

# **EQUALITY COMMISSION FOR NORTHERN IRELAND**

## **Investigation under Paragraph 11, Section 9, Northern Ireland Act 1998**

### **Newry and Mourne District Council**

#### **Final Investigation Report**

**March 2014**

#### **1. Introduction**

- 1.1 Section 75 of the Northern Ireland Act places a statutory duty on public authorities to pay due regard to the need to promote equality of opportunity between various categories of persons, including persons of different religious belief and persons of different political opinion. Without prejudice to that duty, public authorities are also required to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
- 1.2 Designated public authorities are required by Schedule 9(2) to submit an Equality Scheme to the Equality Commission for approval. Such Equality Schemes are both a statement of the public authority's commitment to fulfilling the s75 duties and a plan for their performance. Newry and Mourne District Council's first approved Equality Scheme was dated 5 July 2001 and its revised scheme was approved on 28 March 2012. Both schemes set out at Section 1.3 the Council's commitment to fulfil its s75 duties as described in Section 1.1 of that Scheme. Schedule 9 Paragraph 11 allows the Commission to investigate where it believes that a public authority may have failed to comply with its approved Equality Scheme.
- 1.3 In February 2013 the Commission authorised a Paragraph 11 investigation arising from a decision by Newry and Mourne District Council on 3 December 2012 to retain the name "The Raymond McCreesh Park" for a Council owned children's play park in Newry. The Council decision followed an Equality Impact Assessment

initiated in 2009. Raymond McCreesh was a member of the IRA who died whilst taking part in a hunger-strike in the Maze Prison in 1981.

- 1.4 The Commission Investigation is now complete. The Investigation considered whether, in making this decision, the Council failed to comply with its commitment at Section 1.3 of its approved Equality Scheme to fulfil its s75 obligations as set out in Sections 1.1 of its Scheme to have due regard to the need to promote equality of opportunity across the s75 groups, and to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. A list of documents considered, written submissions received and interviews conducted is attached (**Appendix 1**).
- 1.5 The Statutory Duty Investigations Committee found that there has been a breach of the Council's 2012 Equality Scheme commitment, as set out at Section 1.3, to fulfil its s75 duties as described in Section 1.1 of that Scheme.

## 2. **Background and timeline**

- The play park was originally named Patrick Street Play Park but at a date unspecified an unofficial bilingual sign was erected naming it "Raymond McCreesh Park".
- **Feb 2001:** request from 1981 Hunger Strike Commemoration Committee, to officially rename the play park "Raymond McCreesh Park".
- **April 2001:** Council carry out a local residents' survey and reported that 84% were in favour of renaming the park. Park officially renamed.
- **March 2007:** Policy on naming Council facilities agreed<sup>1</sup>.

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<sup>1</sup> "No buildings, facilities or rooms would be named after any individual person except in exceptional circumstances ie. if someone is to be recognised nationally or internationally"

- **Feb 2008:** The Equality Commission corresponded with the Council in respect of the name of the play park, reminding the Council of its duty to comply with the s75 duties.
- **April 2008:** Receipt, by Newry and Mourne District Council, of a complaint about the play park's name from the Orange Order.
- **Dec 2008:** A legal opinion received by Council.
- **Feb 2009:** Council commenced an Equality Impact Assessment.
- **Oct 2010 – Jan 2011:** Public consultation period.
- **Dec 2011:** *EQIA Consultation Analysis* by Wallace Consulting published.
- **May 2012:** Wallace Consulting presented a report on the analysis of responses to the Equality Impact Assessment consultation process to the Council Management Team.
- **June 2012:** Management Team and Party Representatives meeting considered the Equality Impact Assessment Consultation Analysis Report on the Naming of Raymond McCreesh Park
- **Sept 2012:** Elected Members' Forum considered the report and referred it to Staff and Policy Equality Committee with the recommendation to retain the Raymond McCreesh Park name.
- **Nov 2012:** Committee voted (13/4) in favour of retaining the name and to adopt the related recommendations set out in the Equality Officer's Report.
- **Dec 2012:** Council meeting which voted 20/4 (with 1 abstention) in favour of maintaining the name and adopting the related recommendations set out in the Equality Officer's Report.

2.1 The Council is predominantly nationalist. At the Council meeting of 3 December 2012 all members present from Sinn Fein, the SDLP and

Independents voted in favour of the motion, with the exception of 1 SDLP Councillor who abstained. All the Unionist Councillors voted against the recommendation. The park retained the name Raymond McCreesh Park.

