new duty for the Commission and provides it with an effective tool to secure change. An employer who embarks upon affirmative action must consider the setting of goals and timetables as a benchmark against which progress may be measured. In addition the Commission can itself set and, where necessary, reset goals and timetables. It can also make enquiries from time to time about the progress which the employer is making in achieving the goals and timetables and can require the employer to disclose such information to the Commission (although to avoid undue burdens on employers such requests cannot be made more frequently than once every six months).

3.3.2 The Act makes specific provision for affirmative action training, and for measures to encourage applications from an under-represented community. To aid an under-represented group the Commission can direct training to take place at a particular location in Northern Ireland, or for a particular class of persons (provided that selection criteria are not based on religious belief or political opinion); and it can, for example, direct contacts by employers with specific schools in order to encourage a greater flow of applicants from an under-represented community.

3.3.3 Where an employer undertakes affirmative action training for non-employees, is directed to do so by the Commission, or ordered to do so by the Tribunal, Government would be prepared to consider how it might assist through its network of training arrangements.

3.4 REGULATION OF BEST PRACTICE

3.4.1 The Commission has a number of other duties which are intended to encourage the adoption of best employment equality practice. Amongst these are the duty to:-

- (a) maintain a Code of Practice, i.e. to revise this document, having consulted with the Standing Advisory Commission on Human Rights, employers' organisations and workers' organisations etc;
- (b) advise employers who seek its guidance on the conduct of their regular review of composition and recruitment, training and promotion practices;
- (c) provide legal assistance to individual complainants in a wide range of circumstances;
- (d) keep itself informed about proceedings before the Tribunal so that it can form an opinion that equality of opportunity is not being provided and inform the person concerned of its opinion – this allows the person concerned to give a written undertaking to take appropriate action.

3.4.2 The Commission's new powers include the power to issue a notice stating that an employer in default is disqualified (an employer in this position is excluded from Government grants and public authority contracts); to monitor the contract compliance regime; to seek High Court injunctions; and to conclude binding agreements with employers.

3.5 PROMOTION AND EDUCATION

3.5.1 The Commission has extensive promotional and educational duties. It must take such steps as it considers necessary to publicise the Code. It must also take such steps as it considers necessary to encourage employers and vocational organisations to adopt the policies and practices in the Code.

4. The Role of the Fair Employment Tribunal

4.1.1 The Fair Employment Tribunal is an important new body with considerable powers of adjudication, enforcement and appeal.

4.2 INDIVIDUAL CASES OF DISCRIMINATION

4.2.1 The Act provides for individual cases of alleged discrimination to be heard and determined by the Fair Employment Tribunal. The Commission must give advice to any prospective complainant who requests it in writing (unless it considers the request frivolous). Some cases may be supported by the Commission which has a discretionary power to assist individual complainants where case raises a question of principle or where it is unreasonable for the complainant to deal with the case unaided or where any other special considerations apply.

4.2.2 To further assist individuals taking cases of discrimination, a questionnaire is available from the Commission, Citizens Advice Bureaux and Jobmarkets. These questionnaires may be sent to an employer against whom the individual is taking a case of unlawful discrimination. Employers are not required to complete the questionnaire but the Tribunal may draw any inference it considers just and equitable (including an inference of discrimination) from such a failure, or from evasive or equivocal replies.

4.2.3 The Tribunal may award damages to an individual covering his or her financial loss, loss of opportunity and injury to feelings. It may also recommend remedial action and require increased compensation if that action is not taken. There is provision for appeal on a point of law to the Court of Appeal.

4.2.4 The amount of compensation that can be awarded by the Tribunal can be up to £30,000 (this figure can be updated in line with the value of money).

4.3 HEARING OF APPEALS

4.3.1 The Tribunal's other main function is in connection with the employers' undertakings and directions of the Commission and its role here falls into two main areas.

4.3.2 Firstly, employers can appeal to the Tribunal if they consider the directions of the Commission to be unreasonable, inappropriate or unnecessary. The Tribunal has power to dismiss the appeal, quash any or all of the directions, or substitute its own directions for those of the Commission.

4.3.3 Secondly, the Commission has power to make an application to the Tribunal for enforcement of undertakings or directions with which an employer has not complied. The Tribunal has power to issue orders of enforcement which specify

the steps necessary for compliance and to specify the time-scale within which these must be taken by the employer. Orders can also require a specified person to report back to the Tribunal on the steps taken to comply with its orders.

- 4.3.4 The President or Vice-President of the Tribunal has power to impose cash penalties of up to £30,000 on employers who are in breach of the Tribunal's orders or they may certify a failure to comply with an order to the High Court, which can impose unlimited fines and/or committal penalties for contempt of that Court.

5. The Role of Employers

This Code will be read and used by others besides employers. This chapter and chapter 6 relate specifically to employers and the word “you” is used for convenience to direct advice at employers.

5.1 RESPONSIBILITIES AND DUTIES

- 5.1.1 The responsibility for providing equality of opportunity for all job applicants and employees rests primarily with you, the employer. You should have a written policy on equality of opportunity in employment and put it into effective and visible practice. Your policy and practice must be firmly based on the principle of selection according to merit and will be considerably strengthened if they are agreed between you and your trade unions, your employee representatives or your workforce. They should be clearly stated within the organisation, noted on relevant publications (e.g. company reports), and, particularly, in job advertisements. No one should be in any doubt about your policy and practice.
- 5.1.2 Under section 35 of the 1976 Act you will be treated for the purposes of that Act as though you yourself had done any unlawful acts committed by your employees (whether with or without your approval) in the course of their employment, except where you took such steps as were reasonably practicable to prevent those acts being done.
- 5.1.3 All private sector employers with more than 25 employees (more than 10 from 1 January 1992), have six key duties placed upon them by the Act. These duties are:
- (a) registering with the Commission;
 - (b) monitoring the religious composition of your workforce, and (for certain employers) your applicants, and submitting annual monitoring returns to the Commission;
 - (c) reviewing your recruitment, training and promotion practices at least once every three years;
 - (d) having regard to this Code of Practice in carrying out your review;
 - (e) determining on affirmative action where your review indicates that fair participation is not being enjoyed by a particular community or is not likely to continue to be enjoyed; and
 - (f) considering the setting of goals and timetables where you determine on affirmative action.

Public authority employers are treated as registered from the outset and are subject to all the other duties set out above.

5.1.4 Detailed advice on these key duties is set out in chapter 6. The rest of this chapter sets out a general description of the approach which you should take to ensure good practice.

5.2 GOOD PRACTICE FOR ALL EMPLOYERS – GENERAL GUIDANCE

5.2.1 Equality of opportunity in employment makes good business sense. It broadens the recruitment base and widens the choice of personnel; it also enhances the probity of a company's personnel practices and improves corporate image. Even if you regard your concern as an entirely fair employer it is necessary to check that you are carrying out the steps mentioned in this Code – discrimination and inequality of opportunity can occur in the absence of regular scrutiny and the adoption of sound practices.

5.2.2 To promote equality of opportunity you should:

- draw up a clear policy to promote equality of opportunity in your recruitment, training and promotion practices – you are encouraged to consult the Fair Employment Commission in doing so;
- allocate overall responsibility for policy and practice to a senior manager – in small undertakings this is likely to devolve on the owner or chief executive/plant manager;
- consult with the appropriate recognised trade unions, employee representatives or the workforce on the implementation of your policy and any amendments to practice;
- show that your policy and practice have the backing of management at all levels – the clear backing of the chairman, Board and top management is of particular significance;
- make it clear that breaches of policy and practice will be regarded as misconduct and could lead to disciplinary proceedings;
- provide training and guidance for persons in key decision making areas (e.g. senior executives), and for personnel, reception and supervisory staff, to ensure that they understand their position in law, and company policy and practice – the whole environment within the firm should reflect good practice and these staff should be made aware of the positive influence they can exert in promoting equality of opportunity;
- highlight your policy and practice in a statement, works handbook or similar document, and issue it to all employees and job applicants;
- take all available opportunities, especially when recruiting new staff, to ensure that your policy and practice are widely known;
- promote a good and harmonious working environment and atmosphere in which no worker feels under threat or intimidated because of his or her religious belief or political opinion e.g. prohibit the display of flags, emblems, posters, graffiti, or the circulation of materials, or the deliberate articulation of slogans or songs, which are likely to give offence or cause apprehension among particular groups of employees.

5.2.3 **It is accepted that small to medium sized employers in particular will wish to interpret the detailed advice in this Code in the light of their own individual circumstances. That is fully appreciated by the Fair Employment Commission. Such employers should consult the Commission to ensure that their practices are in full conformity with the provisions of the Acts.**

5.3 GOOD PRACTICE FOR ALL EMPLOYERS – CORE COMPONENTS

5.3.1 Work situations differ so procedures will vary but there are two core components which, taken together with the six key duties outlined in chapter 6, form the basis of good practice:

- (a) systematic and objective recruitment (see paras 5.3.2-5.3.5); and
- (b) sound selection and promotion arrangements (see paras 5.3.6-5.3.7).

Systematic and objective recruitment

5.3.2 Your aim should be to ensure that members of both communities are aware of and encouraged to apply for job opportunities in your company or undertaking. Subject to any specific advice from the Commission, you are recommended to:

- set out the basic facts about the job to be filled. This is best done by preparing a job description including job title, duties and responsibilities, conditions of work, pay, prospects, etc;
- set out the requirements to be met by the person selected to fill the job. This is best done by preparing a personnel specification including educational standard/qualifications (essential and preferred); previous experience/training (essential and preferred); physical requirements; special aptitudes etc.

5.3.3 You should ensure that you:

- so far as practicable make all eligible and suitably qualified persons aware of vacancies and encourage them to put themselves forward for consideration – for example, you might hold information seminars in schools representative of both the Protestant and the Roman Catholic communities in the area, liaise with local careers teachers and invite school leavers from both communities to visit your premises;
- make use of Jobmarkets particularly when it would not be cost-effective to advertise, e.g. when recruiting sporadically for “one-off” posts or for a small number of lower paid jobs;
- always request the staff in the Jobmarket to canvass the vacancies through the other Jobmarkets in the catchment area for the job in question – they will be pleased to do so;
- make sure that recruitment is not confined to those agencies, schools or geographical areas which provide only, or mainly, applicants from a

particular community and do not limit advertisements to a publication or other announcement which is likely to be read only, or mainly, by a particular community (but note if you are taking affirmative action to promote fair participation you may encourage applications from an under-represented community (see paras 6.5.13-6.5.22));

- use application forms. These assist in the objective assessment of candidates. Where used they must be available to anyone interested in an available job or jobs, but the practice of providing application forms in response to casual requests when no job vacancies exist can create problems and should be avoided;
- include in all advertisements a statement to the effect that you are equal opportunity employer or, preferably, that applications are welcomed regardless of religious belief or political opinion.

5.3.4 It is unlawful to give instructions to, or bring pressure on, employment agencies or Jobmarkets to discriminate against members of a particular religious or political group.

5.3.5 You should avoid:

- procedures by which applicants are mainly, or wholly, identified through existing employees, trade unions or any other restricted group if this means that only members of a particular community, or a disproportionately high number of them, come forward;
- use of standing lists as a source of applicants for vacancies. If such lists have to be used, and where practicable, they should be valid only for a limited period (six months maximum is suggested) and must include all eligible persons;
- use of applications for one job for the purpose of filling a different job.

