

**EQUALITY COMMISSION FOR NORTHERN IRELAND
FINAL REPORT OF COMMISSION INVESTIGATION UNDER
PARAGRAPH 10 OF SCHEDULE 9 OF THE NORTHERN
IRELAND ACT 1998**

Gerald Marshall
&
Omagh District Council

INTRODUCTION

This investigation concerns the presence of a Memorial to the 1981 I.R.A. hunger-strikers on the site of the Old Church grounds and graveyard in Dromore Co. Tyrone, which is owned by Omagh District Council, and the subsequent decision of that Council to dispose of the section of the site in which the memorial is situated to a group who are believed to have been responsible for erecting the memorial.

The Commission has conducted an investigation of whether Omagh District Council has failed to comply with its approved equality scheme, arising from the above, which considered;

- (i) Did Omagh District Council fail to comply with Section 7.4 of its approved Equality Scheme by not conducting a screening exercise in relation to the presence of the memorial on Council property?
- (ii) Did Omagh District Council fail to comply with Section 6.3 of its approved equality scheme by not conducting an Equality Impact assessment in relation to the presence of the memorial on Council property?
- (iii) Did Omagh District Council's Equality Impact Assessment relating to "Burial Grounds" referred to at Section 7.2 of its approved Equality Scheme cover the issues raised by the complainant in respect of the Old Church, Dromore, and, if so, was it carried out as planned in 2003-4?

- (iv) Was Omagh District Council's subsequent decision to sell the plot of land in question screened in accordance with the screening criteria as set out in Sections 6.2 and 7.4 of approved Equality Scheme?

BACKGROUND TO COMPLAINT

The Commission received a complaint about this matter from a Dromore resident on 30th January 2006. The Complainant had been in contact with Omagh District Council since 2004, complaining that several years earlier (April 2001) Sinn Féin Council members had organised and attended a march through the village culminating in the dedication of the monument to a deceased IRA member, the erection of a Flag pole with an Irish Tricolour flag, and the planting of a tree for IRA members who died during the hunger strike, all on Council property. The Complainant alleged that the political nature of such emblems meant that this site, which has historical significance for all the residents of the village, was being "hijacked by one section of the community in a very provocative manner". To emphasise his view that the site had been politicised, the complainant referred to the fact that on the date of his correspondence the Irish flag had been lowered to half mast to coincide with the funeral of an IRA member and that there had been a paramilitary procession to the monument on the previous day.

The main sentiment expressed by the complainant in his correspondence is that a site of this nature should be respectful of all traditions and that Omagh District Council should have such emblems removed to allow all visitors and residents to and from the village to be able to visit the site without offence.

The complainant wrote to Omagh District Council about these issues again in February 2005. He had not received a substantive response from the Council to his previous correspondence and had additionally learned that the Council's Environmental Services Committee had recommended that the plot of land in question be sold to Dromore Memorial Committee, which was to be considered by the full Council on 1 March 2005. The complainant indicated that such action was an attempt by Omagh District Council to negate its obligations under S.75 of the Northern Ireland Act.

Omagh District Council replied on 8 March, confirming that it had agreed to sell the portion of land to Dromore Memorial Committee.

On 21 April 2005 the complainant wrote to the Council alleging failure by it to comply with its approved Equality Scheme arising from the matters outlined above. On 5 August the Council wrote to the complainant to advise that the sale of the land at Old Church, Dromore would now be screened as required by the Council's Equality Scheme, as it "either changed an existing policy of Council or created a new Council policy". On 14 October it further advised the complainant that it had decided to conduct an Equality Impact Assessment of its decision to dispose of the area of land.

The complainant wrote to the Commission on 24 January 2006 requesting investigation under paragraph 10 of Schedule 9 to s. 75 of the N. Ireland Act 1998. The Commission considered the complaint on 9 May 2006, and authorised Investigation as set out in the Introduction to this report.

THE INVESTIGATION

Chronological background and History of the Memorial

The memorial was erected sometime before 2001, by persons unknown but assumed by the Council to be the Dromore Memorial Committee, on the basis of information provided to it by a Councillor Begley, who acted as an unofficial go-between between the parties.