### **3. The Investigation**

- 3.1 The Investigating Officer reviewed the documents provided and interviewed and/or received written submissions from individuals/groups. The information below has been collated from these sources.
- 3.2 This park has been called Raymond McCreesh Park by Newry and Mourne District Council since 30 April 2001. The Council decision to so name the park followed a request to do so and a survey of 199 residents of the Daisy Hill Ward. Out of the 73 responses received, 61 agreed with the request and 12 disagreed. The 84% said to be in favour of the proposal represented 37% of those sent a survey. The survey covered only the Daisy Hill wards 1 (96% Catholic) and ward 2 (97.4% Catholic). The Council then erected a bilingual sign naming the park Raymond McCreesh Park. There was already an unofficial sign there at that time.
- 3.3 In 2008 the Commission became aware of the name of the play park and contacted the Council on a number of occasions to remind it of its statutory duties under s75 and the responsibility of the Council to ensure compliance with both the letter and spirit of its statutory duties to promote equality of opportunity and good relations. The Council also received a complaint from the Orange Order. The Council sought legal advice and received a written legal opinion in December 2008.
- 3.4 The legal opinion from Mr Paul McLaughlin BL was referred to in a number of submissions to this Investigation and was provided to the Investigations team. The Opinion recorded that the Council was, at that time, “acting in a manner which is contrary to its own equality scheme” and was “vulnerable to an investigation by the Equality Commission.” Counsel advised the Council to act swiftly “to apply its

equality scheme to the policy and to comply with the screening and assessment process which it prescribes.”

- 3.5 This Opinion states that s75 does not require that the Council change the name of the play park; it advised

“Rather it must undertake the process of determining whether the current name has an impact on good relations within the community, determining . . . what the impact is, how it may be mitigated and whether it is desirable to change it”. Counsel concludes “. . . the name of the park is likely to be regarded as having a clear impact upon good relations within one section of the community. Accordingly if the Council decides to retain the name without mitigation measures, it should ensure its reasons for doing so are clear and considered and the decision making process is transparent.”

- 3.6 On 9 February 2009 the Council decided to undertake an EQIA. The EQIA process involved a 12 week public consultation between 12 October 2010 and 7 January 2011 which was publically advertised in 6 local newspapers. Written responses were received and a public meeting was held in the Sean Hollywood Arts Centre, Newry, on 16 November 2010. An external consulting firm, Wallace Consulting, was commissioned to analyse the findings and produce a report.
- 3.7 The Wallace Consulting Report noted that written responses were received from elected representatives (4 unionists and 2 nationalists); from Castlereagh Borough Council; from the 1980-81 Hunger Strike Commemoration Committee; from 20 individuals; and from the Equality Commission. 25 of the 29 written submissions objected to the name. 26 people attended the public meeting, the majority of whom appeared to be in favour of the name.
- 3.8 A detailed analysis appears in the Wallace Report. In summary - those in agreement believed there was no adverse impact on good relations as the park was in a nationalist area and in proximity to several other streets named after Irish republicans; other areas have roads/parks named after British monarchs /significant figures in the unionist tradition; and the local people should decide. Those in

disagreement believed it was part of a divisive political agenda and insensitive to IRA victims; and it was inappropriate for a children's play park as it may be seen to legitimize political violence and politicize sports and leisure facilities. The analysis considered potential positive and negative impacts and potential mitigating actions and, whilst recognizing the dilemma of whether or not the current name of the park should remain, concluded with observations on building good relations.

- 3.9 The consultants put forward two options – reverse the renaming decision or uphold the decision and acknowledge the decision making process was limited. A third option to do nothing was discounted. Both options would require mitigating actions to include negotiation, dialogue and policy appraisal. The options and their context are set out in full in the Wallace Report which was considered by the SDIC as part of this Investigation. It was recommended that the Elected Members' Forum was used as a vehicle to move this forward. The Elected Members' Forum is described as “*a facilitated, private and informal space run under Chatham House rules for Councillors to discuss sensitive issues*”.<sup>2</sup> The Elected Members' Forum met on 11 September 2012 and recommended that only one option be put forward to the Staff and Policy/Equality meeting – that was to retain the Raymond McCreesh name.
- 3.10 The Council's Equality Officer prepared a report for the Staff and Policy /Equality meeting on 21 November 2012. The report set out 3 options for consideration - to reverse the renaming decision; to uphold the decision; to do nothing. The report recommended Option 2 - to uphold the decision to grant the application for renaming - on the basis of the consensus at the Elected Members' Forum. The Equality Officer's Report indicated that, irrespective of whatever option was agreed, the decision to rename the play park had potential to adversely impact upon good relations between persons of different religious belief and political opinion. The report made a number of related further recommendations to “mitigate adverse impact”. They were that:

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<sup>2</sup> Email of 29 November 2012 from Equality Officer.