Selection and promotion

5.3.6 Employers' selection and promotion procedures should operate so as to ensure the appointment of the best person for the job. The actual procedures and their degree of sophistication will vary from firm to firm but should involve:

- deciding on the qualifications, ability and potential ability needed for a particular job and on their relative importance;
- ensuring that the nature and level of these requirements can be shown to be essential;
- advertising the requirements clearly and, in the case of internal promotions, ensuring that all eligible candidates are notified and have an equal opportunity to compete;
- applying the requirements fairly and consistently when shortlisting, at interview, and throughout the selection process;

- making certain that all candidates are given the same chance to demonstrate their abilities or potential abilities and that differential standards are not applied;
- remembering that e.g. with younger people or those without experience, potential ability which can be developed through training may be just as relevant an attribute as experience;
- ensuring that no extraneous or irrelevant requirements are included in the selection process.

5.3.7 In selecting personnel, either initially or for promotion purposes, you are strongly recommended to:

- record the various factors considered relevant in a particular job before the shortlisting, interviewing and selection of candidates. These factors might include experience, qualifications, personal attributes as demonstrated by performance in jobs having similar requirements, and interview performance;
- decide on the relative importance to be given to each factor at all stages of recruitment (initial consideration, shortlisting, interview and final choice);
- satisfy yourself that these factors and their relative importance are justifiable, appropriate to the job, and clearly objective;
- ensure that those making the selection:
 - (i) are clearly informed of the relevant selection criteria and the need for their fair and consistent application; and
 - (ii) have been given guidance and training on sound selection procedure;
- ensure, if at all possible, that all shortlisting, interviewing and selection panels comprise two or more people;
- record the assessments and decisions of shortlisting, interviewing and selection panels in relation to the relevant factors and their importance (a simple marking chart can be helpful);
- retain all application forms and related documents for 12 months in order to be in position to deal with any subsequent complaints about the implementation of your selection procedures (but note also the obligation to retain certain specific information about applicants for monitoring purposes for three years (see para 6.2.42)).

6. Duties on Employers

As noted in chapter 5, the Act places six key duties on employers. These duties are essential to the effective practice of equality and opportunity.

6.1 REGISTRATION

6.1.1 “Public authorities” as specified in the Fair Employment (Specification of Public Authorities) Order (NI) 1989 are automatically treated as registered under the Act. All other employers² whose concerns satisfy the condition for registration must apply to the Commission to be registered within one month

either from 6 January 1990;

or, if subsequently, from the time they first satisfy the condition for registration.

6.1.2 From 1 January 1990 a concern satisfies the condition for registration at the end of any week if in that week more than 25 employees have been employed. You must register your concern within one month from the end of that week. A week is defined as a week ending on Saturday.

6.1.3 From 1 January 1992 a concern satisfies the condition for registration at the end of any week if in that week more than 10 employees have been employed.

6.1.4 To assist registration the Commission will issue application forms in advance to employers known to have more than 25 employees. If you receive such a form you should complete and return it promptly to the Commission so as to arrive not later than 6 February 1990. However the Commission is under no obligation to issue application forms and the duty to apply for registration rests firmly with you, the employer. **It is a criminal offence not to apply for registration in respect of a concern which satisfies the registration condition within the time allowed.**

6.1.5 It is recommended therefore that if you have more than 25 employees on 1 January 1990 and you have not been contacted by the Commission by 15 January 1990 at the latest you should request an application form and then complete and return it by 6 February 1990 or apply for registration yourself without waiting for such a form.

² Other than Ministers of the Crown, heads of N.I. departments of statutory bodies or office holders.

6.1.6 Although the Commission will issue application forms to many employers, an application for registration need not necessarily be on such a form provided that it

- (a) describes the concern in general terms;
- (b) gives the name and address of the employer;
and
- (c) gives the number of employees employed in Northern Ireland at the date of application.

6.1.7 If you take over or acquire a concern which is already registered you must apply to the Commission within one month for your name and address to be entered in the register in place of the former employer. **Failure to do so is a criminal offence.**

6.1.8 Once your concern is registered with the Commission there is no requirement to renew the registration at any stage unless, in the meantime, it has been removed from the register and then subsequently again satisfied the condition for registration.

6.1.9 If you have been registered with the Commission for a year or more you may apply to the Commission to be taken off the register if you have had less than 11 employees continuously during the 26 weeks prior to your application. If you have not been registered for a year you cannot apply to be taken off the register.

6.1.10 For the purposes of registration – and monitoring – “employee” means (a) an individual employed under a contract of service or of apprenticeship, other than a contract which normally involves employment for less than sixteen hours weekly *, or (b) an individual employed under a contract personally to execute any work or labour. It follows that employees at (a) who normally work 16 hours or more weekly – whether part-time, temporary or casual – are covered by the Act. It also follows, in relation to employees at (b) that independent contractors could fall within scope of the definition.

* *This will be kept under review and may be reduced in the light of evidence of working patterns.*

6.1.11 The Commission may remove from the register either of its own motion or on application made to it:

- (a) the name of any person who appears to have ceased to be an employer;
- (b) the entry for any concern which appears to have ceased to exist;
- (c) the entry for any concern which, on application by the employer and in the opinion of the Commission, did not have more than 10 employees during any of the 26 weeks preceding the application.

6.1.12 The Commission is required to remove from the register of its own motion any person who becomes a public authority employer.

6.2 MONITORING

6.2.1 All registered employers (including public authority employers) are required by the Act to monitor their workforce and you are under a duty to prepare and provide a return each year to the Commission containing prescribed information about your employees. **Failure to supply this information is a criminal offence, as is failure to supply it within the prescribed period.**

6.2.2 Monitoring enables the composition of the workforce to be ascertained and so is a valuable tool in determining whether members of the Protestant and Roman Catholic communities are enjoying, and are likely to continue to enjoy, fair participation in your workforce. It is an essential first step in the effective implementation of equal opportunity practices and even if you are not among the group of employers required by law to monitor, there is value in doing so.

6.2.3 There is an additional monitoring duty placed on all public authority employers, and on those registered concerns with more than 250 employees (para 6.2.22). They are required not only to monitor their existing workforce but also to monitor the composition of those who apply to fill vacancies for employment. Even if you are not required to monitor applicants, you must retain certain specific information about them.

6.2.4 The detailed requirements on monitoring are set out in the Fair Employment (Monitoring) Regulations (Northern Ireland) 1989, the main provisions of which are outlined in paras 6.2.17-6.2.55).

The rationale for monitoring

6.2.5 Monitoring – the provision and analysis of information on community background – is not merely a statistical exercise, nor is it an end in itself. It is the beginning of a process, the starting point for further action. It means establishing the community background of your existing workforce (that is, how many belong to the Protestant community and how many belong to the Roman Catholic community). If you are a public authority employer or a registered concern with more than 250 employees, you must also establish the community background of your job applicants. Taking note of community background in order to ensure that your employment procedures are both fair and seen to be so – and for no other reason – is perfectly acceptable. It is of course unlawful to select for employment on the basis of religious belief or political opinion so those selecting for employment, training or promotion should not have sight of monitoring information.

6.2.6 The ideal is to identify any job category within a workforce for which there are fewer applicants or workers of a particular community background than might

reasonably be expected given the relative numbers with the necessary qualifications, experience, etc. in the catchment area. In identifying job categories you should consult the Commission. Every job category does not have to reflect the overall proportion of both communities in Northern Ireland. That is unrealistic; but, equally, it is wrong to assume that traditional patterns of employment are incapable of change. Affirmative action should be addressed, and the advice of the Commission should be sought, where your monitoring indicates that fair participation is not being secured.

- 6.2.7 A lack of fair participation does not necessarily imply malpractice – but it is a matter of concern. It should prompt immediate examination of your recruitment, promotion and selection procedures to ensure that they are operating fairly. If they are not, then appropriate measures must be introduced and you are strongly advised to consult the Commission in these circumstances.
- 6.2.8 Informed judgement must be exercised in deciding on the relevant catchment area for jobs and on the proportionate religious distribution which might reasonably be expected in both an existing workforce and job applicants. Much depends on the nature of the job in question. Some relevant factors in deciding on the catchment area are:
- the qualifications, skills and expertise necessary for the job in question;
 - the wages on offer;
 - the hours of work involved ;
 - travelling methods, arrangements, distances and times;
 - valid knowledge based on your own expertise and personal experience.
- 6.2.9 Since the nature of the job, its location in relation settlement patterns, and other factors determine the catchment area it is most important that employers consult with the Commission when they are attempting to establish either what is a reasonable definition of a catchment area or what constitutes fair participation in relation to any particular job category. Accordingly you should consult the Commission on both the interpretation of your monitoring returns (and the possible need for affirmative action) and on the determination of appropriate catchment areas for particular job categories. It will be pleased to advise you on these matters.

The community question

- 6.2.10 This is a sensitive matter which requires careful handling. In tackling it you should:
- explain the reason for asking the community question openly and clearly to both job applicants and employees (see paras 6.2.27-6.2.28).
 - consult your trade unions, employee representatives or workforce before asking the question of either applicants or employees; explain to them your legal obligation; and stress the importance of securing an answer to the question;

- ensure that information supplied by job applicants and employees on their community background is treated in the strictest confidence, failure to do so may lead to criminal liability;
- emphasise that information will not be used in assessing a candidate's suitability for a job;
- state in your application forms and works handbook that the question is asked in fulfilment of a legal obligation; that it is necessary to enable you to check, and to demonstrate to others, that your employment and related practices are fair and equitable; that you will safeguard the information obtained and will ensure that it will not be freely disclosed to others; and that it will definitely not be taken into account as a factor in deciding whether an individual is offered a job or not;
- point out that it is an offence for any person knowingly to give false information to another who is seeking that information in order to make a monitoring return, or knowingly to include such false information in a monitoring return.

6.2.11 What you require for monitoring purposes is not a statement of specific religious belief, but a reasonably accurate indication of community background. The method used (see paras 6.2.27 - 6.2.37) is a matter for the employer. The key factor is that you should be able to have reasonable confidence in the accuracy of the information supplied and that in turn may help you decide on what, in your circumstances, is the most appropriate method.

6.2.12 In general you are required not to disclose, without the individual's consent, certain information which you hold or have held in your capacity as an employer or an employee. The relevant information comprises:

- monitoring method to determine community background;
- any determination of an employee's or applicant's community background;
- any other information from which community background might be deduced.

You should, of course, co-operate with the Commission and disclose to it whatever information about the community background of an individual that it requires. You may however disclose such information to those of your employees the nature of whose duties make the disclosure reasonable. Disclosure is also permitted where it is necessary in connection with proceedings, including criminal proceedings, under the 1989 Act.

Completion of monitoring returns

6.2.13 Employers registered with the Commission are required to complete an annual monitoring return and forward it to the Commission within the timescale laid down in the Act. **Failure to do so is a criminal offence.**

6.2.14 You must submit to the Commission a single return covering your total workforce, that is all employees as defined in para 6.1.10. That return must

include the information specified in para 6.2.19 breaking down your total workforce by religion, sex and nine descriptions of employment (and identifying separately apprentices).

- 6.2.15 Employers who have premises in more than one location should, of course, look particularly carefully at the extent to which fair participation is being enjoyed by both communities at each of those locations. That is the objective at which you should be aiming. So, where requested to do so by the Commission, you should supply to the Commission information about the composition of your workforce, applicants and appointees for each location. The Commission can advise you on this point and can supply the appropriate statistical enquiry form.
- 6.2.16 The time for serving a monitoring return expires at the end of the first four months of the year; and a “year” means any period of twelve months beginning with –
- (a) the date on which the concern is entered in the Commission’s register or
 - (b) the anniversary of that date.

The Commission will inform those who apply for registration of the date on which details of the concern are entered in the register. In the case of public authority employers the monitoring year begins on the date (or anniversary) of specification.

