



**EQUALITY COMMISSION
FOR NORTHERN IRELAND**

**INVESTIGATION PROCEDURE UNDER
PARAGRAPHS 10 AND 11 OF SCHEDULE 9 OF
THE NORTHERN IRELAND ACT 1998**

JANUARY 2010

This document was revised March 2014 to reflect roles and responsibilities following organisational restructuring within the Equality Commission.

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1. INTRODUCTION

1.1 This procedure sets out the legislative provisions governing complaints and investigations under Schedule 9 of Section 75 the Northern Ireland Act 1998, and ECNI's arrangements for advising on, authorising and conducting such investigations.

1.2 Paragraph 10 of Schedule 9 provides that when ECNI receives a complaint of failure by a public authority to comply with its approved Equality Scheme, it will either investigate that complaint, or provide reasons for not investigating.

1.3 Paragraph 11 of Schedule 9 additionally empowers ECNI to itself initiate investigation to allow;

"any other investigation [i.e. other than paragraph 10] carried out by the Commission where it believes that a public authority may have failed to comply with a Scheme"

ECNI can therefore only investigate a public authority under Paragraph 11 if it forms the required "belief" that the public authority may have failed to comply with its approved Equality Scheme.

Paragraph 11 confers a powerful discretion on ECNI to initiate investigation. Such investigations can be generated purely from within ECNI's own knowledge, or from matters of general importance brought to its attention by interested third parties.

1.4 ECNI has established the Statutory Duty Investigations Committee to undertake investigations under Schedule 9.

1.5 Both Paragraph 10 and Paragraph 11 investigations are limited to situations where the public authority may have failed to comply with its approved Equality Scheme and not, more generally, that it has failed to have due regard to the need to promote equality of opportunity and/or regard for the desirability of promoting good relations. These may of course be relevant considerations in an investigation, in terms of evaluating whether or not Equality Scheme commitments have properly been complied with.

- 1.6 A prospective Paragraph 10 complainant is required to raise the failure to comply with an approved equality scheme being alleged directly with the public authority concerned **prior** to requesting ECNI investigation. Section 3 covers this required “pre- complaint” stage, when the potential complainant and the public authority may be advised by ECNI’s Investigations Team.

Section 4 covers subsequent written complaints to ECNI requesting investigation under paragraph 10, when the matter becomes a formal “Paragraph 10 complaint” and is progressed by the Investigations Team. The Statutory Duty Investigations Committee will either authorise investigation of the complaint, or provide reasons why the complaint will not be investigated.

Section 5 sets out ECNI’s procedures for initiating and authorising Paragraph 11 Investigations.

Section 6 sets out the arrangements for conducting and reporting on all Schedule 9 investigations.

1.7 Confidentiality and Publicity

ECNI requires that the parties to any complaint under Paragraph 10, or any persons or third parties with whom ECNI discusses a potential or actual investigation under Paragraph 11, treat the matter with the utmost confidentiality, and in particular avoid making any public statements in respect of information relating to same, until ECNI has completed its enquiries and/or investigation, and has published any investigation report.

2. OUTLINE OF ROLES

The Investigations Team is part of the Equality Commission's Legal, Policy & Research Division

2.1 The role of the Investigations Team is to:

- Provide advice to potential Paragraph 10 complainants during the pre-written complaint stage.
- Advise public authorities of potential Paragraph 11 investigations.
- Provide guidance to the Statutory Duty Investigations Committee on the general and specific advice which has or would be given by the Commission in performance of its advice-giving function under Paragraph 1(b) of Schedule 9.
- Progress Paragraph 10 Complaints to the Statutory Duty Investigations Committee for consideration of authorisation of investigation.
- Progress proposed Paragraph 11 investigations to the Commission for consideration of authorisation of investigation.
- Conduct all investigations authorised under Schedule 9.
- Report on compliance by public authorities in respect of Commission recommendations.

2.2 The Statutory Duty Investigations Committee

The role of the Statutory Duty Investigations Committee is to

- Authorise the investigation of Paragraph 10 complaints,
- Assess the potential strategic value of proposed Paragraph 11 investigations.
- Recommend the authorisation of Paragraph 11 Investigations to the Commission.
- Conclude both Paragraph 10 and Paragraph 11 investigations in an impartial fashion within the limits of its delegated authority.
- Consider, following an investigation which has made recommendation(s), whether the public authority has complied with those recommendation(s), and recommend to the Commission whether or not it is necessary for ECNI to refer the matter to the Secretary of State for a Direction to compel compliance.