- Council formally acknowledge that this decision had potential to adversely impact upon good relations between people of different religious belief and political opinion;
- Council remove existing park signage, non-Council and official sign, and erect a new sign in keeping with Council policy;
- The current Council policy regarding applications to name a council building, facility or room after an individual person be equality screened;
- All Council policies, adopted or proposed to be adopted, are screened to ensure compliance with the Council's Equality Scheme;
- Council review all current approaches to consultation and decision-making arrangements.

#### **4. Assessment**

- 4.1 The reasoning of Councillors in support of the disputed decision was largely based on the fact that the community in the immediate vicinity to the play park supported the name change, and that that community would be adversely affected by its removal. It is a duty of the public authority to pay regard to the desirability of promoting good relations between people of different religious belief, political opinion or racial group, not just to consider the impact on one particular group. In this particular case, the Council's decision appears based on Councillors' views of the wishes of one section of a divided community, rather than on how this decision will impact on good relations.
- 4.2 The decision of the Council on 3 December 2012 to retain the name - Raymond McCreesh Park - was accompanied by an acknowledgment that the decision had the potential to adversely impact upon good relations between people of different religious belief and political opinion. A number of mitigating factors were also approved. Two of these were general and not specific to the play park i.e the screening of policies to ensure that they comply with the Council's Equality Scheme; and a review of the approach to consultation and decision making.

4.3 Two of the proposed measures were related to the issue.

- *Park signage.* It was proposed to remove the existing park signage – non Council and official sign- and erect a new sign. In 2011 two plaques (information panels) were erected on the park railings, in English and Irish, which told the Raymond McCreesh story. These were not Council approved and were removed by those who had unofficially erected them the day before the Council’s Committee meeting on 21 November 2012. When Commission staff visited the play park on 17 July 2013, there were still two signs bearing the McCreesh name, only one of which appeared to an official Newry and Mourne District Council sign. The Council removed the existing park signage, the non-Council and Official sign, and erected a new sign in keeping with Council policy during September 2013.
- Equality screening policy on application to name Council facilities. The current policy is that facilities will not be named after an individual “except in exceptional circumstances ie if someone is recognised nationally or internationally”. The Sinn Fein submission refers to Raymond McCreesh as a person who is recognised nationally and internationally.

4.4 The Commission recognises that Newry and Mourne District Council is engaged in a good relations programme and notes its good relations initiatives including mediative civic dialogue forums such as the Newry Good Relations Forum. However the Commission has concluded that in the case of the play park there is little or no evidence that the proposed measures mitigated against adverse impact on good relations or equality of opportunity.

4.5 The naming of public buildings, roads or facilities has the potential to be controversial and destabilizing. While some people were of the view that this was solely a matter for the people who live in the area of the play park, it is noted that this particular facility is off Monaghan Street, a main thoroughfare in Newry, and is in reasonably close

proximity to a Further Education College, Daisy Hill Hospital and a Sports Centre. As one respondent to the EQIA noted, public spaces should be comfortable for everyone to walk in whether they live in the immediate area or not. The ‘equality of opportunity duty’ has been engaged, in that the play park name presents a significant chill factor for the use of a Council run play park by families of a Protestant/Unionist background. The ‘good relations duty’ is certainly engaged; that a complaint was made to the Council and that in more recent months the name of the play park has been the subject of much public discussion in the context of good relations and a shared future is indicative of the potential to be damaging to good relations in the Newry and Mourne District Council area and beyond.

