EQUALITY COMMISSION FOR NORTHERN IRELAND

Advice on flying the Union Flag in Councils

Equality Commission’s remit

1. The Commission’s remit in this area stems from our duties under the Fair Employment and Treatment (NI) Order 1998 to promote equality of opportunity, affirmative action and to work for the elimination of religious/political discrimination, and our duty to offer advice to public authorities in relation to Section 75 of the Northern Ireland Act 1998. Given that flags and emblems may have a general relevance to these provisions and, indeed, have the potential to impact adversely on equality of opportunity and good relations, the Commission has a remit to provide guidance.

Fair Employment and Treatment (NI) Order 1998

2. The Fair Employment and Treatment (NI) Order (FETO) does not make any express reference to flags but makes discrimination on the grounds of religious or similar philosophical belief and political opinion unlawful, both in the workplace and in the provision of goods, facilities and services. Also, in the workplace, it bans “harassment” on these grounds. In addition to the issue of discrimination and harassment, employers also have legal obligations which require them to promote fair participation in employment and associated responsibilities to promote a good and harmonious workplace.

3. In the field of employment, the Fair Employment Code of Practice provides general guidance for employers on these matters. The Code has been cited with approval by the Fair Employment Tribunal when upholding complaints against employers in numerous discrimination cases. A small number of these concerned the display of flags and emblems. The relatively new statutory definition of harassment under FETO, first enacted in 2003, has not yet been explicitly considered by the Tribunal in any case dealing specifically with flags and emblems issues. However, the case law that preceded 2003 can, with a

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1 Article 7, Fair Employment & Treatment (NI) Order 1998.
2 Paragraph 1(b), Schedule 9, Northern Ireland Act 1998.
3 The definition is: Harassment occurs where, on the ground of religious or similar philosophical belief or political opinion, an employee is subjected to unwanted conduct that has the purpose or effect of violating his/her dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.
4 For example, the cases of Brennan – v- Short Brothers Plc [1995] and Johnston – v- Belfast City Council [2000].
reasonable degree of confidence, be used to predict how the Tribunal would approach these questions if raised today. It is noted that the Tribunal has not considered a complaint relating solely to the official display of a Union Flag at a Council's premises.

4. In relation to fair employment obligations on the provision of goods, facilities and services, it is also not clear to what extent FETO impinges on the issue, as there has not been any case law to date in respect of these provisions in relation to the display of flags and emblems. Furthermore, the coverage of the statutory provisions differs from those which apply to employment-related matters.

Section 75 of the Northern Ireland Act 1998

5. As designated public authorities, Councils are also bound by statutory duties under Section 75 of the Northern Ireland Act 1998. Under Section 75(1) designated public bodies are required, in carrying out their functions, to have due regard to the need to promote equality of opportunity between certain groups, including persons of different religious belief and political opinion. Such bodies are also required by Section 75(2) to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion and racial group.

6. Councils, like other public authorities, are required to have an Equality Scheme setting out their practical arrangements for complying with the equality and good relations duties. A public authority’s obligations are to have arrangements for assessing and consulting on the likely impact of policies adopted, or proposed, on the promotion of equality of opportunity. Councils' Equality Schemes include commitments that these arrangements should also consider good relations. To do this, Councils will screen their policies and proposed policies, to identify those that have, or may have, an impact on the promotion of equality of opportunity and good relations.

7. Where a screening analysis reveals that a policy or proposed policy is likely to be a major impact on the promotion of equality of opportunity or good relations then normally the Councils' Equality Schemes have specified further commitments to subject those policies to a more

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5 In the context of the relationship between a service provider and service users there is no corresponding definition of harassment or express ban on "harassment" like that which applies in the case of the employer/employee relationship. Instead, aggrieved service users must allege that, on the ground of religious belief or political opinion, they have been subjected to less favourable treatment compared to others in relation to the quality or manner or terms on which they received a service.
detailed assessment through an Equality Impact Assessment (EQIA). The EQIA process includes consultation.

8. Also arising out of Section 75 and as set out in a Council’s Equality Scheme, an individual who is affected by a Council’s decision can make a complaint if they believe that the Council has failed to comply with its Equality Scheme. The complaint needs to be raised with the Council in the first instance.

9. If the individual is not satisfied with the response from the Council, they can approach the Commission. The Commission may investigate the complaint; it may also initiate investigations into a potential failure by a Council to comply with its approved Equality Scheme.

Other Considerations

10. The Flags Regulations (NI) 2000 (as amended) regulate the display of the Union Flag at “government buildings” and courthouses in Northern Ireland. The Regulations distinguish between occasions when, and locations where, the Union Flag shall be flown and occasions and locations where it may be flown. The definition of “government buildings” does not include buildings occupied by local authorities (including Councils) or private employers. Therefore each Council currently exercises discretion in deciding in what circumstances, and when and where, to fly the Union Flag, or not to fly the Union Flag.

Advice on flying the Union Flag

11. Any advice provided by the Commission is based on our understanding of the legislative provisions within our remit, associated Codes of Practice and on any relevant case law. The Commission does not have the power to issue directives regarding the flying, or not flying, of the Union Flag. It is for each local Council to determine their own policies on the display of the Union Flag, taking account of the full context in which they operate.

12. In the event of any complaint of discrimination in respect of the display of flags or emblems, it would be a matter for the Fair Employment Tribunal, or courts, to decide if discrimination had occurred taking into account all of the circumstances of each individual case. Councils, like other employers, often take their own legal advice with regard to their own policies in this area, to ensure that any particular circumstances are considered.

13. The Commission is of the view that the flying of the Union Flag must be viewed within the context in which it is flown or displayed. Factors affecting the context include the purpose, manner, location and
The Union Flag is the national flag of the United Kingdom and, arising therefrom, has a particular status symbolising the constitutional position of Northern Ireland. On the other hand, the Union Flag is often used to mark sectional community allegiance. There is a world of difference between these two approaches. Thus, for example, while it is appropriate, in the Commission’s view, for a local Council to fly the Union Flag at its Civic Headquarters, the rationale for its display at every Council location, facility and leisure centre would be questionable.6

14. The first stage of the Equality Scheme screening process involves scoping the policy to define the policy aims and objectives. The Council (or other designated public authority) should consider available evidence to assess the likely impact on equality of opportunity and good relations and to assist in its decision on whether the policy should be subject to an Equality Impact Assessment. In making a decision as to whether or not there is a need to carry out an EQIA, the Council should ensure that it follows the commitments in its Equality Scheme and that the decision making process is evidenced with clear records.

15. In developing or reviewing a policy on the flying of the Union Flag a Council should consider the policy aims and intended rationale for the policy. This is a matter for a Council to decide for itself. However the policy aims and objectives must be legitimate. The Commission accepts that there will be a range of legitimate policy options for flying the Union Flag which may be adopted. As noted above, the Commission considers that flying the Union Flag with the aim of acknowledging the constitutional position of Northern Ireland would be a legitimate aim. It also considers it legitimate to fly the Union Flag as a mark of commemoration, in a manner which symbolises the dignity and respect for those it is remembering.

16. It is for a Council reviewing or developing its policy to establish the aims and objectives for the policies it wishes to develop. The final Council policy should reflect the Council’s legitimate policy aims and not cause unlawful discrimination or harassment, unintentionally or indirectly through its likely effects or impacts. In reaching that outcome the Council should also have complied with its Section 75 duties, that is to pay due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations.

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