The Council became officially aware of the memorial when its presence was raised by a Councillor Buchanan at a Council meeting on 10 April 2001. The Council minutes of this meeting read:

"9.1 *Erection of Memorial on Council Owned Lands at Dromore*

CONCERNS: were expressed by Councillor Buchanan (a DUP Councillor in the Dromore area), prior to his departure earlier in the meeting, regarding the unauthorised erection of a memorial on Council owned lands at Church Street, Dromore. He advised that he had received a number of complaints regarding the structure, and requested that the legal position of the

Council in relation to the unapproved erection of such items on Council property be investigated and that the memorial be removed as soon as possible. Councillors McQuaid and Gormley echoed these concerns, while Councillor McQuaid queried who had erected the memorial. Councillor McElduff, in relation to some of the comments made, urged caution in consideration of this matter, and said that there were people within the Dromore community who welcomed the memorial.

RECOMMENDED: that the Acting Chief Executive investigate the Council's legal position on this issue".

Legal advice was received on 19 May 2001, which advised the Council of the legal position in respect of general Land Law and the Law of Tort. The Council states that advice was not sought at this time on the potential equality implications arising from the presence of a Memorial of this nature on Council property. Nevertheless the Opinion notes;

"The Memorial is regarded by some as being of a sectarian and offensive nature."

No action was subsequently taken to remove the Memorial.

The Council considered the matter at its Policy and Resource meeting on 23 July 2001 and decided that it would invite the Dromore Memorial Committee to submit a request that the portion of land in question be donated or sold to it.

The complainant first contacted the Council to complain of the presence of the Memorial, which he described as divisive and sectarian, on 9 April 2004.

The request which had been invited by the Council from Dromore Memorial Committee was eventually received on 8 November 2004, and this, together with the complaint concerning the presence of the Memorial, was reported on at the Council's Environmental Services Committee on the following day, 9 November 2004. The Environmental Services Committee decided to defer further consideration of the proposal, to allow the Council to obtain further legal advice.

On 12 November the Council sought legal advice on its position regarding the request received from Dromore Memorial Committee. The Council states that again advice was not sought on the potential equality implications arising from the presence of a Memorial of this nature on Council property, even though the previous Opinion had highlighted the fact that some regarded the Memorial as sectarian. The Opinion was received on 4 December 2004, and dealt with the Council's legal power to dispose of land under the Local Government Act and general Land Law. The Opinion unambiguously points out that the decision to dispose of the land in question is a matter for Omagh District Council, on which no view is expressed;

"It is not for me to say what I think Querist ought to do and I should not be taken as expressing any view on the matter".

Omagh District Council did seek further Advice on the equality implications arising from the proposal on 4 February 2005, and in a reply of 7 February, the Council was advised of its duties under s.75 of the N. Ireland Act 1998 in respect of the promotion of equality of opportunity and good relations. Counsel proceeded to advise;

"The copy correspondence... clearly demonstrates how each case is fact sensitive and it is not possible for me to say whether the continued presence of the memorial is detrimental to the promotion of good relations although I can see how it well might be argued that a proliferation of such memorials, if that were to occur as a result of any decision taken in this case, could be seen as a marking out of territory which might well by definition be regarded as detrimental".

This Opinion was reported, on the day after its receipt, to the Council's Environmental Services Committee on 8 February 2005, which recommended, by a majority vote, that ownership of the land in question be transferred to the Dromore Memorial Committee. This recommendation required the approval of the full Council.

A letter of objection was received by the Council on 10 February 2005 on behalf of the Mullinagoagh Purple Star Loyal Orange Lodge No. 669, on the basis that the Memorial was perceived to be of a sectarian nature and intimidatory. The complainant submitted

a similar letter of objection on 19 February 2005, alleging that the Council's proposed action was an attempt by it to negate its obligations under S.75.

On 1 March 2005 the (full) Council confirmed, by a majority vote, the earlier recommendation that it would dispose of the portion of land in question to Dromore Memorial Committee at market value.

