

REPORT OF INVESTIGATION UNDER PARAGRAPH 10 OF
SCHEDULE 9 OF THE NORTHERN IRELAND ACT 1998

An Investigation by the Equality Commission for Northern Ireland:

*Children's Law Centre and
Northern Ireland Office*

Equality Commission

FOR NORTHERN IRELAND

Final Report of the Equality Commission Investigation Under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998

Laid before each House of Parliament in accordance with paragraph 12(5)
of Schedule 9 of the Northern Ireland Act 1998 by the
Equality Commission for Northern Ireland

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Equality Commission for Northern Ireland

EQUALITY COMMISSION FOR NORTHERN IRELAND

Final Report of Equality Commission Investigation Under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998

**CHILDREN'S LAW CENTRE (CLC)
AND
NORTHERN IRELAND OFFICE (NIO)**

SUBJECT OF INVESTIGATION

This investigation relates to two alleged failures by the Northern Ireland Office to comply with its approved equality scheme relating to;

- (1) An alleged failure to conduct the screening exercise in accordance with the requirements of paragraph 3.2 of its approved equality scheme.
- (2) An alleged failure to consult on the screening decision in accordance with the requirements of paragraph 3.2(d) and 4.3

S. 75 of the Northern Ireland Act 1998 requires public authorities to have “due regard” to the need to promote equality of opportunity. An approved equality scheme is a statement of commitment to the statutory duties and a plan for their performance. Accordingly the Equality Commission took the substance of the “due regard” duty into account in deciding whether, in its purported compliance with its Scheme, the Northern Ireland Office had shown due regard to the need to promote equality of opportunity.

Schedule 9 Paragraph 4 (3)(a) of the Northern Ireland Act 1998 provides that a scheme shall conform to any guidelines as to form or content which are issued by the Equality Commission with the approval of the Secretary of State. It is therefore appropriate for the Equality Commission to consider the Guide to the Statutory Duties when assessing scheme compliance. The Guide is an essential aid to interpret the meaning and ambit of scheme commitments.

(1) An alleged failure to conduct the screening exercise in accordance with the requirements of paragraph 3.2 of approved equality scheme.

INVESTIGATION FINDINGS

When the Northern Ireland Office applied the screening criteria at paragraph 3.2 of its approved equality scheme, this produced an affirmative answer in respect of the question “is there any evidence of higher or lower participation or uptake by different groups within any of the nine categories”.

By virtue of the penultimate sentence of paragraph 3.2 of its approved scheme, the Northern Ireland Office was obliged, having answered this question in the affirmative, to give further consideration to whether an Equality Impact Assessment was required. No reasoning of such “consideration” is recorded in the original screening documentation, which simply records a decision that Equality Impact Assessment is not required. Therefore, despite the positive finding on the application of the first screening criteria, the Northern Ireland Office proceeded to exclude this policy for Equality Impact Assessment, without presenting any reasons for its decision that Equality Impact Assessment was not required.

The Equality Commission is of the view that when application of the initial screening questions results in a positive answer, it is implicit that a public authority which decides that an Equality Impact Assessment is not required should record its reasons for its decision. In this case it was proposed not to conduct an Equality Impact Assessment despite a recognition by the Northern Ireland Office that there was at least some evidence of differential impact by age and gender without any explanation for that decision. The Equality Commission is of the view that such a decision was not a reasoned decision such as is to be expected of a public authority.

The Equality Commission considered that a decision that Equality Impact Assessment was not required for a policy in respect of which the first screening criteria was judged in the affirmative should have been explained and documented in the Screening documentation. The absence of such an explanation rendered it impossible to understand how the Northern Ireland Office had reached its conclusion that Equality Impact Assessment was not

required. The Equality Commission considered that the Northern Ireland Office's failure to record any such reasons indicated that it had not given "consideration" as required by Paragraph 3.2 of its approved equality scheme.

The Northern Ireland Office maintained this decision following consultation.

In assessing compliance with equality schemes, attention must be paid to the provisions of s75 itself which requires the Northern Ireland Office show "due regard to the need to promote equality of opportunity". Attention must also be paid to the Guide to the Statutory Duties which states that public authorities must 'subject to full impact assessment' those proposed policies (such as the proposal in this case) which had been identified through screening as "having significant implications for equality of opportunity" (see page 37 of Guide).