- 4.6 The primary question for an Equality Commission investigation is – has there been a breach of an approved Equality Scheme? The Equality Scheme adopted by Newry and Mourne District Council includes a commitment at Section 1.3 to fulfil its s75 obligations as set out in Section 1.1 of the Scheme – that is, to have due regard to the need to promote equality of opportunity across the s75 groups, and regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.
- 4.7 The Commission must consider if the actions of the Council are sufficient to discharge the duties to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations. In general terms “to have regard” to a factor means that, when making a particular decision or formulating a policy, the decision maker must “take into account” or “give consideration to” that factor. To have “due regard” generally refers to the amount of regard i.e. “proportionate regard”. In considering the duties of Newry and Mourne District Council, the Commission must refer to the statutory provisions and to any judicial interpretation of the provisions.
- 4.8 While there has been some case law in Northern Ireland - notably the High Court decision in *Re Neill*<sup>3</sup> – the jurisprudence to date has not

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<sup>3</sup> *Re Neill* [2005] NIQB 66

provided a full analysis of what it means for public authorities to have “regard” or “due regard” in the context of the equality duties. However, a significant body of case law has emerged from the higher courts in Great Britain, arising out of the statutory equality duties in England and Wales.

- 4.9 The leading cases are R(Baker) which was a Judicial Review on the application of Irish Traveller families arising out of the refusal of planning permission for caravans on a planning green belt; and R (Brown) which was a Judicial Review concerning the proposed closures of post offices and consideration given to the impact on disabled people. While other cases have concerned the nature of the duties, these two cases established the so called Baker-Brown principles of what it means to have “due regard”.<sup>4</sup> In summary these are as follows: the decision maker must be aware of the duty; the statutory goals must be taken into consideration; “due” regard means the amount that is appropriate in the circumstances of the case; it is NOT a duty to achieve a particular outcome or result; the duty must be fulfilled at the time the decision is being considered; it must be exercised in substance, with rigour and an open mind; it is non-delegable; it is a continuing duty; and it is good practice to keep records.
- 4.10 A significant factor in this Investigation is that the decision makers are elected representatives, rather than public servants. While the Council officials have, at the behest of the Council, carried out the processes and considerations required in law, in the end the decision making came down to party political voting. Democratically accountable decision makers are entitled to make decisions in accordance with their political views and policies, provided they have regard to all material considerations. They are entitled to take into account the views of their constituents, but they cannot approach decision making in a biased way, with a closed mind and without

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<sup>4</sup> R(Baker)v Secretary of State for Communities and Local Government and the London Borough of Bromley [2008] EWCA Civ 141; R(Brown) v Secretary of State for Work and Pensions and the Secretary for Business, Enterprise and Regulatory Reform [2008] EWHC 3158 (Admin)

impartial consideration of all relevant issues.<sup>5</sup> In this instance, they are required to fulfil statutory duties laid down by s75 of the Northern Ireland Act 1998.

4.11 The s75 enforcement mechanism allows the Commission to investigate where it believes that a public authority may have failed to comply with its approved Equality Schemes. Newry and Mourne District Council have had two approved schemes during this time, one approved on 5 July 2001 and the revised scheme approved on 28 March 2012. In both schemes there is a commitment at Section 1.3 to fulfil its obligations as set out in Section 1.1 (and Section 1.2 in the 2000 Scheme) to have due regard to the need to promote equality of opportunity across s75 groups; and to have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

4.12 When the Commission became aware of the name of the play park in 2008, it wrote to the Council seeking information on the extent to which equality and good relations implications were considered and referred to its 2007 Guidance<sup>6</sup> which sets out what is expected of local authorities.

*Leaders of public authorities need to demonstrate publicly in a clear unequivocal manner that promoting good relations is both central to and a measure of their success. The duty is not just directed at removing or avoiding occasions of difficulty between various groups but, rather, is intended actively to encourage the expression of good relations and their promotion in all aspects of an authority's work*

*Section 75 means creating an ethos, a culture, of good relations and recognising the need to promote good relations both within and between communities. Promoting good relations can also involve tackling difficult issues . . .and taking steps to create safe*

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<sup>5</sup> There are judicial dicta on decision making by elected representatives in the cases of EU Plant Ltd v Wokingham Borough Council [2012] EWHC 3305 (admin); and R(West) v Belfast City Council [2006] NIQB 39.