Outline of the monitoring regulations and specific requirements

- 6.2.17 Under section 28 of the Act, the Department is required to make regulations about monitoring returns, and how these are to be completed. Under section 29, the Department may make regulations requiring employers to obtain certain information about applicants, whether or not the employer is required to include such information in his monitoring return.
- 6.2.18 The Fair Employment (Monitoring) Regulations (NI) 1989 therefore concern themselves with:
- (a) the information to be contained in the monitoring return;
 - (b) the date/period to which information is to relate;
 - (c) the period in which information is to be obtained;
 - (d) the order in which monitoring methods are to apply;
 - (e) the substance of the three principal methods;
 - (f) the substance of the residuary method;
 - (g) the monitoring of applicants;
 - (h) disclosure of information;
 - (i) correction of inaccuracies;
 - (j) directions of the Commission;
 - (k) records;
 - (l) the use of information already obtained through voluntary monitoring.

(A) The information to be contained in the monitoring return

6.2.19 The following information must be given in a monitoring return:

- (a) specify whether or not the concern is one which has to include information about applicants in its monitoring return;
- (b) the address of each premises on or from which, on the date of the monitoring return in question, the activities of the employees of the concern were carried on;
- (c) the number of employees who are
 - (i) male;
 - (ii) female;
- (d) the number of male employees and the number of female employees whom the employer has treated
 - (i) as Protestant;
 - (ii) as Roman Catholic;
 - (iii) as if the community to which he or she belongs cannot be determined;
- (e) the number of male employees and the number of female employees whom the employer has treated
 - (i) as Protestant;
 - (ii) as Roman Catholic;under the residuary method (see paras 6.2.38-6.2.39)
- (f) the number of male employees and the number of female employees in the concern who are employed under a contract of apprenticeship and whom the employer has treated-
 - (i) as Protestant;
 - (ii) as Roman Catholic;
 - (iii) as if the community to which he or she belongs cannot be determined;
- (g) the number of male employees and the number of female employees whom the employer has treated as Protestant and whose employment is classified under each of the following major groups of the Standard Occupational Classification as specified in the index for Classifying Job Titles published by the Department in December 1989, that is to say -
 - managers and administrators
 - professional occupations
 - associate professional and technical occupations
 - clerical and secretarial occupations
 - crafts and skilled manual occupations
 - personal and protective service occupations

- sales occupations
 - plant and machine operatives
 - other occupations;
- (h) the number of male employees and the number of female employees whom the employer has treated as Roman Catholic and whose employment is classified under each of the major groups of the Standard Occupational Classification;
- (i) The number of male employees and the number of female employees whom the employer has treated as if the community to which he or she belongs cannot be determined and whose employment is classified under each of the major groups of the Standard Occupational Classification.

(B) The date/period to which information is to relate

- 6.2.20 The date for monitoring workforce composition will be the date of registration by the Commission in the case of those required to apply of registration, or, in the case of public authority employers, the date of their specification. The Commission is under a duty to inform each concern that applies for registration of the contents and date of its entry in the Commission's register. For example, for concerns which are entered on the registration on 31 January 1990, the first monitoring return must provide the required information about those employed on 31 January 1990 and the return must be sent to the Commission by 31 May 1990. This allows employers who have not already started to monitor their workforce a period of four months in which to complete the necessary work.
- 6.2.21 For employers who have to monitor applicants (i.e. registered concerns with more than 250 employees and all public authority employers) the position is slightly different. The first monitoring return must provide the required information about applicants for employment during the period of two months from the date of registration/specification. In the following paragraph this is referred to as "the monitoring period".
- 6.2.22 If you are a private sector employer with a registered concern and your workforce is 251 or more at the start of any monitoring period you must monitor applicants for the whole of that period. If, after the start of a monitoring period, your workforce increases to 251 or more employees, you are required to monitor applicants from that day forward for the remainder of the monitoring period, whether or not your workforce falls below 251 employees during that period.

(C) The period within which information is to be obtained

- 6.2.23 So that you can be sure of fulfilling your legal obligations, the regulations require that you obtain relevant information within specified periods. These periods are co-ordinated so that you will have sufficient time to collect the information you need in order to prepare the return, collate it and send your return to the Commission within four months after the date or anniversary of registration.
- 6.2.24 In respect of employees, for your first return you must obtain the prescribed information (that is, the information as listed in para 6.2.19) within the first three months of the year. That will leave you at least one month to collate and submit your return to the Commission. In any subsequent year you should obtain the information during the first month of the year. That does not mean that you need to seek information from all your employees every year – you need only survey or resurvey (as set out in section (E) below) those for whom you have no determination of community background under a principal method. If you have a trustworthy record that a person did not attend primary school in Northern Ireland that is sufficient to discharge your obligation under the first schools list method. If you have a trustworthy record that a person did not attend either primary or secondary school in Northern Ireland that is sufficient to discharge your obligation under the second schools list method.
- 6.2.25 For your first return, you must obtain the necessary information about applicants for employment within the first three months of the monitoring year. That will ensure that your first return can be sent to the Commission within four months after registration containing information on applicants during the first two months after registration. In the case of subsequent returns the information must be obtained within the two months after the date of each application.

(D) The order in which monitoring methods are to apply

- 6.2.26 The ways in which community background is to be determined are set out in the monitoring regulations. There are three principal methods and you must select one. Where that principal method does not result in a employee being treated as a member of the Protestant or Roman Catholic communities then the fallback (“residuary”) method of monitoring may be used. The objective is to ensure the most comprehensive and accurate coverage possible, so you should select your principal method with care. In every case where an individual cannot be treated as belonging to a community under the principal method, you are strongly recommended to use the residuary method in order to determine the community background of the individual. The regulations do not authorise you to apply to an individual a second principal method. However, the Commission has a power to direct you to apply the prescribed methods (which would include the principal methods) in a manner different to that authorised by the regulations (see also para 6.2.50). For example, in exceptional circumstances, it could help to achieve the objective of comprehensive and accurate coverage to apply a second or third principal method to a workforce, or part of a workforce. The Commission is obviously best placed to consider the particular circumstances of any such case, and offer advice. Where the Commission considered it

appropriate, it could, for example, direct you to apply a second or third principal method. So if circumstances arise in which you consider it would be helpful to apply a second principal method, you should contact the Commission for advice and, if appropriate, direction.

(E) The substance of the three principal methods

- 6.2.27 Two of the principal methods of monitoring are based on the fact that in Northern Ireland educational background is a very reliable indicator of community background, particularly primary school data. There will always be cases where an individual's educational background does not reflect his or her actual community background but the system of classification on the basis of schools attended can be relied upon to give a reasonable accurate statistical picture for monitoring purposes.
- 6.2.28 Under the regulations the Commission has a duty to maintain and publish from time to time a list of each primary and each secondary school in Northern Ireland for the purposes of monitoring and to classify each school as (a) Protestant where in the opinion of the Commission it is attended wholly or mainly by Protestants or (b) Roman Catholic where in the opinion of the Commission it is attended wholly or mainly by Roman Catholics and (c) to list another school as unclassified. For the purposes of the regulations the "Classification of Schools for Monitoring Purposes" published by the Department in September 1987 is the first schools list. (This list was amended in September 1988 by Addendum No 1).

Principal Method 1 – First schools list method

- 6.2.29 To apply this method, you must seek the name and address of the primary school in Northern Ireland which your employee or applicant attended longest. You may consult any records in your possession, including information obtained as a result of voluntary monitoring before 1 January 1990. If you do not have such information, you must request the information in writing from the employee or job applicant.

Model questionnaire to be used in conjunction with an explanatory letter and following consultation with the Commission

Primary school attended longest

Did you attend primary/preparatory school in Northern Ireland? Yes/No

Please give the name and full address of the primary/preparatory school in Northern Ireland which you attended for the longest time

Name of School _____

Address of School _____

6.2.30 Once you have the identity of the primary school, you must consult the schools list and assign community background to the individual in accordance with the classification of the school in that list. If an employee or job applicant declines to answer the question, or names a school not listed or not classified, the residuary method should be used. If it is still not possible to determine the community background of an employee or applicant, you must regard that individual as incapable of being treated as a member of either the Protestant or the Roman Catholic community.

Principal Method 2 – Second schools list method

6.2.31 In order to determine the community to which your employees and applicants belong using this method, you must seek to discover all the schools in Northern Ireland attended by each individual. You may consult any records in your possession including personnel records and records of response to voluntary monitoring before 1 January 1990; but, failing that you must request the information in writing from the employee.

Model questionnaire to be used in conjunction with an explanatory letter and following consultation with the Commission

Primary and secondary schools attended

Did you attend primary/preparatory or secondary school in Northern Ireland? Yes/No

Please list the names and full addresses of all primary/preparatory schools attended in Northern Ireland _____

Please list the names and full addresses of all secondary schools attended in Northern Ireland _____

- 6.2.32 By consulting the schools list you can then determine whether to treat the person concerned as a Protestant or a Roman Catholic (or neither) for the purposes of completing your monitoring return.
- 6.2.33 You must first establish the classification of any primary school listed by an individual. If the primary school attended by the employee, or (if more than one) if all the primary schools attended by him/her, are classified as Protestant or Roman Catholic then the employee should be so classified himself/herself. If not all schools have the same classification but if, for example, at least one primary school is classified as Roman Catholic and none as Protestant you must treat him/her as a member of the Roman Catholic community.
- 6.2.34 If no determination results from a consideration of primary school, you must establish the classification of any secondary schools listed by the individual. If the secondary school attended by the employee, or (if more than one) if all the secondary schools attended by him/her, are classified as Protestant or Roman Catholic then the employee should be so classified himself/herself. If not all schools have the same classification but if, for example, at least one is classified as Roman Catholic and none as Protestant, you must treat him/her as a member of the Roman Catholic community.
- 6.2.35 If no determination results from a consideration of secondary school, you should use the residuary method. If it is still not possible to determine the community background of an individual, you must treat that person as incapable of being treated as a member of either community.

Principal Method 3 – The direct question

- 6.2.36 This is the most direct method of monitoring and requires the employee or applicant to state in writing whether he/she belongs to the Protestant or Roman Catholic community or belongs to neither. You then treat him/her accordingly for the purposes of completing your monitoring return.
- 6.2.37 Where you have a written statement made by an individual that he/she is Protestant or a member of the Protestant community, or Roman Catholic or a member of the Roman Catholic community, you must treat him/her as belonging to that community. Such a statement may have been obtained as a result of voluntary monitoring before 1 January 1990. Where you do not have such a statement you must seek one.

Model questionnaire to be used in conjunction with an explanatory letter and following consultation with the Commission

The direct question

Please indicate the community to which you belong by ticking the appropriate box below:

I am a member of the Protestant community

I am a member of the Roman Catholic community

I am a member of neither the Protestant nor the Roman Catholic community

Where an individual refuses to answer the question, or replies that he is a member of neither community, you should use the residuary method. If it is still not possible to determine the community background of an individual, you must treat him/her as incapable of being treated as a member of a particular community.

(F) The substance of the residuary method

- 6.2.38 This is a fall-back method of monitoring which an employer can use if the principal method has failed to provide information by which to determine the community to which a person belongs. The residuary method is based on the fact that there are a number of pieces of information about an individual which, if known, can give a reasonable indication of community background. The following information has been set out in the regulations and may be used to determine the community background of a particular individual:
- surname and other names;
 - address;
 - the schools that he/she attended (whether in Northern Ireland or else where);
 - his/her sporting or other leisure pursuits or interests;

- any course of education undertaken for any recognised award, examination or qualification;
- the clubs, societies or other organisations to which he/she belongs;
- the occupation as a clergyman of a particular school of any referee given by him/her when he/she applied for employment.

