EQUALITY COMMISSION FOR NORTHERN IRELAND

FINAL REPORT OF COMMISSION INVESTIGATION UNDER PARAGRAPH 11 OF SCHEDULE 9 TO S. 75 OF THE NORTHERN IRELAND ACT 1998

DEPARTMENT OF FINANCE AND PERSONNEL: LAW REFORM (MISCELLANEOUS PROVISIONS) (NI) ORDER 2006

1 INTRODUCTION

1.1 s. 75 of the N. Ireland Act imposes statutory duties on public authorities to pay due regard to the need to promote Equality of Opportunity and regard to the desirability of promoting good relations. 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 fulfil the s. 75 duties and a plan for their performance. Schedule 9 (11) allows the Equality Commission to investigate potential failure by a public authority to comply with its approved Equality Scheme. Investigation of this matter was authorised on 25 October 2006. The issue under investigation relates to the fact that, in reforming the legislative position in respect of the defence of the reasonable chastisement of minors, the Department (through its Office of Law Reform- hereafter referred to as OLR) decided to replicate the G.B. legislative position by limiting the defence to summary charges of common assault, as opposed to imposing a complete ban. The related potential failures to comply with approved Equality Scheme required by s. 75 of the N. Ireland Act were:

(i) Failure to consult "in relation to … screening" - Section 3.5 of approved Equality Scheme.

Was consultation on the screening determination on the proposal to replicate the GB legislative position adequate, and in particular should OLR have engaged in consultation on the screening exercise itself?

(ii) Failure to subject the proposals to equality impact assessment - Sections 4.8 and/or 4.13 of approved Equality Scheme.

Did the decision not to carry out an Equality Impact Assessment (EQIA)of the proposal to replicate the G.B. legislative position constitute a failure to comply with approved Equality Scheme commitments to carry out EQIA where appropriate?

1.2 Background to events leading to Investigation

In A v U.K. (1998) the European Court of Human Rights held that the U.K. had breached Article 3 of the European Convention on Human Rights by failing to provide a young boy with adequate protection from inhuman and degrading treatment in the form of beatings by his step-father. The father relied on the defence of reasonable chastisement in the U.K. domestic courts. Following the judgement in the ECHR, the U.K. undertook to review the operation of the defence and to introduce measures which would prevent a repeat of the violation found by the Court.

1.3 Groups and organisations representing children and young people are opposed to the legislation that has been subsequently introduced in N.Ireland, the Law Reform (Miscellaneous Provisions) Northern Ireland Order 2006, on the basis that it will not impose a complete ban on the defence of reasonable chastisement in respect of the physical punishment of children. The legislation replicates the G.B. legislative position, introduced in 2004, by retaining the defence in respect of a Summary (as opposed to Indictment) charge of Common Assault. The defence has been removed in respect of;

- serious criminal charges such as wounding, grievous bodily harm, assault causing actual bodily harm, cruelty to children and common assault on Indictment.

- a civil claim for damages where the harm alleged amounts to actual bodily harm

1.4 The Office of Law Reform (OLR) state that a restriction on the defence of reasonable chastisement was one of the options which were widely consulted upon following the judgement in A v U.K. and whilst there was strong support for both a complete ban

and retaining the defence, it concluded that the restriction of the defence as set out would offer additional protection to children and ensure the necessary compliance with the Convention.

2. THE INVESTIGATION

1. Potential failure relating to adequacy of consultation on screening.

2.1 Section 3.5 of the Department's approved Equality Scheme provides;

"…. *The Department will consult with the bodies listed in Annex C in relation to S75 duties, screening and the scheme itself".*

Chronology of Engagement that took place in relation to the policy

2.2 OLR state that there was extensive consultation on the screening of the proposal to replicate the G.B. legislative position by restricting, rather than banning, the defence. They state that the screening of the policy was initiated by its consultation paper "Physical Punishment in the Home - Thinking about the issues", which was widely consulted upon, beginning in 2001. OLR state that this consultation paper sets out very specific equality related questions and invited consultees to "provide their assessment of the best way forward in the light of our equality duties."