<sup>6</sup> Promoting Good Relations; A Guide for Public Authorities [October 2007]

*shared public spaces in towns and cities, that can be accessed and used by all sections of all communities.*

4.13 When an Equality Impact Assessment finally got underway, the Commission responded and detailed a number of concerns about the EQIA process. In summary they were:-

- the EQIA was difficult to navigate and understand;
- the aim of the policy was not explicitly defined at the outset;
- it is not made clear whether the Council had a “naming” policy when the park’s name was first approved in 2001; and if so whether this and the successive 2007 policy on naming facilities etc was equality screened. It noted that the existing ‘naming’ policy was ambiguous;
- the consideration of the available data cites statistics taken from a previous survey of a small geographical area and does not take into account possible impacts on the wider community;
- there was no explicit reference to assessment of equality impacts in relation to any of the s75 groups. The Commission emphasised that the *purpose* of the EQIA is to assess impact on equality;
- the omission of any potential mitigation actions or alternative policies at that time was critical.

4.14 Following the EQIA and the consideration given to the matter by the Elected Members’ Forum, Committee and full Council meetings in the end the outcome was determined by political voting. To fulfil the commitment to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations there should be evidence that the duty was exercised in substance, with rigour and an open mind<sup>7</sup>. While there was some attempt at addressing mitigating actions, after the EQIA had been completed, it is not clear that these actions were undertaken or were capable of mitigating against adverse impacts on equality of opportunity or good

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<sup>7</sup> R(Baker)v Secretary of State for Communities and Local Government and the London Borough of Bromley [2008] EWCA Civ 141; R(Brown) v Secretary of State for Work and Pensions and the Secretary for Business, Enterprise and Regulatory Reform [2008] EWHC 3158 (Admin)

relations between people of differing religious belief or political opinion. That little consideration at all appears to have been given by Councillors to reverting to the original name – Patrick Street Play Park – indicates that the exercise was focused more on process than on the substance of the impact on the Protestant/Unionist community of naming a publically owned and run facility after such a controversial figure.

## **5. Conclusions**

- 5.1 The Statutory Duty Investigations Committee (SDIC) met on 13 November 2013 to consider whether Newry and Mourne District Council had breached its approved Equality Scheme and its commitments therein to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group. It met on 19 December 2013 to consider appropriate recommendations. SDIC met again on 19 March 2014 to consider the response to the Draft Final Investigation Report and to refer this Final Investigation Report to the Equality Commission for approval.
- 5.2 This Investigation has noted that when the park was first named Raymond McCreesh Park, the process that was conducted was very limited. Following a complaint and representations to the Council by the Commission in 2008 the name was again considered. An EQIA was conducted, which concluded in 2011. A number of submissions to this Investigation referred to the fact that, at that time, the name had been in existence for almost a decade. This, however, does not absolve the Council from responsibility of complying with its statutory equality duties. The duties are continuing duties. In its Equality Scheme at paragraphs 3.1 and 3.2.1, the Council recognises the importance of consultation and seeking the views of those directly affected by the matter/policy and others. Paragraph 4.17 notes that an EQIA will be carried out in accordance with Commission guidance. The limitations of the EQIA process were made clear to the Council by the Equality Commission. More critically however, the duty is not

simply a “box ticking” exercise. There must be evidence that the duty was exercised in substance, with rigour and with an open mind<sup>8</sup>.

- 5.3 It is not the role of the Equality Commission to substitute its view for the decisions made by democratically elected Councillors or indeed, public authorities generally. However, the Commission has a particular role in this jurisdiction in monitoring compliance with approved Equality Schemes.
- 5.4 The evidence in this Investigation is that the name was first adopted by the Council on the basis of a very limited survey. The Council did not have an approved Equality Scheme at that time. When the name became more widely known in the community and following the representations referred to above, the Council embarked on a lengthy decision making process. This appears to have been more focussed on process and on maintaining the name of the play park than on paying due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations. There is little evidence that the duty was exercised in substance, with rigour and with an open mind<sup>9</sup> in the decision making process.
- 5.5 In light of the above, the Statutory Duty Investigations Committee found that there has been a breach of the Council’s 2012 Equality Scheme commitment, as set out at Section 1.3, to fulfil its s75 duties as described in Section 1.1 of that Scheme.

## **Recommendations.**

Having found a breach of Equality Scheme commitments, the Equality Commission recommends that:

- I. Newry and Mourne District Council review the decision to name the park after Raymond McCreesh, in a transparent manner that takes proper account of the legal obligations to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations;

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<sup>8</sup> ibid

<sup>9</sup> ibid

- II. Newry and Mourne District Council review the policy on naming Council facilities, in a transparent manner that takes proper account of the legal obligations to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations
- III. the reviews should be completed and reported to the Commission within 12 months of receipt of the final Investigation Report. A report on progress should be made to the Commission within 6 months.

26 March 2014