6.2.39 The information used for residuary monitoring must be in writing and supplied by the individual concerned. For example, information on an application form or CV may be used. You are strongly recommended to consult the Commission on the interpretation of such information. The key question to ask yourself is: “Is it considerably more likely that a person belonging to a particular community would exhibit this characteristic (say, membership of a specific club) than a person belonging to the other community?” If all such relevant information is consistent in tending to show a connection with a particular community you may make the appropriate determination. If, in the case of a particular individual, the information tends to show a connection with both communities you should weigh the strength of the connection shown by each piece of information by considering: “How probable is it that a person not of a particular community would exhibit this characteristic?” If the balance lies in a connection with a particular community you may make the appropriate determination, otherwise you must treat the person as incapable of being treated as a member of either community.

Under the residuary method you are authorised to take account of an individual’s attendance at a particular school or schools. For example, if you select the direct question as your principal method and it does not produce a determination, you retain the ability to take account of schools information under the residuary method, and you are encouraged to do so.

If you have used one of the two principal methods based on the schools list and it has not produced a determination, you should consider under the residuary method the information you have about an individual’s school attendance. The reason is that, under the residuary method, you have greater discretion than under the relevant principal methods to draw a conclusion from an individual’s school attendance. For example, you may take account of attendance at a particular school or schools outside Northern Ireland, or for some other reason not classified in the schools list; you may draw a conclusion in circumstances where an individual attended both a school classified as Roman Catholic and a school classified as Protestant in the schools list. Under residuary method school attendance where available must be considered together with other available pieces of information to arrive at a balanced conclusion that a person is a member of a particular community.

(G) The monitoring of applicants

- 6.2.40 All public sector employers, and private sector employers with more than 250 employees, must monitor the composition of those applying to fill vacancies for employment and submit their monitoring returns to the Commission. This applies to both advertised and non-advertised vacancies.
- 6.2.41 All other registered private sector employers (i.e. from 1 January 1990 those employing more than 25; and from 1 January 1992 those employing more than 10) must seek to obtain certain information from each applicant for a vacancy. This applies to both advertised and non-advertised vacancies.
- 6.2.42 All registered employers must retain information about applicants for a period of three years from the date of receipt of the application.
- 6.2.43 It is recommended that employers should:
- (1) advertise job vacancies as widely as possible so that all eligible and suitably qualified persons are aware of them;
 - (2) issue application forms to all those who enquire about a vacancy by a personal visit, by telephone or in writing;
 - (3) regard as applicants only those who return the application form;
 - (4) disregard those who do not return application forms.
- 6.2.44 If you do not follow the above best practice – and it is recognised that it may be impracticable for all employers to do so – you must seek the prescribed information set out below from everyone who applies for employment. This duty obtains whether the application is made in writing or orally; whether or not the job vacancy has been advertised; and whether the job concerned is of a casual, seasonal or permanent kind.
- 6.2.45 **All** registered employers must seek to obtain the following information from each applicant:
- (a) surname and other names;
 - (b) address.

Those employers required to monitor applicants have additional legal duties. If you are such an employer you must select one of the principal methods, and seek to make a determination of the community to which the applicants for employment which you are required to monitor belong. (For the applicants you are required to monitor see paras 6.2.22, 6.2.40 and 6.2.46). These principal methods are basically the same as those applied in the case of employees except that you are required to seek information for the purposes of making a determination either on an application form or another form issued separately to the applicant. If the chosen principal method does not result in a

determination you should apply the residuary method. The information for this will usually be found on the application form.

6.2.46 Where you are not required to monitor a person's application you must seek to obtain the following information from each applicant:

- (a) the name and address of all the primary and secondary schools attended by him/her in Northern Ireland; or
- (b) the name and address of the primary school in Northern Ireland attended by him/her for the longest period of time; or
- (c) a statement that he/she is a member of the Protestant community, or the Roman Catholic community, or neither.

You are strongly recommended to do this by including requests for such information on a "tear-off" section of your application forms. If you do not include such requests on a "tear-off" section of your application form, you must obtain it on another form. This information should be kept strictly confidential. It *must* be retained for three years from the date of receipt of the application. Where an applicant indicates a particular date on his application form that is the date of application. Otherwise the date of receipt of the application is the date of application. Information may be retained on computer but those employers who do so must, of course, comply with their obligations under the Data Protection Act 1984.

An employer who is required to monitor applicants in any year may still not be required to monitor certain applications, eg, if they fall outside the monitoring period or are the made at any time within that period but before the employer's workforce increases to 251 or more.

6.2.47 The following information must be included in a monitoring return to the Commission:

- (a) the total number of applicants for employment in the concern;
- (b) the number of applicants for employment who are -
 - (i) male;
 - (ii) female;
- (c) the number of male applicants for employment and the number of female applicants for employment whom the employer has treated -
 - (i) as Protestant;
 - (ii) as Roman Catholic;under the residuary method;
- (d) the number of male applicants for employment and the number of female applicants for employment whom the employer has treated –

- (i) as Protestant;
- (ii) as Roman Catholic;

under the residuary method;

- (e) the number of applicants for employment who, on or before the date of the monitoring return in question, commenced employment in the concern, other than a person who so commenced employment under a contract of apprenticeship;
- (f) the number of those persons referred to in subparagraph (e) (“appointees”) who are –
 - (i) male;
 - (ii) female;
- (g) the number of male appointees and the number of female appointees whom (as applicants for employment in the concern) the employer has treated –
 - (i) as Protestant;
 - (ii) as Roman Catholic;
 - (iii) as if the community to which he or she belongs cannot be determined;
- (h) the number of applicants for employment who, on or before the date of the monitoring return in question, commenced employment in the concern under a contract of apprenticeship (“apprentices”);
 - (i) the number of apprentices who are –
 - (i) male;
 - (ii) female;
- (j) number of male apprentices and the number of female apprentices whom (as applicants for employment in the concern) the employer has treated –
 - (i) as Protestant;
 - (ii) as Roman Catholic;
 - (iii) as if the community to which he or she belongs cannot be determined;
- (k) number of male appointees and apprentices and the number of female appointees and apprentices whom (as applicants for employment in the concern) the employer treated as Protestant and whose employment is classified under each of the major groups of the Standard Occupational Classification;
- (l) the number of male appointees and apprentices and the number of female appointees and apprentices whom (as applicants for employment in the concern) the employer treated as Roman Catholic and whose employment is classified under each of the major groups of the Standard Occupational Classification;

(m) the number of male appointees and apprentices and the number of female appointees and apprentices whom (as applicants for employment in the concern) the employer has treated as if the community to which he or she belongs cannot be determined and whose employment is classified under each of the major groups of the Standard Occupational Classification.

(H) Disclosure of information

6.2.48 After the monitoring regulations come into operation, the employer must tell each employee, for whom a determination about his/her community background has been made under one of the principal methods for the first time, in writing, the nature of that determination (or if no determination has been made); and how and on the basis of what information that decision was reached. The employer must do this at least two weeks before the information is included in the monitoring return to be sent to the Commission.

Although the employer is not obliged to make such a disclosure about

- (a) the outcome of the residuary method or
- (b) a determination relation to an application,

he/she should consider doing so.

(I) Correction of inaccuracies

6.2.49 Consequent on (H), the employee may inform the employer within one week of any factual error in the information which was the basis for the determination under a principal method. The employer must disregard the inaccurate information. He must take account of any additional accurate information supplied. This may involve changing the determination arrived at in respect of the employee.

Model Disclosure Form

Fair Employment (Monitoring) Regulations (NI) 1989

The following determination/No determination of your community background has been made:

Member of the Protestant/Roman Catholic community

The determination/No determination was arrived at under the First Schools List/Second Schools List/Direct Question method which is based on primary school attended longest in NI/all primary and secondary schools attended in NI/a direct statement of community background.

In your case the following information was taken into account:

If there is any material inaccuracy in the above information, please inform me of the correct information within the next week so that account can be taken of it in preparing the monitoring return which I am required to send to the Fair Employment Commission.

(J) Directions of the Commission

6.2.50 If, for any reason, you consider that your monitoring return does not reflect accurately the composition of your workforce, you should draw any significant inaccuracy to the attention of the Commission. The Commission has a power to direct you to conduct monitoring in a way different to that set out in the regulations, and could thus help ensure the accuracy of your return.

(K) Records

6.2.51 It is important that you should retain records so that you can seek to establish trends in the composition of your workforce and applicants. You should certainly retain a copy of any return which you make to the Commission.

6.2.52 You must also retain for each employee a record of any determination which you have made, together with all information which has been, or might be, used to make such a determination. Such records will be useful to both you and the Commission if there is some doubt about the accuracy of your monitoring return. You must retain such records for at least three years after the date on which the

relevant employee ceased to be employed in your concern. Such records may be held on computer. See (G) above in connection with records on applicants.

(L) The use of information already obtained through voluntary monitoring

6.2.53 Even if you have been voluntarily monitoring you must comply with the regulations. They set out three principal methods of monitoring, and a residuary method. You must select one principal method. Where you have already obtained information which satisfies that method, you may use that information without posing any further questions to the relevant individuals. Where you do not have the necessary information you must seek it in writing from the individuals. Where you do not have the necessary information you must seek it in writing from the individuals concerned. In all cases where the principal method does not produce a determination you are encouraged to use the residuary method. Where you have already obtained in writing from the individual concerned any of the pieces of information authorised for the residuary method you may use them. Where you do not have the necessary information you are encouraged to seek it in writing from the individual concerned. The regulations mean that you can use information previously obtained, but you cannot use a determination previously arrived at. You must make a new determination and disclose that to the individuals concerned.

(M) Enquiries, undertakings and directions

6.2.54 The Commission may, at intervals of not less than six months, require you to give to the Commission any information about an employee or job applicant which you hold and which could be used for monitoring purposes. It may also require you to disclose the community to which an employee or job applicant is to be treated as belonging. Following receipt of a monitoring return, the Commission may also require you to give to the Commission information on how your return was prepared.

6.2.55 The Commission may form an opinion on the basis of information obtained as set out in para 6.2.54, or as a result of its enquiries into the conduct of a review, that the manner in which you prepare your return is inadequate, or that the information sought for the purposes of monitoring is inadequate. It must then use its best endeavours to ensure that you remedy the inadequacy and, where appropriate, it will seek an undertaking from you to that effect. If you do not give such an undertaking the Commission may issue reasonable and appropriate directions to you. If you give an undertaking but do not comply with its terms the Commission may substitute directions for the undertaking. The Commission may seek an order of the Tribunal to enforce any undertaking or direction.

6.3 REGULAR REVIEW OF EMPLOYERS' PRACTICES

- 6.3.1 The Act places a duty on the employer in a registered concern to review, at least once every three years, both employment composition and practices i.e. those practices affecting recruitment or training for employment in the concern, or training or promotion of employees in the concern. It is important to liaise with the Commission in preparing for a review of composition and practices (see para 6.3.10-6.3.16).
- 6.3.2 The purpose of this review is:
- (a) to determine whether members of each community are enjoying, and are likely to continue to enjoy, fair participation in employment;
 - (b) to ensure, where this does not appear to be the case, that the employer determines on the affirmative action (if any) that would be reasonable and appropriate;
 - (c) to ensure, where affirmative action is determined that – where practicable – goals and timetables are set.
- 6.3.3 You must review both the composition of those employed, and your employment practices, at least once every three years. Your employment practices include any practice affecting recruitment or training for employment in your concern, or the training or promotion of your employees.
- 6.3.4 Where your review indicates that fair participation is not being provided, or is not likely to continue to be provided, you must determine – as part of your review – what affirmative action (if any) that would be reasonable and appropriate. You must then consider whether it is practicable to set goals and timetables for the progress towards fair participation that can reasonably be expected to be made by the under-represented community concerned. If so, you must set goals and timetables.
- 6.3.5 In carrying out reviews, employers must have regard to the advice contained in this Code of Practice. Additionally the Commission must give advice to employers who request it as to the manner in which reviews should be carried out, so it makes sense to consult the Commission in good time before beginning your review.
- 6.3.6 Undertaking a review of fair employment practices is an integral part of good personnel management. The precise way in which a particular employer carries out a review will depend on his/her own individual circumstances, although in both large and small organisations the review will have to be conducted in a formal manner with a written report being prepared.