The Site

Dromore has a population of 1,101 (2001 Census), and is therefore classified as a village. It is predominantly nationalist: the 2001 Census figures indicated that its inhabitants were 85.1% Catholic, 14.1% Protestant.

The village consists of two streets, Main Street with Church Street joining and rising steeply to the right, at the top of which lies the Old Church, grounds and graveyard. The site is an extremely visible land-mark associated with Dromore, set at the top of the village on a high promontory, from which the village derives its name (Droim Mór meaning Big Ridge).

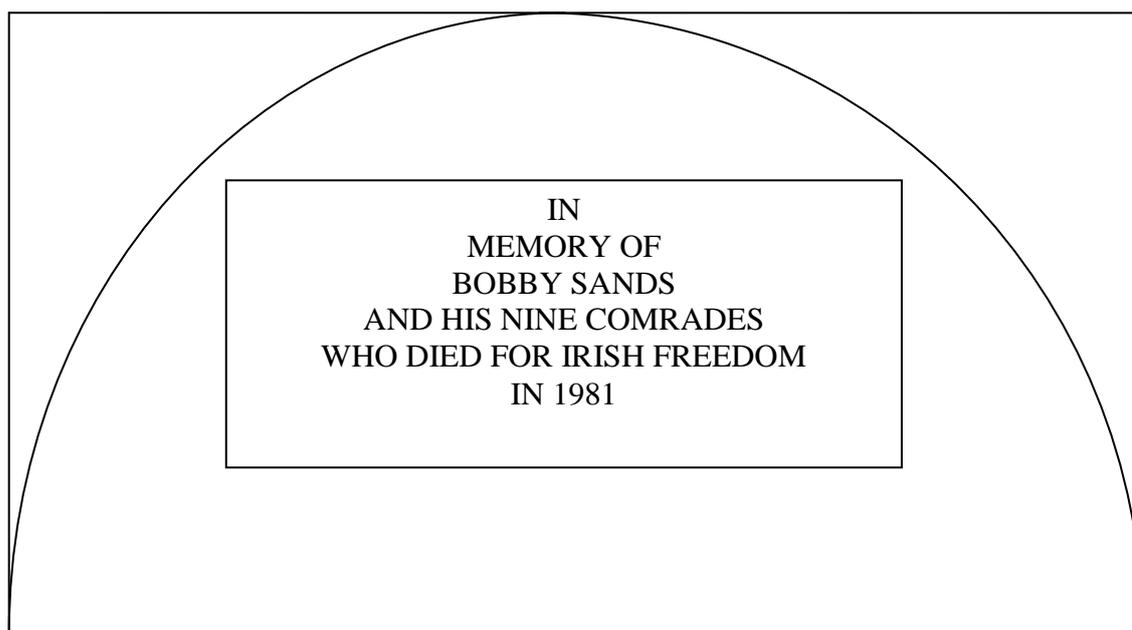
The Church, which is now in ruins, was Church of Ireland, and was built in 1694. It was used until approximately 1840, and parishioners were interred there until that time. It consists of a rectangular nave 20m x 7.5m, with a 7m square transept projecting from the middle of the south wall. A number of architectural details survive, including several windows. At the base of the promontory below the church is a spring, known locally as the 'Eye Well' which is believed to have curative powers.

The building is surrounded by a graveyard. Two walls are present to create a walkway up the promontory. Burial headstones are present close to the ruins, and remains are believed to be present. The memorial is at the front of the site, between the first and second wall. It is not known whether remains are present in this area. Previous archaeological digs had found remains under the original Church.

The memorial consists of the following items;

- a monument to a deceased IRA member.

This monument is in the shape of a headstone of approximately 3 foot in height and is inscribed as follows;



- a flag pole with an Irish Tricolour flag.

This flag-pole is approximately 20 feet in height, prominently displaying a large flag, on a high ridge at the top of the village. This represents a location which would be a local land-mark synonymous with the village.

- a tree/shrub/conifer for each IRA member who died during the hunger strike of 1981.