2.3 OLR indicate that the consultation submissions were analysed and published in June 2004, and from August it began to meet with individual organisations, including the umbrella group Children are Unbeatable (CAU), to discuss the policy proposals and the equality issues arising. The most recent of these meetings with CAU took place on 6th February 2006, and involved representatives from the Children's Law Centre (CLC), Children in N. Ireland (CINI), Save the Children and the CAU coordinator. OLR indicate that CAU had also been invited by letter dated 24 January 2006 to submit any additional information it wished to be taken into account for screening purposes, and this invitation was repeated at the meeting in February.

2.4 OLR state that Lord Rooker, as Minister for Children and Young People and Minister for DFP, met with voluntary organisations to discuss the proposed Strategy for Children and Young People in November 2005, and that the draft Strategy had specifically referred to the proposed replication of Section 58 of the

Children Act 2004 and the policy on physical punishment, and its equality implications were discussed.

2.5 ORL advised that the screening proforma setting out the initial screening decision had been completed in January 2006, and that the screening determination was finalised on or about 22 February 2006. OLR concluded that 2 of the 4 screening questions should be answered in the affirmative, i.e.;

- There was evidence of higher participation or uptake by different groups, namely Gender, Religion, Disability, Race, Age, and Dependency.

"…the application of physical punishment has a differential impact linked to age, as children are the recipients".

- and that consultations had indicated that the policy created problems specific to the age category.

"Most of the childcare professionals/children's organisations support a complete ban, rather than a limitation of the defence".

2.6 Having answered two of the screening questions in the affirmative, OLR proceeded to consider whether the policy has a significant impact on equality of opportunity and, therefore, should be subject to an equality impact assessment (EQIA). It concluded that EQIA was not required on the basis that the change in the law would have a positive impact, in that it would preclude reliance on the defence of reasonable chastisement when serious injuries are inflicted, and therefore did not have an adverse differential impact on any of the S.75 categories.

2.7 In summary therefore, OLR did engage in public consultation when developing the policy and the subsequent draft legislation, and had meetings with groups who were seeking the complete abolition of the defence prior to and during the screening exercise. OLR wrote to CAU on 24 January 2006 to indicate that it was in the process of screening the policy to replicate S. 58 of the Children Act 2004, and asking if there was "*any additional information which you would wish to submit following the policy decision to replicate s. 58*". This lead to a further meeting between OLR and CAU on 6th February 2006. However, the actual decision to screen the policy out, despite screening questions

being answered in the affirmative, was not communicated to consultees for comment and possible revision.

2.8 OLR contends that it did consult in the course of the screening exercise, and that it's approved Equality Scheme commitment to "*consult in relation to…screening*" had been satisfied:

"…*having consulted in the course of the screening exercise, we did not undertake a further consultation on the outcome of that exercise, as distinct from that involved in the screening exercise itself. We would respectfully submit that Paragraph 3.5 imposes no requirement on the Department to do so. Undoubtedly, the aim of that paragraph is to ensure that interested bodies have an opportunity to contribute to the s. 75 screening process and to have their views heard. We gave that opportunity and, indeed, specifically invited the voluntary organisations to provide any additional material relevant to the screening exercise. In light of this, it would be inappropriate to import a requirement to consult on the actual "screening out" decision itself, where no express obligation lies".*

2.9 In determining whether DFP has failed to comply with its commitment to "*consult in relation to…screening*" the Commission has had to consider what specifically is required by this wording. Does Paragraph 3.5 simply require DFP to consult on the development of the policy and take that consultation into account when making its screening determination. Or is the requirement to consult on each screening determination so that, for example, consultees would have the opportunity to provide reasons why a policy that the public body is proposing should be screened out, is in fact appropriate for Equality Impact Assessment, to be considered by the public body and which might lead to a reversal of the screening decision. This issue is central to the question of whether the consultation that was carried out was sufficient in light of the Department's approved Equality Scheme.

2.10 The Commission has concluded that a requirement to consult "in relation to … screening" as set out in the Equality Scheme under investigation cannot be interpreted in such a prescriptive way that could lead to a finding of failure to comply with approved Equality Scheme in this particular case. Section 3.5 does not stipulate how and in what manner consultation on screening will be

conducted, and makes no reference to consulting on the actual screening determination.