6.3.7 In general you should:

- allocate responsibility for the conduct of the review to a senior manager or, in small undertakings, probably the owner;
- brief senior staff about the objective, conduct, timing and nature of the review and encourage their participation in it e.g. by seeking individual manager's view on the policy and the way it has been implemented;
- consult with recognised trade union or employee representatives and provide them with an opportunity to put forward their views on the policy and the way it has been implemented;
- take into account the picture which emerges from your monitoring data, both as to the current composition of the workforce and as to the flows of applicants and recruits into and through it;
- bear in mind that – while you must determine on affirmative action if your review indicates that fair participation is not being provided or is not likely to continue to be provided – you can consider and take affirmative action at any time and that it is not conditional upon a review;
- respond fully and co-operatively to any requests for information from the Commission about the proposed conduct of your review, its timing, its outcome, any affirmative action taken or goals and timetables set, or about the information that you propose to include in your review.

6.3.8 The Act states that your review is to be of both composition and employment practices. The term “practices” is defined as practices “affecting recruitment or training for employment in the concern or training or promotion of employees in the concern”. All procedures and arrangements which affect these practices should come within the scope of your review and your main interest will be in the impact of these practices in securing fair participation. In addition to reviewing the composition of those employed there are four activities which need to be addressed in every review:

- (a) procedures for recruiting new employees;
- (b) any arrangements for the provision of training for potential employees;
- (c) procedures for training existing employees, including the selection of employees for training; and
- (d) procedures for promoting employees.

6.3.9 Each of these four activities will have its own specific features but there are some common threads running through them. In carrying out a review you should:

- examine rigorously the selection criteria being used (whether for selection for employment, training or promotion) and ensure that these are strictly job-related, are appropriate in every case and are not having an adverse impact on members of a particular community;
- analyse the monitoring returns submitted to the Commission over the previous three years, together with any other information or more detailed

data that is available, in order to establish any patterns that appear to be emerging;

- look for trends not only in relation to the total workforce and all job applicants but also in relation to separate locations (e.g. where you have employees on different sites), smaller occupational groupings within the workforce (e.g. in particular skill groupings, sections or shifts) and salary band. This is important in larger undertakings. Ideally trends should be plotted in relation to each separate occupational category included on the monitoring returns submitted to the Commission;
- reassess the catchment areas from which employees could reasonably be expected to be drawn as these may have changed since they were originally determined (for example, as a result of the movement of population, new housing developments or improved road communications). Again it should be stressed that different jobs, and different premises or locations, will have different catchment areas;
- contact the Fair Employment Commission for information on the most recently produced labour availability data for the catchment area;
- consider the implementation of appropriate affirmative action measures, including the setting of goals and timetables for all applications and appointments;
- prepare a written report on the review. This should set out how the review was carried out, what conclusions were reached, and the action that it is proposed to take to rectify any problems that may have been identified. It should also indicate when the next review is to take place and give an indication of any changes that would be expected by that time.

Active co-operation with the Commission

- 6.3.10 The importance of liaison between you and the Commission in preparing for your review exercise cannot be over-estimated. The Commission has a duty to assist you in the conduct of reviews and to offer advice when you request it. This duty is there to assist constructive dialogue between you and the Commission. If such close liaison is maintained before and during your review activities, then it is more likely that you and the Commission will be able to agree on any affirmative action measures and goals and timetables that may be necessary.
- 6.3.11 You should also bear in mind that the Commission can make enquiries about the conduct of your review, its outcome, the affirmative action you may have determined upon, and any goals and timetables that have been set. It can also require you to give it such information as it specifies on the matters disclosed by your review, any affirmative action determined upon and any goals and timetables set.
- 6.3.12 Where your review discloses to the Commission that fair participation is not being provided, or is not likely to continue to be so provided, the Commission

must make such recommendations as it thinks fit as to the affirmative action that must be taken and associated goals and timetables.

- 6.3.13 Where you have disclosed to the Commission your determination to take affirmative action, the Commission can require you to give information on the affirmative action take or proposed. Similarly, where you have disclosed to the Commission a goal and timetable which you have set the Commission can require you to give it such information as it specifies to determine the progress being make. The Commission may not require such information in either case until six months after your initial disclosure to the Commission or the date you were last required to provide such information.
- 6.3.14 Where the Commission is of the opinion that you have no proposals for carrying out a review, or that the manner and timing of your review are unsatisfactory, or that the information you are seeking is inadequate, then the Commission must use its best endeavours to ensure that the information you are seeking for your review is adequate, or that your review is carried out at a satisfactory time and in a satisfactory manner. Where appropriate the Commission shall use its best endeavours to obtain a satisfactory written undertaking from you for this purpose.
- 6.3.15 If you are asked for an undertaking and it is not given the Commission is required to issue directions to you. If you give an undertaking and do not comply with it the Commission must either issue direction to you or apply to the Tribunal for enforcement of the undertaking. This does not apply where the Commission decides no further action is appropriate. Where the Commission issues directions to you it must inform you of your right of appeal to the Fair Employment Tribunal.
- 6.3.16 The conduct of a review is not an end in itself. Its fundamental purpose is to establish if your concern's procedures are operating well and continue to do so; if they are not, to determine what affirmative action would be reasonable and appropriate in all the circumstances.

Voluntary undertakings

- 6.3.17 There is provision in the Act for you voluntarily to enter into a written and binding agreement with the Commission where it has formed the opinion that you ought to take action for the promotion of equality of opportunity. The Commission can form that opinion in exercising any of its functions under the Act or where it appears to the Commission - in the light of a decision taken by a Tribunal in an individual case or the evidence presented in such a case - that action is necessary to promote equality of opportunity.
- 6.3.18 Where the Commission forms such an opinion it is recommended that you conclude such an undertaking. The purpose behind this is to allow you and the Commission to agree on certain steps to be taken without either party incurring

the cost, inconvenience or delay which a formal investigation would entail. This provision emphasises the important advisory element in the Commission's functions and enables you to take an active and responsible role in providing equality of opportunity. If you enter into such an undertaking and fail to comply with it the Commission must either serve directions upon you or make an application to the Tribunal for enforcement of the undertaking. When the Commission issues directions to you it must inform you of your right of appeal to the Fair Employment Tribunal.

6.4 CODE OF PRACTICE

- 6.4.1 This Code of Practice complements the Act. You should use it as a constant reference point. You should study this Code carefully; carry out its recommendations where applicable; make every effort to ensure that your managers, and all those involved in the recruitment, training and promotion of staff are familiar with its recommendations; and discuss the implementation of these recommendations with your trade union or workforce representatives. Your objectives should be to ensure that this Code is used as a working document, is widely understood, and is established as your touchstone of good practice.
- 6.4.2 A failure on your part to observe any of the provisions in this Code will in itself not render you liable to any proceedings but –
- (a) you must have regard to this Code in carrying out your review of composition, recruitment, training and promotion;
 - (b) the Commission must have such regard to the recommendations in this Code as it considers proper in all the circumstances in considering whether or not action is required for promoting equality of opportunity;
 - (c) the Tribunal must take into account any recommendations of the Code that it considers relevant when determining any question arising in proceedings before it.
- 6.4.3 The Commission has the discretionary power to revise the Code in whole or in part at any time. The Commission must take such steps as it considers necessary to publicise this Code; and both the Commission and the Department of Economic Development must take the steps they consider necessary to encourage both employers and vocational organisations in Northern Ireland to adopt the policies and practices recommended in this Code.
- 6.4.4 If you have any doubt about any of the guidance contained in the Code (e.g. about whether or not – or how best – a particular recommendation can be applied in your specific circumstances) then you should take the initiative and consult the Commission. It is there to help you.

6.5 AFFIRMATIVE ACTION

- 6.5.1 Affirmative action is a mechanism for change. Essentially it is any lawful action designed to secure fair participation and its continuity. It follows that where change is necessary, affirmative action measures should be an integral and continuous feature of good fair employment practice.
- 6.5.2 You can take affirmative action measures voluntarily at any time and particularly, if necessary, following your own analysis of your monitoring return. In addition when your own review indicates to you that fair participation in your concern is not being provided you must determine what (if any) affirmative action would be reasonable and appropriate. You can also be directed by the Commission, or ordered by the Tribunal to undertake affirmative action.
- 6.5.3 It is preferable to take your own initiative on affirmative action. The key point is that you do not have to await receipt of a direction or order, or on the outcome of your formal review, before you initiate affirmative action. As an employer, the main responsibility for fair employment in your organisation rests with you. So you should be working on fair employment – not only addressing it but thinking ahead about it – as an essential feature of your normal personnel management practice.
- 6.5.4 The Commission stands ready to give you strictly confidential advice, on request, on any affirmative action measures you may be contemplating. You should take full advantage of this and initiate consultations with the Commission when you consider that change may be necessary.

How affirmative action is defined

- 6.5.5 The legal definition of affirmative action fully reflects this pro-active and forward looking philosophy. Affirmative action means 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:
- the adoption of practices encouraging such participation; and
 - the modification or abandonment of practices that have or may have the effect of restricting or discouraging such participation.

This definition allows you to identify both present, and likely future, problems in the area of fair participation and to take appropriate action to deal with them.

- 6.5.6 The term “fair participation” is not defined because fairness can only be assessed in relation to particular cases and circumstances. You should be considering fair employment and any necessary affirmative action as an integral part of your standard personnel procedures. So it follows that, in the first instance, it is for you to consider - on the basis of your experience of the labour market or markets with which you are in contact - whether or not you are

securing fair participation and whether or not your practices are resulting in fair participation by both communities.

- 6.5.7 It is not possible to prescribe a rigid and predetermined level of participation which should be achieved generally by all employers. Obviously what is fair will depend very much on the circumstances of each particular and individual case. What is required is that you afford opportunities to both communities and, where a community is under-represented, you take affirmative action steps to remedy that under-representation. Accordingly you must ask yourself whether, in the light of all the factors known to you – and including advice from the Commission – the composition of the workforce and of your recent recruits as revealed by monitoring is broadly in line with what might reasonably be expected. If it is out of line then you must ask yourself why this is so and what affirmative action is needed in order to bring about fair participation by both Protestants and Roman Catholics. In considering this matter you should consult the Commission. What is not required is that the proportionate distribution of Protestants and Roman Catholics in the population as a whole should be automatically reflected in every job category, occupation or position in each undertaking throughout the province. That is quite unrealistic; and obviously it is accepted that the realities of each specific location need to be addressed in framing appropriate affirmative action measures.
- 6.5.8 What is required is the identification of broad patterns, and an assessment of how these compare with the appropriate catchment areas. It follows that in considering fair participation you should draw on all relevant factors known to you. Obviously you will wish to make use of your annual monitoring returns and the information contained in them about your composition. In addition you will wish to draw on any other information contained in your personnel records and relevant to determining the composition of your workforce. Similarly the information generated by your review procedures on your recruitment, training and promotion activities will be particularly relevant to a determination on fair participation. You will also wish to consider the information which you obtain from the Commission on labour availability. You will also be aware – in the light of your own operational experience – of the dynamics of the labour market and the catchment areas within it from which you are drawing employees. All these factors taken together will help you to make a determination on whether or not fair participation is being provided. In doing so, of course, you should consult with the Commission.
- 6.5.9 Usually the affirmative action that is most appropriate will follow from the analysis of the problem. It must be tailored to the particular circumstances in your undertaking. In implementing an affirmative action programme within your undertaking there should be consultation with the Commission, the trade unions, employee representatives or workforce.