2.3 The Equality Commission

The role of the Equality Commission is to:

- Authorise Paragraph 11 investigations.
- Approve all investigation reports adopted by the Statutory Duty Investigations Committee.
- Decide if, following an investigation which has made recommendations to the public authority, reference should be made to the Secretary of State for a direction.

3. PRE COMPLAINT ACTION REQUIRED BY PROSPECTIVE COMPLAINANT

- 3.1 Prior to requesting an ECNI investigation under Paragraph 10, a complainant must bring the potential complaint to the notice of the public authority concerned and allow it a reasonable opportunity to respond. Prospective complainants will often be in communication with ECNI for advice before or concurrent to this required initial stage. “Pre- Paragraph 10 complaint” refers to any contact ECNI receives from a potential complainant that might subsequently form the basis of a Paragraph 10 complaint requesting ECNI investigation, but which has not reached that stage.
- 3.2 The Commission encourages prospective complainants to contact its Investigations Team before bringing a potential complaint to the public authority’s notice as required. This will ensure that the complainant receives advice on the ambit of a potential investigation under Paragraph 10, the procedural requirements to be followed, and the relevant time-limit for submission of a formal written complaint seeking Commission investigation.
- 3.3 When the Commission is contacted by a prospective complainant, the initial contact details will be recorded by an Investigation Officer, on a standard initial contact form.
- 3.4 An Investigations Officer will provide advice and information to the prospective complainant, covering, inter alia:-
- The ambit of a potential s75 investigation under Paragraph 10, which must relate to an alleged failure by a public authority to comply with its approved Equality Scheme,
 - The requirement for a complaint to be made by person(s) who can properly claim to be directly affected by that alleged failure.
 - The legislative requirement that the complainant must initially bring the complaint to the notice of the public authority and allow it a reasonable opportunity to respond.
 - The need for the complainant to be sufficiently specific about the failure to comply with approved Equality Scheme being alleged, in firstly giving notice of it to the public authority so that it can respond, and also in referring any subsequent written complaint to ECNI.
 - The public authority’s contact details for complaints as set out in the approved Equality Scheme.
 - Where appropriate, advice to the complainant, when bringing the matter to the authority’s attention, that s/he should specifically

ask the authority to include the matter in its Equality Impact Assessment timetable, or if already included, to specifically consider and consult upon the matter complained of when conducting that Assessment. In the latter case the complainant may be advised that when s/he contacts the authority s/he should specifically ask to be included in the consultation list for that Assessment, to allow the complainant to bring his/her concerns about the policy to the authority's attention as part of the policy making process.

- The Commission's role, which must either investigate any subsequent written complaint, or provide the complainant with reasons for not investigating.
- The need to revert to the Commission in writing, if the matter is not resolved as a result of contact with the public authority, to make a formal complaint under Paragraph 10 seeking ECNI investigation.¹ . A complaint form is available to overcome any barriers that might be created by the legislative requirement that the complaint requesting Commission investigation must be made "in writing".
- The time-limit for submitting a written Paragraph 10 complaint to ECNI. Having first complied with the requirement of bringing the complaint to the notice of the public authority and allowing it a reasonable opportunity to respond, the complainant must send the Commission a written complaint. Such written complaint must be sent to the Commission during the period of 12 months starting with the day on which the complainant first knew of the matters alleged. The Investigations Team may also assist the potential complainant in drafting an initial letter to the public authority to bring the complaint to its notice. The Investigations Team will provide 'reasonable accommodation' in its advice-giving to those who have difficulties with the technicalities of the process. The Investigations Team will follow-up any verbal advice in writing.

3.5 All advice and information is without prejudice to any decision made by ECNI as a result of any investigation undertaken under Paragraph 10 or Paragraph 11.

3.6 Paragraph 10 is silent as to what period of time is reasonable in terms of allowing the public authority an opportunity to respond. Approved Equality Schemes will set out a commitment to respond to complaints within a given period of time. In general terms, ECNI takes the view that a one month period will normally be sufficient. However, it will

¹ This is the point when a potential complaint becomes a formal Paragraph 10 complaint,. On occasions however ECNI receives written Paragraph 10 complaints which very obviously do not meet the preliminary criteria required by paragraph 10, from eg prospective complainants who have not taken ECNI advice before submitting a complaint, and are not aware of the requirements of Paragraph 10, . In those limited circumstances the Legal, Policy & Research Division may contact the complainant to provide advice.

interpret this period flexibly, to allow for the complexity or urgency of the complaint.