The Equality Commission considered whether such due regard was shown by the Northern Ireland Office in respect of

- (i) the initial screening exercise,
 - (ii) the Northern Ireland Office's subsequent reasons for not undertaking an Equality Impact Assessment and
 - (iii) the decision not to undertake an Equality Impact Assessment.
- (i) the initial screening exercise

The Equality Commission considered that, in circumstances where the screening criteria had resulted in one positive answer, further "consideration" which failed to record any reasons for the decision not to undertake an Equality Impact Assessment represented a failure to 'consider' an Equality Impact Assessment in the context of the "due regard" duty

- (ii) the Northern Ireland Office's subsequent reasons for not undertaking an Equality Impact Assessment,

The Northern Ireland Office issued a summary of the responses to consultation in April 2004. This simply reported that "whilst some concerns were expressed" the majority of responses (50 out of 69) were in support of the proposals".

In terms of the potential equality impact on young persons and other Section 75 groups which had been highlighted by the submissions submitted by the Northern Ireland Commissioner for Children and Young People, the Northern Ireland Human Rights Commission and the Children's Law Centre, and the consequent need for a full Equality Impact Assessment, the Northern Ireland Office stated;

“Prior to consultation the Government carried out an initial equality screening on the proposals. This confirmed that the proposals in themselves are not likely to have an adverse differential impact on any of the Section 75 groups and therefore a full EQIA was unnecessary. The proposals are directed towards the population as a whole and would be universally applied. Those falling within the ambit of the legislation would be self-selecting, by virtue of their behaviour. The intention is not therefore to target any groups or individuals, but rather to address activities and behaviour that society has deemed to be anti-social. ASBOS are not targeted at children and young people. In fact evidence from Orders made in England and Wales which suggest a fairly even split between children and adults”.

In its reply of the 10 June 2004 to the Children's Law Centre's complaint, the Northern Ireland Office elaborated on this reasoning as follows;

“On the grounds that there could be a higher uptake by young males under the terms of the scheme (paragraph 3.2, Question A) consideration was given to whether to subject the policy to a full equality impact assessment. The first issue was whether the policy was constructed to be aimed at any particular sector. The answer is clearly ‘no’. The policy is designed to address anti-social behaviour and is not directed against any individual or group. Any person exhibiting anti-social behaviour can be made subject to an order.”

The second issue was whether the policy by its nature or any technical deficiency in the construction of the policy led to an inadvertent differential impact. Clearly we have no local data but the evidence of the use of ASBO's in England and Wales shows that whilst the majority of orders are made against males aged 17, a very substantial number are made against adults aged 18 and over. The analysis of this data and other more general considerations led the department to the clear conclusion that any imbalance in the use of ASBOs would be a reflection not of

deficiencies in either the policy or potential draft legislation but rather of the nature of the self-selecting group that behaves in an anti-social manner. In these circumstances the department concluded that a full equality impact assessment was not necessary”.

The Equality Commission noted that the purpose of screening, as set out in the Equality Commission’s Guide to the Statutory Duties, is;

“to identify those policies which are likely to have a significant impact on equality of opportunity ...”

The Equality Commission did not accept that the Northern Ireland Office’s stated reasons for not undertaking an Equality Impact Assessment, which focussed on the reasons for the adverse impact and the fact that such impact was not intentional, rather than the potential for adverse impact, represented a proper consideration of whether the policy was “likely to have significant impact on equality of opportunity”.

It is necessary but not sufficient to establish whether a proposed policy is ‘targeted’ at a s75 sub-category such as children and young people. It is also necessary to establish ‘inadvertent differential impact’. It is not adequate to deny significant differential impact if a majority of those likely to be affected are 17 or younger (and in some cases as young as 10). Furthermore the sub-category of ‘children and young people’ extends to those who are 25 or younger. Indeed, the Northern Ireland Office’s first consultation document specifically identified children and young people as a category likely to be significantly affected.

Nor is it adequate to deny significant differential impact on the basis that those likely to be affected are ‘of the nature of the self-selecting group that behaves in an anti-social manner’. The focus must be on the adverse impact. To deny an Equality Impact Assessment on this basis is the equivalent of denying an Equality Impact Assessment in relation to a policy affecting Travellers on the basis that they are ‘self-selecting’ to be nomadic or in relation to affecting women on the basis that they are ‘self-selecting’ to be pregnant. To deny an Equality Impact Assessment on the basis that the objective of the policy is to target ‘anti-social behaviour’ would insulate the entire criminal justice system from the impact of the statutory equality duty.

The Equality Commission therefore decided that the Northern Ireland Office had failed to 'consider' adequately an Equality Impact Assessment, in the context of the duty to have due regard to the need to promote equality of opportunity, in respect of its reasons for not undertaking an Equality Impact Assessment.

(iii) The decision not to undertake an Equality Impact Assessment.