When it should be taken

- 6.5.10 This Code does not attempt to set out a definitive list of circumstances in which affirmative action should be taken but it should certainly be considered if, for example, either Protestants or Roman Catholics:
- are applying in fewer numbers that might be expected for employment, training or promotion;
 - are recruited, trained or promoted in numbers proportionately lower than their rate of application;
 - hold jobs carrying higher pay, status and authority in numbers proportionately lower than their rate of application or availability;
 - are, in larger undertakings, concentrated in certain branches, shifts, sections or departments;
 - enjoy less attractive terms, hours or working conditions than others;
 - are inhibited by the “chill factor” – the attitudes, or supposed attitudes, on religious and political matters of existing employees, customers or clients, or the environment in the workplace;
 - are more subject to lay-off, recall and termination procedures than others;
 - are likely to be adversely affected by possible redundancies and agreed or traditional schemes such as “last in – first out”.
- 6.5.11 If any of these symptoms exist it does not necessarily imply malpractice, but it does mean that the matter should be investigated to establish what factors are producing these effects and what can be done to counter them. In doing so employers should consult with the Commission which will readily co-operate in the design and implementation of affirmative action measures.
- 6.5.12 Affirmative action should be tailored to your particular circumstances. It is simplistic to assume that there is a standard package of measures or that it is a once-off exercise. It is a continuum of action that must be progressively considered, implemented and modified (perhaps with some measures being dropped and others added) to ensure that fair participation is secured and then maintained.

Specific protections from both direct and indirect discrimination

- 6.5.13 The 1976 Act as amended by the Act specifically excepts from both direct and indirect discrimination three key areas of affirmative action. So you should consider first whether any or all of these measures would be appropriate in your circumstances and, if appropriate, consult with the Commission in doing so. The three areas are:
- (a) targeting training in a particular area, or at a particular class of persons (not framed by reference to religious belief or political opinion) in order to help fit persons from an under-represented group for employment;

- (b) specifically encouraging applications for employment or training from persons from an under-represented group or by mentioning in advertisements that applications are particularly welcome from them, or specifically contacting certain schools likely to supply such applicants;
- (c) negotiating an agreed redundancy scheme with your trade unions or workforce representatives in order to preserve gains made in your workforce by persons of that under-represented group, or to prevent disproportionate losses of such persons e.g. by negotiating a redundancy scheme other than “last in – first out”.

(a) Training

- 6.5.14 Affirmative action training is a particularly important way of remedying under-representation. While you are not permitted to select for training schemes on the basis of religious belief or political opinion, you can deliberately and intentionally locate a training scheme in a particular area of the Province in order to facilitate a specific under-represented group. In doing so you are protected against charges of direct and indirect discrimination on the grounds that the access of persons of an over-represented group is excluded or restricted. You should make use of this important affirmative action facility in appropriate circumstances.
- 6.5.15 While you are not permitted to select for training schemes on the basis of religious belief or political opinion, you can also deliberately and intentionally confine a training scheme to a particular class of persons defined in such a way that will facilitate a specific under-represented group. Unless you are providing affirmative action training for employees in an existing all male or all female workforce, you should avoid framing such classes of persons by reference to age, entitlement to unemployment benefit or length of service. To do so could run the risk of indirect sex discrimination.
- 6.5.16 The criteria which you may wish to use in selecting a class of persons for the purposes of affirmative action training is a matter on which you should consult the Commission. The most appropriate criteria will depend on the particular circumstances of your case, but the following examples illustrate that criteria based on the existence or otherwise of particular characteristics can be used; (i) individual skills; (ii) previous work experience; (iii) qualifications; (iv) educational background; (v) previous training. If you are contemplating targeting training at a particular class of persons you are recommended to seek advice from both the Commission, and the Equal Opportunities Commission, in order to ensure that your proposed actions are compatible with the Sex Discrimination (NI) Order 1976.

(b) Encouraging applications

6.5.17 Another important affirmative action measure is the encouragement of applications from members of an under-represented community whether Protestant or Roman Catholic. Accordingly you are specifically protected from accusations of both direct and indirect discrimination when, as part of affirmative action, you:

- include in advertisements a statement to the effect that applications are particularly welcomed from the appropriate under-represented group, whether Protestant or Roman Catholic. (The key points are that the group concerned must be under-represented; and that affirmative action is required to increase its representation and effect progress towards fair participation);
- target advertising on a particular under-represented group;
- take steps to increase the awareness of pupils in the schools serving any under-represented community to the opportunities which are open;
- take steps to inform community groups which work with any under-represented community of the opportunities which are open.

(c) Agreed redundancy schemes

6.5.18 The securing and continuity of fair participation could be compromised by redundancies and the method used to select for them. If you find yourself contemplating such circumstances you should consult with the Commission and negotiate with your trade unions or employee representatives.

6.5.19 You are not permitted to select for redundancy on the basis of religious belief or political opinion. You are permitted, however, to negotiate a redundancy scheme which may affect a proportionately smaller number of persons from one community than the other. Three conditions must be met. Firstly, the scheme must be carried out as part of affirmative action. Secondly, the scheme must be in accordance with agreed procedures. This means that it will have been agreed by unions or employees' representatives, and as such is consistent with good industrial relations. Thirdly, the scheme must not be selective on the basis of religious belief or political opinion.

6.5.20 The particular type of redundancy scheme which should be implemented in any specific set of circumstances is a matter for negotiation between employers and union or workforce representatives. But, typically, this form of affirmative action should be contemplated when you face redundancy and wish to preserve gains in the percentages of an under-represented group in your workforce. Such gains are likely to have resulted from those most recently recruited; and they could be dissipated under e.g. a LIFO "last in – first out" redundancy agreement.

6.5.21 You are permitted, therefore, to negotiate another agreed method of redundancy as part of affirmative action provided it is not selective on the basis

of religious belief or political opinion. You could, for example, decide to base a redundancy scheme on various other criteria such as skills, qualifications or disciplinary records. In doing so you are protected against accusations of both direct and indirect discrimination even though the scheme impacts disproportionately on the over-represented community in your workforce.

- 6.5.22 Your protection against charges of direct and indirect discrimination does not confer protection against the unfair dismissal provisions of industrial relations legislation. Accordingly you should take appropriate advice on this matter from the Labour Relations Agency, in addition to seeking the guidance of the Commission on your affirmative action programme.

Other affirmative action measures

- 6.5.23 These three specific affirmative action measures may not be suitable to, or required in, your particular circumstances. The following are suggestions of other affirmative action measures – without the special statutory protection mentioned at paras 6.5.13-6.5.22. These other affirmative action measures may be more appropriate for general and initial use. In selecting from this list, or considering other measures that are not listed, you should consult with the Commission. You might consider:

- advertising all vacancies in media which will reach all potential candidates. This should include advertising vacancies in the press in such a way as to ensure that candidates from any under-represented community know that the vacancies are as open to them as they are to others;
- considering the possibility of opening up vacancies in senior management to outside competition in order to widen the pool of suitable candidates;
- abandoning preferences, or expressed preferences, in recruitment, selection or promotion for the friends and relations of existing employees; or ex-members of the security forces or the Armed Services (unless such service is a valid criterion for the job to be done); or people with the longest service;
- removing employment conditions which are not strictly job-related;
- removing an insistence on educational qualifications which are not absolutely necessary for the job to be done;
- ending informal selection methods and replacing them by objective testing as a basis for selection;
- ending all word of mouth recruitment;
- ending displays at the workplace of flags, emblems, posters, graffiti, or the circulation of materials, or the deliberate articulation of slogans or songs which are likely to give offence to, or cause apprehension among, any one section of the population.

It is important to remember that, depending on the circumstances, ending some or all of the above mentioned practices will not just be a matter of instituting affirmative action measures. Some of these practices will themselves be, at

least indirectly, discriminatory. For example some companies have been held to be discriminating because of the circumstances in which they permitted the display of flags and emblems likely to cause apprehension or fear.

6.6 GOALS AND TIMETABLES

6.6.1 Like affirmative action, goals and timetables are mechanisms for change; they are also a means of measuring change for both you and the Commission. As with affirmative action, you can set goals and timetables voluntarily, and at any time, for applicants, appointees, and your workforce as a whole. Such goals and timetables must be linked to action on your part and serve as a check on its effectiveness. You could conclude a voluntary but binding undertaking with the Commission as a means of progressing towards such goals and timetables. Where, following your own analysis of your monitoring return, you consider that affirmative action is necessary then you are strongly recommended to set complementary goals and timetables.

6.6.2 In addition when you have decided on affirmative action following your formal review, you must:

- consider the setting of goals and timetables for applicants, appointees and the workforce as a whole as a complement to your affirmative action; and
- where it is practical to do so, you must set such goals and timetables.

The Commission can enquire about your progress towards fair participation and make recommendations about your goals and timetables. Following an investigation you can also enter into an undertaking with the Commission – or be directed by the Commission – to take affirmative action and the Commission can also specify goals and timetables. If it forms the opinion that progress is not being made, the Commission can audit your progress and secure or direct further affirmative action without further investigation and can specify new goals and timetables.

6.6.3 As with affirmative action the key point is that you do not have to await specification, or on affirmative action subsequent to your review and a recommendation from the Commission, before you set goals and timetables. Like affirmative action, goals and timetables should be considered as a standard matter to be addressed when working on fair employment. As such, their use should be considered as a normal feature of your personnel practice – indeed they are already in use as management tools in many companies, for example, when attempting to reduce labour turnover and absenteeism, or to increase productivity and profitability.

6.6.4 In using goals and timetables you may be faced, on occasion, with the quite mistaken assumption that goals and timetables operate, in practice, as “quotas”. So it is important to emphasize strongly the following points:

- goals and timetables are not “quotas” – quotas reserve jobs or training places for people, and exclude others from employment or training, simply on the basis of religious belief or political opinion; such quotas are restrictive, inefficient, exclusive and unjust; they are also unlawful in Northern Ireland;
- goals and timetables on the other hand are targets that you would expect – and should make good faith efforts – to reach within a certain timescale;
- goals and timetables are consistent with appointment on merit at the point of selection – this is fundamental; all selection must be – and be seen to be – based on picking the best person for the job;
- goals and timetables, as targets of expectation, should be both challenging and realistic if they are to be useful to you and the Commission as a means of promoting and measuring change; so they may have to be adjusted – upwards or downwards – in the light of mutual experience.

6.6.5 As with affirmative action generally, you should take the initiative and regard the Commission as a valuable source of advice when considering or setting goals and timetables. You should also inform your trade union or workforce representatives of any goals and timetables that have been set, and explain to them your rationale for doing so. It is important that the consideration and setting of goals and timetables should be addressed openly.

6.6.6 It follows that goals and timetables should be freely acknowledged and, if appropriate, made public. There are a number of reasons for this. Firstly, their use is a clear, public and unequivocal indication that the employer is committed to one to the important aspects of best fair employment equality practice and is actively working towards the achievement and continuity of fair participation. Secondly, it is preferable to openly publicise goals and timetables rather than to invite unnecessary rumour and suspicion by keeping them confidential. Thirdly, the Commission could publicise information obtained from employers on goals and timetables. Fourthly, open publication of goals and timetables by employers serves two complementary educational functions – it familiarises their use as a standard feature of good management and personnel practice and educates the employees in the crucial distinction between goals and timetables on the one hand and unlawful quotas on the other.

7. Indirect Discrimination

7.1.1 The Act makes indirect discrimination unlawful. It does so by amending the definition of “discrimination” contained in section 16 of the 1976 Act to include indirect discrimination.