2.11 In the course of this investigation the Commission sought the views of organisations representing the interests of children, some of whom participated in the meeting of 6 February 2006 referred to by OLR. These groups all argued that consultation on screening requires public bodies to communicate its initial screening determination to consultees, so that proposing, for example, to screen out a policy would be subject to public consultation. The groups contended that this was particularly important in cases such as the matter under investigation, where policies that had received affirmative answers to the screening questions were nevertheless being screened out for EQIA.

2.12 The Commission agrees that as a matter of good practice, public authorities should allow consultees to input into screening determinations, particularly in cases where it is proposed not to EQIA a policy that has received affirmative answers to the screening questions. However the Commission does not consider that this type of approach was mandatory by virtue of a general commitment to consult "in relation to ……screening".

2.13 Accordingly the Commission finds that the Department has not failed to comply with Section 3.5 of its approved scheme. However, as previously stated, the Commission considers that public authorities should engage in consultation as an integral part of the screening process, in particular where it is proposed to screen out the policy in question. Accordingly the revised Guide to the Statutory Duties now provides that proposed policies must be subject to screening and to consultation on the outcomes of the screening exercise.

2.14 This is a matter which the Commission has addressed in its Section 75 Review, as follows:-

"…. *screening has been less effective in the development of new policies. The Commission's guidance (revised) is clear that in developing new policies, the authority should screen the proposal, consult on its decision and if "screened in" should carry out an EQIA as part of the policy development process……*

The Commission has considered the role of consultation in screening new policies. Following a review of its Guidance in 2002, the Commission required public authorities to consult on the outcome of screening exercises. This has, in effect, required public authorities to consult twice on a single policy and. perhaps acted as a disincentive to carrying out an EQIA.

The Commission intends to advise that, in the development of new policies, consultation is not required where policies are "screened in" i.e. where a requirement for EQIA is identified…. Where a public authority proposes, following screening, to "screen out" the policy a two month consultation will remain a requirement."

2.15 Arising from the Commission's review of effectiveness, public authorities will be required to amend future schemes to reflect changes to practice required by any future Guidance.

2. Failure to subject the proposals to equality impact assessment: Sections 4.8 and/or 4.13 of approved Equality Scheme

2.16 Groups who have raised concerns with the Equality Commission about the introduction of the legislation in question contend there is a very clear adverse impact on children by not fully removing the reasonable chastisement defence in respect of the physical punishment of children, and therefore screening of the proposal to restrict, rather than completely ban, the defence should have led to an equality impact assessment (EQIA).

2.17 OLR points out that s.75 of the N. Ireland Act 1998 imposes a duty to promote "Equality of opportunity" and asserts that a policy can promote equality of opportunity, whilst not providing equality of treatment. It also asserts that the change to the law, coupled with work on positive parenting will have a positive rather than an adverse impact on children (the latter being the reason set out in its screening documentation for its view that EQIA was not required). It concludes that it was entirely reasonable for it to decide that EQIA was not required.

2.18 The Guide to the Statutory Duties simply states that, if the answer to any of the four screening questions is "yes", then "consideration**"** must be given to whether the policy should be

subject to the equality impact assessment procedure. This is precisely what happened in the case under investigation, with OLR ultimately taking the view that despite receiving (2) affirmative responses to the screening questions, this policy did not have sufficient implications for equality of opportunity to require an EQIA to be carried out. OLR provided the following reasons for holding this view;

"*It is generally acknowledged that the proposed replication of section 58 is of most relevance to children, those with dependants and those who support the use of physical punishment by reference to the Bible. However, it is not envisaged that the decision to replicate will have an adverse differential impact on any of those categories.*

With regard to children, the change in the law will have a positive impact because it will move the law closer to that applicable to adults and preclude reliance on the defence of reasonable chastisement when serious injuries are inflicted. In addition, children will benefit from the work with regard to positive parenting and the highlighting of alternative methods of discipline.

Likewise, those with dependants and religious convictions will not be adversely affected because those who advocated the continuing use of physical punishment emphasised the importance of moderation and not "overstepping the mark". This will be reflected in the revised law, which will apply "across the board".