4. PARAGRAPH 10 – FORMAL WRITTEN COMPLAINT REQUESTING EQUALITY COMMISSION INVESTIGATION

- 4.1 A formal written complaint is a written complaint sent to the ECNI requesting investigation under Paragraph 10 by a person who has previously brought the complaint to the notice of the public authority and allowed it a reasonable opportunity to respond. At this stage the complaint will be progressed by the Investigations Team through the Statutory Duty Investigations Committee².
- 4.2 For authorisation of a Paragraph 10 complaint to be considered, the Statutory Duty Investigations Committee must first be satisfied that the complaint has been made in accordance with the requirements set out in that Paragraph. These are:

(i) **Prospective complainant must notify Public Authority prior to making complaint to ECNI**

The complainant must first (i.e. prior to lodging a written complaint to ECNI requesting an investigation) bring the alleged failure to comply with approved Equality Scheme to the notice of the public authority and allow it a reasonable opportunity to respond.³ This should be sufficiently specific about the failure to comply with approved equality scheme being alleged to allow the public authority to properly respond.

(ii) **Subsequent Complaint to ECNI must be in writing by a person who claims to be directly affected by the failure**

Complaints of failure to comply with approved Equality Scheme to ECNI must be in writing by a person who claims to have been directly affected by that alleged failure.⁴ For ECNI investigation under Paragraph 10 to be possible, the complaint must allege that the public authority has failed to comply with its commitment contained in the public authority's approved Equality Scheme, as opposed to allegations of a more general nature.

Paragraph 10 refers to persons who "claim" to be affected, rather than persons affected. ECNI considers that this sub-section places an onus on it to consider whether there is a sufficient connection between the person making the complaint and the failure to comply with approved Equality Scheme being alleged, to legitimately establish direct affect. As Paragraph 10 refers to a 'person', rather

² See footnote 1 on page 8

³ Schedule 9 Paragraph 10(4).

⁴ Schedule 9 Paragraph 10(1).

than an 'individual' it is also open to a 'legal person', e.g. a company limited by guarantee, to make a complaint under Paragraph 10.

Reasonable adjustments will be made to accommodate persons who may have difficulty with the technicalities of pursuing a complaint, or may be unlikely or unable to do so without assistance. This will include allowing complainants to be assisted by a friend, relative, or other representative during the Investigation.

(iii) Time-Limit

The written complaint must be sent to ECNI during the period of 12 months starting with the date on which the complainant first knew of the matters alleged.⁵

- 4.3 An Investigations Officer will make a recommendation as to whether in his/her opinion the complaint has been made in accordance with the requirements of Paragraph 10, and, if so, whether investigation should be authorised, which will be considered by the Statutory Duty Investigations Committee. The Investigations Officer may obtain the advice which the Commission has or would give in respect of the alleged failure to comply with approved Equality Scheme under investigation.

If the Statutory Duty Investigations Committee decides that the complaint has not been made in accordance with the requirements of Paragraph 10, investigation cannot be authorised. If the Committee decides that the requirements of Paragraph 10 have been met, the Commission has a discretion to authorise investigation.

If the Statutory Duty Investigations Committee decides that the complaint has been made in accordance with the requirements of Paragraph 10, it will consider the matter for investigation. The Statutory Duty Investigations Committee will either investigate any complaint made in accordance with Paragraph 10, or give the complainant reasons for not investigating.

- 4.4 Reasons for not investigating a complaint might include the following:
- There is not an arguable case that a failure to comply with the approved Equality Scheme has occurred.
 - The public authority has agreed to submit the matter to Equality Impact Assessment or, if already doing so, has agreed to consider the particular issue and consult about it as part of that Assessment.

⁵ Schedule 9 Paragraph 10(3).

- The policy/matter could properly be considered to be affirmative action to correct disadvantage or combat inequality.
- The policy/matter under consideration is due to be reviewed, discontinued or superseded.
- The nature of the complaint is such that the individual or person affected by it will not derive any benefit from investigation.
- A more appropriate form of redress is provided by anti-discrimination legislation.
- The action taken by the public authority when the complaint was brought to its notice was sufficient to remedy any potential failure by it to comply with its approved Equality Scheme.
- The complainant is not co-operating with Commission staff.
- The alleged failure to comply with approved Equality Scheme is already subject to Commission investigation.
- Any other relevant consideration

4.5 The Statutory Duty Investigations Committee will decide whether a Paragraph 10 investigation will be authorised. The Committee's decision will be recorded and a Record of Decision will be communicated to the complainant and to the public authority. The Record of Decision will set out the reasons for the Committee's decision. Either party may seek a review of the Committee's decision in respect of whether or not the complaint has been made in accordance with the criteria set out in Paragraph 10. The party seeking such review should set out the basis on which it considers the Committee should reverse its decision, and any additional information that the Committee should take into account. All such requests will be considered by the Chair of the Committee, who will either refuse the request, or have the complaint re-submitted to the Committee for re-consideration.