The issue to be determined is whether, in the context of the mandatory nature of the Guide on this matter, and in the context of the 'due regard' duty, whether 'consideration' of an Equality Impact Assessment could ever require an Assessment to be conducted. The Committee is satisfied that a Public Authority cannot have an absolute discretion whether to conduct an Assessment in any circumstances. There must be an evidential threshold beyond which an Assessment is required unless the Public Authority has good reasons not to do so.

In this case, the Public Authority received substantial representations from two statutory bodies, the Northern Ireland Commissioner for Children and Young People and the Northern Ireland Human Rights Commission, and from a range of community and voluntary groups, particularly from the children and young person's sector, which outlined the substantial impact the proposed policy would have on those in that s75 sub-category. This impact included possible breaches of human rights law, including the UN Convention on the Rights of the Child, inconsistencies with the youth justice system in Northern Ireland and practical difficulties in the operation of the proposed policy in Northern Ireland. The Equality Commission is satisfied that the evidential threshold of 'significant implications for equality of opportunity' was substantially exceeded in this case. In the absence of adequate reasons not to do so, the Equality Commission was satisfied that 'consideration' of an Equality Impact Assessment in these circumstances should have led to the undertaking of an Assessment.

The Equality Commission therefore decided that the Northern Ireland Office had failed to 'consider' adequately an Equality Impact Assessment, in the context of the "due regard" duty, in deciding not to undertake an Equality Impact Assessment.

(2) An alleged failure to consult on the screening decision

The Children's Law Centre also challenged the integrity of the consultation exercise conducted on the Northern Ireland Office's screening decision, arguing that the determination was prejudiced and was not genuinely reconsidered in light of the consultation submissions received. It also highlighted comments that were made by the Minister in Parliament during the consultation period to substantiate its view that the Northern Ireland Office did not genuinely intend to reconsider its initial screening determination in light of consultation.

The Equality Commission considered that, whilst the Minister's comments were unfortunate, they did not in themselves show that the outcome of consultation had been prejudged. However, the Equality Commission was satisfied that the alleged failure to consult on this matter had been established. In reaching this decision the Equality Commission noted:-

- (1) The Equality Commission has considered the decision by the Northern Ireland Office not to advise in consultation that the initial screening exercise had resulted in a positive answer to the question, "Is there any evidence of higher or lower participation or uptake by different groups within the nine categories". The Equality Commission is of the view that for a consultation exercise to be open and transparent it is implicit to present to consultees reasoned decisions as to why a particular course of action is proposed. In this case it was proposed not to conduct an Equality Impact Assessment despite a recognition by the Northern Ireland Office that there was at least some evidence of differential impact by age and gender. The Equality Commission is of the view that such a decision was not a reasoned decision such as is to be expected of a public authority. The Northern Ireland Office's consultation document simply indicated that "an initial screening of the proposals" had "confirmed that the proposals in themselves are not likely to have an adverse differential impact". Consultees were not alerted to the fact that the application of the screening criteria had resulted in one positive response, and no explanation was given as to why the Northern Ireland Office were of the view that the policy did not require equality impact assessment. The

Equality Commission were of the view that this information should have been made available to ensure meaningful consultation on the initial screening determination.

- (2) As outlined above, the Northern Ireland Office received substantial representations in relation to the adverse impact of the proposed policy on children and young people. The reasons it gave for persisting in its decision not to undertake an Equality Impact Assessment were inadequate. Nor do they address the significant adverse impact on children and young people identified in the representations made to it.

The Equality Commission was satisfied that the failure to disclose the application of the screening criteria had produced one positive response, and the inadequacy of the response made by the Northern Ireland Office to the representations made to it, indicate inadequate consultation on the screening of the proposed policy.

RECOMMENDATIONS

The Equality Commission considered that, in light of the reasons provided by the Northern Ireland Office for excluding this policy for Equality Impact Assessment that it would be insufficient to recommend that the Northern Ireland Office carry out a further screening exercise. The Equality Commission recommends that, to comply with its approved equality scheme, the Northern Ireland Office must undertake an Equality Impact Assessment of the Anti-Social Behaviour Order policy and legislation in relation to its potential impact on children and young people. The Equality Commission further recommends that such Impact Assessment be commenced by 1 June 2005 , and that the Northern Ireland Office report on progress on such Assessment to the Equality Commission's Statutory Duty Team by 5 August 2005.

The Equality Commission further recommends that in future screening exercises, the Northern Ireland Office should;

- set out its reasons for not undertaking a full Equality Impact Assessment at the initial screening stage,
- ensure that any reasons given for not undertaking an Equality Impact Assessment are adequate reasons in relation to significant implications for equality of opportunity
- disclose, for the purposes of consultation, any evidence of differential impacts identified in the initial screening exercise and
- address representations of significant adverse impact which emerge from the consultation process.

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