7.1.2 Under the amended definition in the Act:

“A person discriminates against another person on the grounds of religious belief or political opinion in any circumstances relevant for the purposes of this Act if –

- (a) on either of those grounds he treats that other less favourably than he treats or would treat other persons, or
- (b) he applies to that other a requirement or condition which he applies or would apply equally to persons not of the same religious belief or political opinion as that other but –
 - (i) which is such that the proportion of persons of the same religious belief or of the same political opinion as that other who can comply with it is considerably smaller than the proportion of persons not of that religious belief or, as the case requires, not of that political opinion who can comply with it, and
 - (ii) which he cannot show to be justifiable irrespective of the religious belief or political opinion of the person to whom it is applied, and
 - (iii) which is to the detriment of the other because he cannot comply with it.”

7.1.3 The Fair Employment Tribunal will determine individual cases of alleged discrimination, whether direct or indirect. In reaching its decision it will consider the particular circumstances applying in each individual case brought before it.

7.1.4 A possible example of indirect discrimination might be the imposition by you of a requirement that all applicants for employment must have previously served in an organisation associated particularly with either the Protestant or the Roman Catholic community. In these circumstances a potential applicant who was from the other community and who had not had such experience might successfully argue:

- (a) that the proportion of persons from his/her community who had served in such an organisation was considerably smaller than the proportion of the other community who had so served
- (b) that in terms of the job for which he/she wanted to apply there was no justification for requiring previous service in such an organisation i.e. it was not a job-related criterion; and

(c) that the imposition of the requirement was to his/her detriment to the extent that it closed an employment opportunity for which he/she was otherwise suitable.

7.1.5 It follows that in order to avoid indirect discrimination you must avoid job requirements or conditions which have an adverse impact on one community, which are detrimental to an individual and which cannot be shown to be justifiable irrespective of religious belief or political opinion.

7.1.6 If in any doubt about whether or not one of your proposed job requirements or conditions might lead to indirect discrimination, you should consult the Commission. It will be pleased to give you advice and guidance on this matter.

7.1.7 You should bear in mind that the determination of whether or not indirect discrimination has occurred in any particular case is a matter for the Fair Employment Tribunal. It has the power to award damages to an individual covering financial loss, loss of opportunity and injury to feelings. It may also order remedial action and increased compensation if that action is not taken.

7.1.8 You should also note that the Commission has the power, following the hearing of an individual discrimination case by the Tribunal and regardless of its outcome, to form an opinion that action ought to be taken to promote equality of opportunity. It also has the power to pursue remedial action through the conclusion of undertakings with the relevant employer. So even if an individual case of indirect discrimination is not proven, an employer can be expected by the Commission to take general action to improve employment practices that it considers unsatisfactory.

7.2 EXCEPTED OCCUPATIONS

7.2.1 There are certain excepted occupations from both the indirect and direct discrimination prohibitions in the 1976 and 1989 Acts: namely, clergymen and ministers of religion, teachers in schools, employment in a private household, and jobs where their essential nature requires them to be done by a person holding, or not holding, a particular religious belief or political opinion. Determining whether the essential nature of a job requires it to be done by someone of a particular religious belief or political opinion is easier with some jobs than with others – particularly those jobs that might be considered to have mixed religious and secular elements (e.g. wardens of homes or hostels that are intended to operate with a particular religious ethos and to encourage the adoption of specific religious principles by those they serve).

7.2.2 If you are an employer who is considering recruiting for such a job then you should ensure that its essential nature is such that it must be done by someone of a particular religious belief, or none. It would be difficult to argue, for example, that the essential nature of cooking or gardening would require either the cook or gardener to hold a particular religious belief even if that cooking or

gardening was being done for the members of a particular religious group or church body. But where the cook or gardener had other duties of a religious or evangelising nature associated with their cooking or gardening functions – such as inducting members of a home, hostel or community into a particular set of religious values – then you could reasonably claim that the essential nature of that particular job required it to be done by someone of a specific religious belief.

7.2.3 The key point is that you, as the employer, are in the position to consider and write the job description of the post for which you are recruiting. You will know whether the job in question has straightforward secular functions even if it is undertaken within a church or church body. If so, it would be difficult to argue that the essential nature of such a job required it to be done by someone of a particular religious belief. Such a job would not be covered by the exception, recruitment for it should be open to all, and selection should be on the basis of merit. If, on the other hand, the job in question has mixed secular and religious function, it would be difficult to argue that it could be done by someone not of the religious belief, or not in full sympathy with the religious principles, in question. Such a job would be covered by the exception and recruitment and selection could be limited to those of the particular religious belief, or sharing the specific religious belief, or sharing the specific religious values, in question.

7.2.4 If you are in any doubt about the essential nature of any job for which you may be recruiting, or about how to describe it in your advertising, then you should take the initiative and consult with the Commission. It will be pleased to give you every assistance in this matter. In any particular case of alleged discrimination, of course, the determination of whether or not discrimination has occurred rests with the Fair Employment Tribunal.

8. The Role of Trade Unions, Their Representatives and Their Members

8.1 RESPONSIBILITIES

- 8.1.1 Trade unions, in common with a number of other organisations, have a dual role in the promotion of equality of opportunity in employment both as employers in their own right and as active participants on behalf of their membership. In some cases they effectively control recruitment and selection for employment.
- 8.1.2 While the main responsibility for eliminating discrimination and providing equality of opportunity in employment rests with employers, individual employees and their representatives also have a part to play. Indeed the effective implementation of equality of opportunity in employment can best be achieved by co-operative action by employers, trade unions and individual employees. All will benefit from arrangements which ensure fair treatment. It is in everyone's interest to ensure that justice is done and is seen to be done.
- 8.1.3 As employers, trade unions have the responsibilities set out in chapters 5 and 6 of this code. They also have a responsibility to ensure that their representatives and members do not discriminate, on the grounds of religious belief or political opinion, against any individual or group in the admission or treatment of members. Union officials, at all levels, are in a key position and share a responsibility to try to influence and secure the practice of equality of opportunity in employment. Union representatives should also be aware that unions have been found guilty of discriminating even when their representatives claimed that they were "only putting forward the views of their members".
- 8.1.4 Trade unions must not discriminate on religious or political grounds against existing members:
- by varying their terms of membership, depriving them of membership or subjecting them to any other detriment;
 - by treating them less favourably in the benefits, facilities or services provided. These may include training facilities, welfare and insurance schemes, entertainment and social events, processing of grievances, negotiations, or assistance in disciplinary or dismissal procedures.
- 8.1.5 Trade unions must not victimise individuals who have made allegations or complaints of religious or political discrimination, or provided information about such discrimination.

8.2 RECOMMENDED PRACTICE

8.2.1 It is therefore recommended that trade unions should play their part by:

- declaring unequivocally their commitment to equality of opportunity in employment and ensuring that all their members are aware of this;
- participation fully in the consultation process, in monitoring and affirmative action programmes;
- encouraging their members to respond positively to the monitoring arrangements introduced by employers by completing fully and accurately any questionnaires issued to them;
- co-operating with management in devising remedial measures to eliminate discrimination wherever it exists; for example, by negotiating changes which might be necessary to remove indirect and unintentional discrimination in certain areas, such as craft apprenticeship schemes, seniority rights, and mobility between departments;
- providing adequate information and training for trade union officers, shop stewards and employee representatives on their responsibilities. The content of training schemes might usefully be discussed with the Commission;
- instructing members who may be involved in selection decisions on recruitment, promotion, training or transfer to avoid direct or indirect discrimination and to promote equality of opportunity in employment;
- examining their procedures and joint agreements to ensure that they do not contain indirectly discriminatory requirements such as unjustifiable restrictions on transfers between departments, or selection criteria which could have a disproportionately adverse affect on people of a particular religious affiliation;
- encouraging members to co-operate with their employers in concluding, as part of an affirmative action programme, an agreed redundancy scheme;
- treating as disciplinary offences acts of unlawful discrimination by union members, and including in any agreed disciplinary procedures, provisions for penalising (by dismissal or discipline under union rule) those who engage in intimidation of, or discrimination against, their fellow workers;
- paying serious attention to cases where employees believe that they are suffering religious discrimination, whether by their union or their employer; and taking any necessary steps to ensure they are fully investigated including, where appropriate, reference to the Commission;
- supporting management in its prohibition of the display of flags, emblems, posters, graffiti, or the circulation of materials, or the deliberate articulation of slogans or songs which are likely to give offence or cause apprehension among particular groups of employees;
- ensuring that members can have access to full-time officials if the local branch to shop stewards refuse to deal with cases alleging intimidation and/or discrimination.

9. The Role of Employees

9.1 RESPONSIBILITIES

- 9.1.1 As well as employers and trade unions, individual employees at all levels have responsibilities in promoting equality of opportunity in employment.
- 9.1.2 Employees must not discriminate or knowingly aid their employer to do so; nor must they knowingly incite, pressurise or induce any other person to do so. Indeed they should play an active part in helping their employer – and, if they are members, their trade union – with the promotion of equality of opportunity in employment.
- 9.1.3 They must not discriminate against fellow employees or job applicants on religious or political grounds, for example, in selection decisions for recruitment, promotion, transfer or training.
- 9.1.4 They must not victimise individuals who have made allegations or complaints of discrimination, or provided information about such discrimination.
- 9.1.5 They must not knowingly give false information to any other person seeking information for monitoring purposes. **If guilty of such an offence an individual is liable on summary conviction to a maximum fine of £2,000.**

9.2. RECOMMENDED PRACTICE

- 9.2.1 It is therefore recommended that employees should play their part by:
- co-operating with management in measures introduced to promote equality of opportunity in employment – particularly in monitoring procedures and affirmative action measures;
 - supplying full and accurate information on their religious affiliation (or religious belief) in response to legitimate requests from their employer;
 - making known their support for the introduction of affirmative action measures (through trade unions where appropriate);
 - opposing harassment or intimidation (e.g. by not refusing to work with colleagues because of their particular religious belief or political opinion); and opposing any action that might have the effect of discouraging them from continuing in their employment;
 - co-operation with management when it prohibits the display of flags, emblems, posters, graffiti, or the circulation of materials, or the deliberate

articulation of slogans or songs which are likely to give offence or cause apprehension among particular groups of employees;

- drawing the attention of management and, where appropriate, their trade union to any suspected discriminatory acts or practices or any action or activity likely to make working conditions less acceptable to employees of a particular religious belief;
- avoiding any action or demonstration which may have the effect of giving offence or causing apprehension, and refusing to assist in the publication or distribution of materials which are sectarian or intimidatory to any group of fellow workers;
- participating in training or other schemes designed by their employer or trade union to inform them of equality of opportunity in employment policy and to provide guidance and advice on the implementation of affirmative action measures;
- discussing with their employer or trade union, where appropriate, any difficulties that may arise in the implementation of affirmative action measures and working constructively with their employer and trade union in order to resolve such difficulties.

10. Joint Declaration of Protection

10.1.1 The successful practice of equality of opportunity in employment will be greatly assisted by the creation of a harmonious working relationship on the shop floor. Employers and trade unions have an important role to play in ensuring that all employees can work without fear of intimidation or harassment. Good practice will be strengthened if the employer and the appropriate trade union agree on a voluntary Declaration of Protection for the individual employee or groups of employees.

10.1.2 The Joint Declaration agreed between the Engineering Employers' Federation (NI Association) and the Confederation of Shipbuilding and Engineering Unions in March 1989 is a noteworthy example of the type of Joint Declaration which can be made. Although this related to a specific sector of industry, and was drawn up before the commencement of the new Act, it represents a commendable initiative of a type which could also be taken by other employers and trade unions.