2.19 The most relevant sections of the Department's approved Equality Scheme for the purposes of this matter are 4.8 and 4.13.

Section 4.4 sets out the 4 screening questions. Section 4.8 continues;

"…*those current policy areas scoring against at least one of the criteria in paragraph 4.4 above would not necessarily have a significant impact on all of the nine S.75 categories. Impact assessment will therefore concentrate on those categories where impact has been identified. As new policies emerge within a current main policy area their assessment will initially concentrate, as a minimum, on the S75 categories as already impacted upon. However, additional categories will be addressed as necessary*"

Section 4.13 of the Scheme also provides;

"Prior to putting forward a proposal for legislation the Department will subject the proposed policy which the legislation will implement to a s.75 screening process and will carry out any Equality Impact Assessment required with associated public consultation."

2.20 The issue is, therefore, can the equality impact assessment of a policy ever be a requirement if this procedure need only be "considered"? The Commission has previously considered this question in the context of its investigation of *CLC & NIO*, and concluded that, in appropriate circumstances, an equality impact assessment would be required. In concluding that the NIO should have "screened in" a policy relating to the introduction of anti-social behaviour legislation in Northern Ireland, the Commission noted that the Guide to the Statutory Duties provides that public authorities must subject to full impact assessment those proposed policies identified through screening as having significant implications for equality of opportunity (p37 original Guide). In the context of both the "due regard" duty to promote equality of opportunity, and the mandatory nature of the Guide to the Statutory Duties, the Commission concluded that in appropriate circumstances "consideration" of an equality impact assessment should lead to the undertaking of such an assessment.

2.21 Having decided that unreasonable failure to proceed to EQIA can in the appropriate circumstances constitute a failure to comply with approved Equality Scheme, the Commission proceeded to consider whether it would be appropriate to reach such a conclusion in this particular case. Having considered a considerable amount of evidence on this issue, including detailed submissions from groups who were seeking a complete abolition of the defence of reasonable chastisement, the Commission has concluded that this is not an appropriate case to conclude that the "screening out" of this policy constituted a failure to comply with approved Equality Scheme.

2.22 In reaching this conclusion, it is important to emphasise that the Commission is not endorsing the Department's view that an EQIA was not required. Indeed, given the nature of the policy, there is a strong argument that EQIA should have taken place. That need or desirability is not necessarily obviated or reduced if,

as the Department has argued, the overall impact of the legislative amendment will be to improve the position for the s. 75 groups.

2.23 However, it is not the Commission's role to decide whether this policy should have been subject to the EQIA procedure. The s. 75 process makes it clear that this is a decision for the public authority, and it would be inappropriate for the Commission to use an Investigation of this nature to substitute its own view in the matter. The Commission has previously, in its role as a statutory consultee listed in the Department's approved Equality Scheme, strongly recommended that the defence of reasonable chastisement be abolished.

2.24 The Commission's Investigatory role is to evaluate whether, in deciding not to proceed to EQIA, this decision was in itself so unreasonable or ill-founded to constitute a failure to comply with approved equality scheme.

2.25 In the previous case cited where the Commission did make such a finding, it took into account the substantial representations outlining the significant impact arising from the policy for children and young persons, the fact that no (contemporaneous) explanation for the decision that EQIA was not required was provided, and its view that the public authorities subsequent (non-contemporaneous) reasons for its decision were inadequate.

2.26 The Commission considered that the evidence supporting the need to EQIA the policy in the case currently under Investigation was not as strong or over-whelming. Voluntary and community sector groups representing the interests of children had argued for a complete abolition of the defence of reasonable chastisement. This was also the Commission's position, and it is a view shared by the Northern Ireland Commissioner for Children and Young People, although it did not submit a formal response to OLR's consultation paper. However the majority of respondents had resisted any attempt to reduce the defence. Unlike the previous investigation cited, the screening documentation had a contemporaneous explanation of why the view was being taken that EQIA was not required, and the Commission agrees that a reduction in the circumstances in which the defence can be pleaded is an improvement, although we would have preferred that the defence be completely abolished.

27 June 2007