5. PARAGRAPH 11 – INITIATION AND AUTHORISATION

- 5.1 The Equality Commission can initiate an investigation under Paragraph 11 of Schedule 9 if it believes that a public authority may have failed to comply with its approved Equality Scheme. It should be noted that Paragraph 11 (like Paragraph 10) investigation is limited to situations where the public authority may have failed to comply with its approved Equality Scheme and not more generally that it has failed to have due regard to the need to promote equality of opportunity and/or regard for the desirability of promoting good relations, although again these may be relevant considerations in an investigation.
- 5.2 Paragraph 11 confers a powerful additional discretion on ECNI to initiate investigations in areas where it believes a failure to comply with the terms of an approved Equality Scheme may have occurred, without any need for a directly affected person to come forward with a complaint. Accordingly ECNI uses Paragraph 11 investigations strategically to tackle potential failures to comply with approved Equality Scheme which may significantly impact upon equality of opportunity and/or good relations.
- 5.3 ECNI recognises that there may be persons who, although directly affected by failure to comply with approved Equality Scheme, may be unlikely or unable to make a complaint under Paragraph 10. Accordingly ECNI will, when considering whether a Paragraph 11 investigation be authorised, take into account the fact that it is unlikely that a complaint would be pursued by a person who is directly affected such as, for example, a child.
- 5.4 Initiation of a Paragraph 11 investigation can arise from various sources.

ECNI conducts reviews of information:

- within its own knowledge;
- obtained in the course of considering a Paragraph 10 complaint;
- brought to its attention by external parties (whether representative bodies or otherwise);

The Commission has put internal mechanisms in place to permit a regular evaluation of such information so that all parts of the organisation have input to this process and Commissioners can be advised of areas where the Paragraph 11 discretion could or ought to be exercised.

- 5.5 All proposed Paragraph 11 investigations will initially be progressed by the Investigations Team, which will:-
- raise the potential failure to comply with approved Equality Scheme with the relevant public authority,⁶
 - give the public authority a reasonable opportunity to respond,
 - consider that response,
 - decide whether, in light of that response, the potential failure to comply with approved Equality Scheme should be referred to the Commission's Statutory Duty Investigations Committee who may recommend the authorisation of a Paragraph 11 investigation to the Equality Commission.
- 5.6 Such referral will be based on the Senior Investigation Officer's assessment of whether the failure to comply with approved Equality Scheme which may have occurred, is such that may significantly impact upon equality of opportunity and/or good relations. In doing so it will consider:-
- Is the perceived failure one of substance and/or of strategic importance?
 - Is there potential to raise awareness of Section 75 and/or of the Commission's role in this regard?
 - Is there potential to change policies, practices and/or attitudes in public authorities?
 - Is the perceived failure one that might not otherwise be pursued?
- 5.7 When such referral is made the Statutory Duty Investigations Committee will consider the Senior Investigation Officer's assessment that the proposed Paragraph 11 investigation is sufficiently strategic to merit a Commission-initiated investigation. The Investigation Team will also prepare a report to allow the Statutory Duty Investigations Committee to decide:
- If it would be appropriate for the Commission to form the required belief that failure to comply with approved Equality Scheme may have occurred, and if so,
 - Whether the potential failure to comply with approved Equality Scheme which may have occurred should be investigated under Paragraph 11.⁷

⁶ If the public authority has already been notified of the potential failure to comply with approved equality scheme by another party and has been allowed a reasonable opportunity to respond, the Legal, Policy & Research Division may simply notify the public authority that it is referring that potential failure to the Statutory Duty Investigations Committee for consideration of an ECNI initiated investigation.

⁷ In deciding whether it is appropriate to authorise investigation under Paragraph 11 the Committee may have regard to the range of considerations set out previously at paragraph 4.4

If the Statutory Duty Investigations Committee concludes that it would be appropriate to form the required belief, and that the potential failure to comply is a strategic matter that merits the initiation of an ECNI-generated investigation, it will recommend authorisation of a Paragraph 11 investigation.

- 5.8 All such recommendations shall be considered by the Equality Commission. On the basis of the information before it, including the supporting documentation put before the Statutory Duty Investigations Committee, and the recommendation of that Committee, the Commission shall determine whether it has formed a belief that there may have been a failure to comply with approved Equality Scheme and whether it wishes to authorise investigation under Paragraph 11. Where these two questions are answered in the affirmative, the Commission will authorise a Paragraph 11 investigation.
- 5.9 The relevant public authority will be informed when a Paragraph 11 investigation has been authorised.