10.1.3 Employers and trade unions will wish to consult on the precise wording of such a Joint Declaration but it is recommended that it should include:

- a clear statement that discrimination, intimidation and victimisation are illegal; that the firm must be seen to be a fair employer; and that intimidation is a dismissable offence;
- recognition of the right of all workers to work without intimidation or harassment;
- a statement of joint opposition to any attempts to prevent – contrary to the letter and spirit of the Fair Employment (Northern Ireland) Acts – the employment, continued employment, or career development of any person.

10.1.4 Employers and trade unions will wish to include in any Joint Declaration an affirmation of their intention to work together:

- to ensure the safety of employees from intimidation or harassment in the workplace by persons of other religious beliefs or political opinions;
- to ensure that no employee is victimised (i.e. treated less favourably) because he or she has taken action or may take any action connected with the Fair Employment (Northern Ireland) Acts;
- to create and sustain a neutral workplace and to discourage an intimidating working environment or atmosphere (e.g. by prohibiting the display of flags, emblems, posters, graffiti, or the circulation of materials, or the deliberate

articulation of slogans or songs which are likely to give offence or cause apprehension among particular groups of employees).

- 10.1.5 The Joint Declaration should be included in works handbooks, etc, and should be displayed in a prominent position on the premises.

11. The Role of Employment Agencies

11.1 RESPONSIBILITIES

- 11.1.1 Employment agencies, in their role as employers, have the responsibilities outlined in chapters 5 and 6 of this Code. In addition, as an important recruitment source they can and should make a positive contribution to the active promotion of equality of opportunity in employment. In doing so they should liaise closely with the Commission.
- 11.1.2 Under section 20 of the 1976 Act it is unlawful for an employment agency to discriminate against a person –
- (a) in the terms on which it offers to provide any of its services; or
 - (b) by refusing or deliberately omitting to provide any of its services; or
 - (c) in the way it provides any of its services.
- 11.1.3 Apart from not discriminating in the provision of their services, employment agencies must also avoid becoming involved in discriminating action by a client employer. They should not accept instructions from clients to the effect that applicant of a particular religious belief or political opinion will be rejected, preferred or recruited.

11.2 RECOMMENDED PRACTICE

- 11.2.1 Employment agencies vary considerably in the wide range of recruitment services they offer their clients but generally they fall into three broad areas:
- (a) recruitment from the labour market as a whole;
 - (b) recruitment from a limited number of people, details of whom are held on a register by the agency; and
 - (c) executive search.
- 11.2.2 Each of these areas of activity should be pursued with careful regard to the active promotion of equality of opportunity.

Recruitment from the labour market

- 11.2.3 Employment agencies should keep in mind that they act as agents of, and are subject to the same constraints as, the employers by whom they are engaged. This means that an employment agency, in assisting in the recruitment of staff for a client, should adopt the same practices as those recommended for

employers in chapter 5 of this Code. In summary it is recommended that employment agencies should:

- ensure that adequate job descriptions and personnel specifications are prepared;
- advertise vacancies widely;
- use application forms;
- make clear that applications are welcomed regardless of religious belief or political opinion;
- not limit recruitment sources;
- apply the job requirements consistently when interviewing and shortlisting;
- record decisions, and reasons for them, systematically; and
- retain records for at least 12 months.

- 11.2.4 The responsibility to monitor the religious affiliation of new recruits rests firmly with the employer but an employment agency should, where necessary, advise him/her of his/her statutory duties in this regard and, if in a position to do so, encourage applicants for jobs to provide the details necessary for the employer to classify them. For example, if in carrying out a preliminary interview, the employment agency notices that the monitoring section of an application form has not been completed, it should be explained why this information is necessary and the applicant encouraged to supply it.
- 11.2.5 It must be remembered that the statutory duty to monitor applicants is placed on the employer and he/she cannot pass this legal responsibility off on an employment agency engaged by him/her. So monitoring of applicants should be carried out by the employer.
- 11.2.6 If however any employment agency does carry out the monitoring function on behalf of a client, this should be done by someone who is not directly involved in the selection process. The monitoring section should be removed from the application form before it is passed to the person involved in the selection process. It is important that candidates should have the assurance that their community background has not been divulged to the person interviewing them.
- 11.2.7 The employment agency should act in the best interests of its clients and give them access to whatever documentation they need to fulfil their legal obligations. In practice an employer may be willing to allow an agency to act on his/her behalf and to prepare the necessary returns and record. If this is the case, employment agencies are strongly advised to ensure that the terms of such an arrangement are clearly understood (i.e. that the employer retains his/her legal responsibility) and preferably set out in writing, prior to the commencement of the assignment.
- 11.2.8 On completion of the assignment the employment agency should hand over the information that a registered employer is required to retain in relation to applicants (see paras 6.2.45 and 6.2.46) (including such information on those

applicants rejected by the agency at any stage), and any other relevant documentation. This would not apply where a person, in responding to an advertisement placed by an agency, had specifically requested that his/her identity should not be revealed to certain named employers. (This is often done to avoid the possibility of someone applying unknowingly for a job with his/her existing or a former employer.) Such responses to advertisements are not applications and can be ignored for monitoring purposes.

- 11.2.9 Some employers use agencies to advertise vacancies because for various reasons they do not want the company name to be published. On occasion there may be understandable reasons for this. However open publication of the company name does give the employer an opportunity to make a public declaration of commitment to the practice of fair employment by including an appropriate statement in the advertisement. Such public commitment by their clients should be encouraged by employment agencies.
- 11.2.10 An employment agency will frequently undertake a shortlisting or sifting exercise on behalf of a client. Where this is done it is recommended that:
- the criteria for shortlisting should be as precise as possible and agreed in advance with the employer;
 - the agency should prepare such documentation or records as it considers necessary of it to defend its shortlisting decisions if subsequently challenged.
- 11.2.11 In making a recommendation to the client (for example, putting forward perhaps the top four applicants for a post) the agency should not make any reference to their religious belief or political opinion. Nor, of course, should the religious belief or political opinion of the individuals – or the existing composition of the employer's workforce – be taken into account in selecting those to be put forward for final decision by the employer.
- 11.2.12 Employment agencies should always keep in mind that they act on behalf of employers and that it is the employer who will be held legally responsible for any selection decisions whether taken directly by him/her or on his/her behalf.

Recruitment from an employment agency register

- 11.2.13 Some employment agencies hold registers of people who are seeking a change of job and then draw on these registers (possibly in combination with a public advertisement) to fill vacancies notified by client employers. The use of such registers is similar to the use of standing lists by employers and considerable care must be taken to ensure that they are operated in a manner that is consistent with the philosophy and practice of fair employment. It is important, for example, that both the existence of such registers and the criteria for inclusion on them should be made known. Vacancies notified to the employment agency should receive wide publicity so that as many eligible

people as possible are aware of the employment opportunities on offer and can compete for them.

11.2.14 Accordingly, if employment agencies do hold registers of people who want to change jobs, or who are seeking temporary employment, it is recommended that they should:

- not select people for jobs solely from their registers;
- advertise any vacancies notified to them so that other eligible people can compete on merit against anyone on the register;
- make the existence and purpose of the register widely known;
- treat all applicants for inclusion on the register in exactly the same way and take no account of an individual's religious affiliation in deciding whether to accept him or her on to the register;
- monitor the composition of the register (and sections within it, where appropriate) to ensure that applicants are drawn from both communities in proportions that could reasonably be expected;
- take steps to encourage more applicants from any under-represented community;
- review and update the entire register at regular intervals.

It is important to note that in some circumstances an agency which selects simply from a register without complying with these recommendations may be guilty of unlawful indirect discrimination.

Executive Search

11.2.15 Many employment agencies offer a recruitment service to their clients which is commonly known as "executive search" or "headhunting". The exact nature of the service may vary from one agency to another but, in broad terms, it involves obtaining for a client the services of a known individual in employment elsewhere, or seeking to identify for a client an individual with very specific qualifications and experience with a view to encouraging that person to leave his/her present job and take up employment with the agency's client.

11.2.16 By its very nature executive search tends to be a fairly covert operation. To this extent it raises problems in the context of equality of opportunity because it results in vacancies being filled which have not been advertised or made known in any way to all those in the labour market who have, or might have, the qualifications and experience which are being sought.

11.2.17 It is therefore recommended that where employment agencies carry out executive search assignments they should:

- explain to the client that the filling of a vacancy which is not made known to all eligible candidates is a denial of equality of opportunity;
- ensure that the vacancy is widely advertised;

- treat those who respond to the advertisement in exactly the same way as those identified by the executive search i.e. they should be subject to exactly the same subsequent selection process.

Appendix

CRIMINAL OFFENCES CREATED BY AND UNDER THE 1989 ACT

It will be a criminal offence to

- (i) fail to apply within due time for a concern to be registered with the Commission
- (ii) fail to apply within due time for the entry in the register to be changed to reflect a change of employer
- (iii) make a false statement in connection with the removal from the register of an entry or part of an entry
- (iv) fail to serve on the Commission a monitoring return before the time for serving the return expires
- (v) fail to retain monitoring information for the prescribed period
- (vi) submit a monitoring return not prepared in accordance with the regulations or not containing the prescribed information
- (vii) give false information to another in connection with the preparation of a monitoring return
- (viii) include false information in a monitoring return
- (ix) fail to retain monitoring information about job applicants for the prescribed period
- (x) give false information to another who is seeking information from job applicants
- (xi) include false information in records kept concerning job applicants
- (xii) disclose monitoring information held in one's capacity as an employee in a concern as the employer
- (xiii) fail to comply by the specified time with a requirement by the Commission for monitoring information; or for information on how a monitoring return was prepared
- (xiv) fail to comply by the specified time with a requirement by the Commission for information as to what steps the employer has taken or proposes to take to carry out a review of employment practices and as to the manner in which the review has been or is to be carried out; information as to the matters disclosed by the review; information as to a determination of reasonable and appropriate affirmative action; information as to consideration for determination of goals and timetables; information as to progress with affirmative action or towards achieving goals and timetables
- (xv) fail to comply by the specified time with a requirement by the Commission, where a notice about goals and timetables has effect, for information in order to determine the extent of progress being made
- (xvi) fail to comply by the specified time with a requirement by the Commission for information to determine whether a person is an employer, or whether a concern has satisfied the condition for registration; whether a body corporate is controlled by an employer or associated with him, or whether any person is connected with him; or whether a contract made by tender

by a public authority or in a specified class has been made or is likely to be made or whether any person has executed any work or supplied any goods and services for the purposes of any such contract, or is likely to do so

(xvii) give false or misleading information to the Commission in response to any requirement under (xiii), (xiv), (xv) or (xvi) above

(xviii) disclose (save in specified circumstances) information in the Commission's possession which discloses, or from which there can be deduced, the religious belief of any identifiable individual

(xix) fail to comply with Tribunal regulations in respect of attendance or discovery or inspection of documents.

Penalties

- (a) For the offences at (i), (ii), (iv), (xiii), (xiv), (xv), (xvi) and (xix) the maximum penalty on first conviction is £2,000; if the offence continues after that conviction, on a second or subsequent conviction the maximum penalty is £200 for each day on which the offence continued after the preceding conviction
 - (b) For the offences (iii), (v), (vii), (viii), (ix), (x), (xi), (xii), (xvii) and (xviii) the maximum penalty is £2,000
 - (c) For the offence at (vi) the maximum penalty is £10,000
 - (d) Where a public authority acting on behalf of the Crown is, or is in the opinion of the Commission, in breach of any duty set out at (i) to (xix) above a special procedure applies instead of the penalties at (a) to (c) above. The Commission sends a report to the appropriate Minister, or to the head of the relevant Northern Ireland department, or during direct rule to the Secretary of State for Northern Ireland. Where a report is sent to a Minister or the Secretary of State, the report must be laid before Parliament.
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