There are 10 such trees, one for each deceased hunger-striker, which are quite small, and of a conifer appearance.

The Council's position

Omagh District Council officials interviewed in the course of the investigation did not accept that the Council had failed to comply with the commitments contained in its approved Equality Scheme

as alleged, and made the following points in support of this position;

Re; Alleged failure to comply with Section 7.4 of approved equality scheme by not conducting a screening exercise in relation to the presence of the memorial on Council property.

It was confirmed that there had been no screening in relation to the presence of the Nationalist items at the site, and officials stated that this was because there was no policy in relation to the site. The Council was in the position that a third party had placed these items on its property, and it had to decide how it should react. It took legal advice and decided to take no action to remove the Memorial. Specific advice was not sought in respect of the potential equality implications of this course of action. It was further decided at the Policy and Resources meeting on 23 July 2001 that "Council officials would liaise with Dromore Memorial Committee, which was believed to have erected the Memorial, and that they would be advised to submit a retrospective application for consideration by the Council".

Council officials indicated that they did not know the nature of the complaints about the Memorial referred to in the minutes of its meeting in April 2001, and if same raised the political nature of the items in question, and the equality implications of such items being present on Council property. Councillors considered Dromore Memorial Committee's request at the Environmental Services Committee Meeting on 8 February 2005 and recommended that the portion of land be disposed to the Dromore Memorial Committee. This recommendation required ratification by the full Council, which followed at the next monthly Council meeting on 1 March 2005.

Council officials did not accept that the Council's actions (or inaction) in any way established a policy and therefore the requirement to screen did not arise. These officials were unaware of any comparable situation involving the placement of memorials or flags and emblems without permission on Council property and indicated that the Council's response to such a situation would be decided on a case-by-case basis, in the same manner that any land-owner would deal with unauthorised entry onto property.

Re; Allegation that, if these matters had been screened, this should/would have resulted in an EQIA, in accordance with Section 6.3 of the Scheme.

The Council officials accepted that if this matter was a 'policy' it would have clear equality implications. However in this instance the issue had never previously arisen and the Council did not have a policy on the matter, and therefore the obligation to screen and/or conduct an Equality Impact Assessment did not arise.

The Council can point to the legal advice received by it on 5 February 2005 to corroborate the contention that it did not consider that its actions in this matter had established a policy. The opinion states; "*In the present case the Instructions have always been that the Council has no policy on the matter...*".

Re; Did the proposed Equality Impact Assessment on 'Burial Grounds' cover the issues raised by the complainant in respect of the old Church, Dromore, and if so, was it carried out as planned in 2003-4 in accordance with Section 7.2 of approved equality scheme.

The Council officials advised that this Equality Impact Assessment had not been commenced and that the Council had approached the Commission to review its Equality Impact Assessment timetable, which it now considered to be unrealistic. In any event, the particular Assessment related to public cemeteries currently in use and would have no application to the historical site in Dromore.

Re; Was the Council's subsequent decision to sell the plot of land in question screened in accordance with the screening criteria, as required by Sections 6.2 and/or Section 7.4 of approved equality scheme.

A copy of the screening report was provided (at Appendix 2), and it is clear from same that the screening exercise was conducted according to the screening criteria set out in the Guide to the statutory Duties and as required by 6.2 and/or 7.4 of the Council's approved equality scheme .

Application of these screening criteria concluded that this policy had sufficient equality implications to require an Equality Impact Assessment. The screening documentation highlighted the Republican nature of the Memorial and the fact that complaints had been received that the Memorial was sectarian, intimidating, divisive, offensive and could be perceived as inhibiting use of the area by all of the local community. Application of the screening criterion relating to good relations also acknowledged that an opportunity existed to better promote good relations by altering this policy.

Investigation Findings

1. Did Omagh District Council fail to comply with Section 7.4 of its approved Equality Scheme by not conducting a screening exercise in relation to the presence of the memorial on Council property?