6. PARAGRAPHS 10 AND 11 – INVESTIGATION AND REPORTING

6.1 Investigations under Schedule 9 will necessarily focus on the question of whether there has been a failure to comply with approved Equality Scheme as alleged in the complaint under Paragraph 10, or which formed the basis of the belief of the Commission under Paragraph 11.

6.2 Investigations will be inquisitorial in nature and will involve a series of meetings between the Investigations Officer and the parties to the investigation. These may be followed up by written requests for information and/or documentation. The public authority and any complainant will be involved in the investigation process. Generally the initial facts will be in the knowledge of the public authority whose compliance with its approved Equality Scheme is under investigation, and therefore the investigation will normally involve an initial fact-finding interview with the public authority and, in the case of a Paragraph 10 investigation, a subsequent review with the complainant prior to preparation of a draft Investigation Report.

Where it considers it appropriate, ECNI may invite the parties to the investigation to a hearing before the Statutory Duty Investigations Committee.

6.3 The Investigations Officer, in conducting the investigation, may review

- the approved Equality Scheme
- desk audit advices
- consultation audits
- responses to consultation and
- the public authority's annual reports of progress.

The Investigations Officer will also consider any Guidelines and guidance issued by the Commission pertinent to the investigation, including the 'Guide to the Statutory Duties', and the 'Practical Guidance on Equality Impact Assessment'.

6.4 In the course of an investigation, the Investigations Officer may seek the views of relevant interest groups with particular expertise in the area or other public authorities in the same sector, particularly if the matter is complex or technical. The Investigations Officer may also obtain the advice which the Commission has or would give in respect of the alleged failure to comply with approved Equality Scheme under investigation.

Draft Investigation Report

- 6.5 The Investigations Officer will prepare a Draft investigation report for consideration by the Statutory Duty Investigations Committee. This report will set out the facts established by the investigation and indicate whether a failure to comply with the approved Equality Scheme has been established. The report may also recommend to the Statutory Duty Investigations Committee action to be taken by the public authority to redress any failure to comply with approved Equality Scheme, and the time-scale for compliance.
- 6.6 The Statutory Duty Investigations Committee will adopt a draft investigation report on the basis of the evidence collected by the Investigations Officer and any further evidence which it may direct. If the Committee concludes that a failure to comply with approved Equality Scheme has been established, it may include a recommendation for action by the public authority and a time-scale for implementation in the draft investigation report.
- 6.7 The parties to the investigation will be given a copy of the draft investigation report and will be allowed an opportunity to comment on any of the facts included in it, any conclusions drawn on the public authority's alleged failure to comply with the approved Equality Scheme and any recommendations and time-scales for action included in the draft investigation report.
- 6.8 The Investigations Officer will collate any responses received and communicate them to the Committee which will adopt an Investigation Report, including any recommendations and time-scale for implementation.
- 6.9 The Committee's Investigation Report will be referred to the Equality Commission for approval. The (approved) Investigation Report will be sent to the public authority concerned, the Secretary of State and any complainant. The Assembly will be notified that the Investigation Report has been sent to the Secretary of State, and sent a copy of that report.
- 6.10 If the Investigation Report recommends action by the public authority, the Commission's Advice & Compliance Division will liaise with the public authority on those recommendations. Once the time-scale for implementation provided in the Investigation Report has passed, the Investigations Team will prepare a report on the public authority's implementation. The Statutory Duty Investigations Committee shall consider the report and reach a view as to whether or not the action set out in the recommendations has been taken, and if not, whether the matter should be referred to the Secretary of State to decide whether a direction be issued to the public authority. It will make a recommendation to the Commission where it considers that such a reference should be made.

- 6.11 The Statutory Duty Committee's recommendation shall be reviewed by the Commission which shall decide whether it considers that the action set out in the recommendations has been taken, and if not, whether the matter should be referred to the Secretary of State.
- 6.12 Paragraphs 6.9 to 6.11 do not apply to those Government Departments mentioned in s.75 (3)(a) of the Northern Ireland Act 1998, i.e. public bodies listed in Schedule 2 of the Parliamentary Commissioner Act 1967 and designated for the purposes of section 75. Investigation Reports relating to such Government Departments will be sent to the Department concerned and any complainant, and may be laid before Parliament and the Assembly.
- 6.13 Copies of all Investigation Reports will be published on the Commission's web-site.