The Commission does not accept Omagh District Council's contention that it did not have a policy in relation to the presence of the Memorial on its property. In reaching this conclusion, the Commission noted;

- The term policy includes both written and unwritten policies, and this is accepted by the Council in Section 6.1. of its approved Equality Scheme.
- The definition of what is 'a policy' in the Guide to the Statutory Duties is extremely wide;
"... policies is a broad inclusive term. A policy is defined in the New Oxford Dictionary as "a course of action adopted or proposed ..."

"... the term policies covers all the ways in which an authority carries out or proposes to carry out its functions...Policies include unwritten...policies".
- In the present case the original placement of the items in question was carried out, not by the Council, but a third party, presumed to be the Dromore Memorial Committee. The Commission considers that the responsibilities of any

public authority in this type of situation should not be negated or reduced by the fact that it was not responsible for the original placement of such items on its property.

- The Council was responsible for the action to be taken subsequently, and adopted a policy of allowing the Memorial to remain in place, ignoring the trespass and any breaches of planning and/or building regulations (the Memorial was erected without Council permission) whilst proactively seeking to dispose of the portion of land in question to the group which it believed had erected the Memorial. It has been noted, for example, that the proposal to request an application from this group had been decided upon by Councillors at the Policy and Resources meeting in July 2001. This course of action had not been recommended or even suggested in the legal Opinion obtained. When this application was eventually made, the Council sought further legal advice. The barrister providing that advice, who had highlighted the fact that some persons regarded the Memorial as being sectarian in his previous Opinion, emphasised that the proposal to dispose of the land to the group which was believed to have erected the memorial was a matter for Council and cautioned that his advice “should not be taken as expressing any view on the matter.
- The Council’s subsequent decision to screen and conduct an Equality Impact Assessment of its decision to sell the plot in question to Dromore Memorial Committee for the purpose of allowing the Memorial to be retained supports the conclusion that the original action by the Council in response to the unauthorised erection of the Memorial also established a policy. It is inconsistent to accept that it is a policy to sell a particular piece of land because its purpose is to allow a Memorial that has been placed on that land to be retained, whilst arguing that it was not a policy to have allowed those items to remain on that land for the previous 4 years, whilst seeking to dispose of the land to the group believed to have erected the Memorial.

2. Did Omagh District Council fail to comply with Section 6.3 of its approved equality scheme by not conducting an Equality Impact Assessment?

Section 6.3 states that the Council is screening its existing policies and that; “Where the answer to any of the (4 screening) criteria is positive, consideration will be given to whether to subject the policy to impact assessment”. This language is taken from the Guide to the Statutory Duties, which states at Section 4(1)(3)(a) in relation to screening;

“Its purpose is to identify those policies which are likely to have a significant impact on equality of opportunity so that greatest resources can be devoted to these”.

The Guide emphasises that public authorities must “subject to full impact assessment” proposed policies identified through screening as “having significant implications for equality of opportunity”. (Page 37 of the Guide to the Statutory Duties).

The Commission considers that, given the mandatory nature of the Guide to the Statutory Duties on this point and in the context of the statutory duty to have due regard to the need to promote Equality of Opportunity, there will be circumstances in which the requirement to “consider” an Equality Impact Assessment would actually require such an Assessment to be carried out.

The Commission has set out its view that Omagh District Council should have carried out a screening exercise in relation to its policies that allowed the Memorial to remain on its property for over 4 years. Whether or not such a screening exercise should result in a decision to conduct an equality impact assessment will always be a question of degree depending on the particular circumstances of the case. In this particular instance, however, Council officials accept that, if a policy was in existence, this would be a policy with clear equality implications.

The Commission takes the view that the political nature of the Memorial, and its high level of visibility on a site that is synonymous with Dromore, may have the effect of marking the village out as being Nationalist or Republican, and may not be conducive to good relations, and therefore the matter did have

sufficient equality implications to be fully considered by way of an equality impact assessment.

This view is supported by Omagh District Council's subsequent screening analysis of its decision to dispose of the land to Dromore Memorial Committee, which did accept that this proposal had sufficient equality implications to require an equality impact assessment. In determining that an equality impact assessment needed to be carried out, the screening documentation highlights the Republican nature of the Memorial and that complaints had been received that the Memorial was sectarian, intimidatory, divisive, offensive and could be perceived as inhibiting use of the area by all of the local community. It also acknowledged that an opportunity existed to better promote good relations by altering this policy.

The Commission therefore concludes that, if Omagh District Council had carried out a screening exercise in relation to its policies that allowed the Memorial to remain on its property, this either would or should have resulted in a decision to conduct a full equality impact assessment.

3. Did the Council's Equality Impact Assessment relating to "Burial Grounds" referred to at Section 7.2 of its approved Equality Scheme cover the issues raised by the complainant in respect of the Old Church, Dromore, and if so, was it carried out as planned in 2003-4 in accordance with that Section 7.2?

This Equality Impact Assessment, which has not been commenced to date, relates to those Council cemeteries currently in use, and will have no application to the Old Church site in Dromore.

4. Was the Council's subsequent decision to sell the plot of land in question screened in accordance with the screening criteria as set out in Sections 6.2 and 7.4 of approved Equality Scheme?

Screening documentation provided in the course of this Investigation (at Appendix 2) confirms that, in conducting this exercise, Council officials did apply the screening criteria set out in the Guide to the Statutory Duties, as required by Sections 6.2 and 7.4 of Omagh District Council's approved Equality Scheme. Application of these criteria resulted in a determination that the proposal to dispose of the land for the purpose of retaining the

Memorial had sufficient implications for Equality of Opportunity and Good Relations to require a full equality impact assessment to be carried out in relation to the proposal.

Investigation Decision

Omagh District Council has failed to comply with Section 7.4 of its approved Equality Scheme by not conducting a screening exercise in relation to its policies that allowed the unauthorised Memorial to remain on its property.

Omagh District Council has failed to comply with Section 6.3 of its approved equality scheme by not conducting an Equality Impact Assessment in relation to its policies that allowed the unauthorised Memorial to remain on its property.

Omagh District Council has complied with Sections 6.2 and 7.4 of its approved Equality Scheme in respect of the screening exercise conducted in respect of its subsequent decision to dispose of the land in question.

The Commission makes no finding in respect of Omagh District Council's failure to conduct the Equality Impact Assessment relating to "Burial Grounds" referred to at Section 7.2 of its approved Equality Scheme.

Recommendations

Omagh District Council intends to conduct an Equality Impact Assessment relating to its policy "Disposal of Land for the Purpose of Erecting or retaining a Memorial or a Monument". Application of the screening criteria to this policy had highlighted the potentially sectarian nature of the Memorial, and that altering this policy might better promote good relations.

Omagh District Council officials indicated in the course of the investigation that a decision had been made in principle to dispose of the land in question, and that it would be unlikely that the planned Equality Impact Assessment would consider the potential equality implications of allowing an unauthorised Memorial of this nature to remain on Council property in the first place.

The Commission is of the view that a proper equality analysis of the proposal to dispose of the land in question to allow the Memorial to be retained would necessarily need to consider the implications, in terms of equality of opportunity and indeed good relations, of a policy that allowed the Memorial to remain on the site for the previous 4 years and any proposed policies that would permit the Memorial to continue to remain there.

Accordingly, the Commission recommends that:

The Council commence the Equality Impact Assessment on: “Disposal of Land for the Purpose of Erecting or retaining a Memorial or a Monument” with immediate effect.

The Commission further recommends that such Assessment must consider the nature of the Memorial, and its high level of visibility on a site that is synonymous with the locality, and assess whether the following policies have an adverse impact on Equality of Opportunity on one or more of the nine S. 75 categories;

- The Council’s policies from 2001 to present that permitted the Memorial to remain on its property, and which proactively encouraged the group considered by the Council to have erected the Memorial to apply to have the land in question transferred to it,
- Any proposed policy that would continue to allow the Memorial to remain on the site in the future.
- Any proposed policy to dispose of the land in question to a third party to ensure that the Memorial is retained on this site.

28 February 2007