



EQUALITY COMMISSION FOR NORTHERN IRELAND

Investigation of the Commission's belief that the Northern Ireland Office
may have failed to comply with its Equality Scheme

Investigated under Paragraph 11 of Schedule 9 of the Northern Ireland
Act 1998

Investigation Report

March 2023

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Investigated under Paragraph 11 of Schedule 9 of the Northern Ireland
Act 1998
February 2023

Presented to Parliament

by the Equality Commission for Northern Ireland

in accordance with Paragraph 12(5) of Schedule 9 to Section 75 of the Northern
Ireland Act 1998

Laid before the Northern Ireland Assembly in accordance with paragraph 12(5) of
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Northern Ireland

on

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Introduction and Summary

1. Section 75 of the Northern Ireland Act 1998 (the Act) places a statutory duty on public authorities to have due regard to the need to promote equality of opportunity between various groups of people, and to have regard to the desirability of promoting good relations, when carrying out their functions in Northern Ireland. The Northern Ireland Office (NIO) is a public authority for the purposes of the Section 75 duties.
2. Designated public authorities are required by Schedule 9(2) of the above Act to submit an Equality Scheme to the Equality Commission (Commission) for approval. Equality Schemes are both a statement of the public authority's commitment to fulfilling the Section 75 duties and a plan for their performance. The Commission approved the NIO's Equality Scheme in 2013.
3. The Equality Commission for Northern Ireland conducted an investigation into whether the NIO failed to comply with its approved Equality Scheme, at Paragraph 4.2, in relation to its equality assessment of its proposed policies as set out in the Northern Ireland Troubles (Legacy and Reconciliation) Bill, as contained in its Equality Impact Assessment that was published for consultation on 16 May 2022.
4. The investigation was undertaken in accordance with the Commission's powers, as set out in Paragraph 11 of Schedule 9 of the Northern Ireland Act 1998 (the Act). The Commission formed the required "belief" that the NIO may have failed to comply with its approved Equality Scheme and decided to investigate the matter under Paragraph 11.
5. For the investigation, the Commission followed its Procedures in conducting the investigation: Commission staff assessed the documentary evidence on the matter and assessed it against the commitments the Department has made in its equality scheme and requirements of Schedule 9 of the Northern Ireland Act 1998, the Commission's advice and guidance, and relevant caselaw.
6. The Background, Facts and Evidence, Assessment, Findings and Recommendations are set out in the sections below.
7. Based on the evidence and assessments, the Commission finds that the NIO failed to comply with its Equality Scheme at paragraph 4.2. The Northern Ireland Troubles (Legacy and Reconciliation) Bill, having been introduced into Parliament at the same time as the Equality Impact Assessment was published for consultation, contains the proposed policies assessed. The NIO cannot have taken any consultation responses to its equality assessment into account for its decisions on the policies proposed in the Bill.
8. Based on the findings, the Commission makes the following recommendations:

- The NIO must in future undertake its equality assessment of policies as part of the development process and ensure that such assessments are presented for proposed policies that are brought forward or announced.
- The NIO must make its equality assessments, and any consultation on them, available to its decision makers.
- The Secretary of State should ensure that his decisions are informed by the full information required; if the equality assessment is not presented with other information to inform his decision making, the Secretary of State should ask for it.

Background

9. On 29 June 2022, the Commission raised concerns with the NIO that the NIO published its Equality Impact Assessment (EQIA) on its proposed legacy policies, for consultation, on 16 May 2022. It noted that the NIO published the EQIA alongside the Northern Ireland Troubles (Legacy and Reconciliation) Bill, which contains the policies that are subject to the equality impact assessment. The Northern Ireland Troubles (Legacy and Reconciliation) Bill was published as it was introduced into Parliament.
10. The concerns were about how the NIO can take into account, in its decision making, its equality assessment of the policies it proposed on legacy matters. The NIO's approved Equality Scheme sets out arrangements which the NIO commits to following in order to fulfil its duties under Section 75. The central process for this is through assessing and consulting on the likely impact of policies adopted or proposed to be adopted, by the NIO, on the promotion of equality of opportunity.
11. The Commission's Statutory Duty Investigations Committee (Committee) considered the information that the NIO provided in response to the concerns raised at its meeting in September 2022. It considered, in accordance with the Procedures for Complaints and Investigations, at paragraph 6.6, whether there was sufficient evidence to form a belief that the public authority may have failed to comply with its approved Equality Scheme. The Committee decided that there was, and the Commission went on to approve an investigation of the matter at its meeting in September 2022.
12. The scope of the Investigation was:

“The Commission has formed the belief that the NIO may have failed to comply with its approved Equality Scheme at Paragraph 4.2, in relation to its equality assessment of its proposed policies as set out in the Northern Ireland Troubles (Legacy and Reconciliation) Bill, as contained in its Equality Impact Assessment that was published for consultation on 16 May 2022. The Commission decided to investigate the matter under Paragraph 11 of Schedule 9 of the Northern Ireland Act 1998.”

13. Paragraph 4.2 of the NIO's Equality Scheme says: "In making any decision with respect to a policy adopted or proposed to be adopted, we take into account any assessment and consultation carried out in relation to the policy, as required by Schedule 9 9.(2) to the Northern Ireland Act 1998."

Facts and Evidence

The function and policies concerned

14. The Northern Ireland Troubles (Legacy and Reconciliation) Bill sets out a range of policies for Parliament to consider legislating for; the Bill has a number of sections with legislative provisions, such as for: The Independent Commission for Reconciliation and Information Recovery; Reviews of deaths and other harmful conduct; and the historical record of deaths.
15. The Equality Impact Assessment, published on 16 May 2022, says: "The UK Government understands that legacy issues are sensitive and complex. That is why they remain unresolved -over two decades after the signing of the Belfast/Good Friday Agreement ..."
16. Under the heading "policy objectives," the EQIA states: "The UK Government's current legacy proposals are intended to create a legal framework for the implementation of mechanisms to address the legacy of Northern Ireland's past, delivering a way forward that provides information and helps families get the answers they have long sought."
17. The EQIA has a number of sections with information, data and the NIO's equality assessment of policy proposals. It sets out that policy objectives, such as: "[the] Establishment of a new information recovery body to enable individuals and family members to seek and receive information about Troubles-related deaths and very serious injuries." Also, it says: "The body will produce a historical record of what is known in relation to every death that occurred during the Troubles."
18. The NIO published a Command Paper, preceding the publication of a Bill. It did so in July 2021, and the proposals it contained are set out in chapters covering areas such as: "A New Information Recovery Body; Oral History and Memorialisation; A Statute of Limitations and Inquests and Civil Cases."
19. It is a Command paper that is set within the NIO's functions; it is titled: "Addressing the Legacy of Northern Ireland's Past - Presented to Parliament by the Secretary of State for Northern Ireland - by Command of Her Majesty".
20. The NIO's Equality Screening form of July 2021, published alongside the Command Paper includes: "NIO is the key policy holder, but there are a range of operational partners and other Government departments who will have an interest in the timing of the legislative proposals coming into force."

Paragraph 4.2 of the NIO Equality Scheme

21. The NIO has undertaken equality screening exercises on a number of occasions during the course of its work to develop policies on legacy matters.
22. The Commission's investigation of a complaint made about the NIO found it failed to comply with its Equality Scheme in relation to screening a proposal on the legacy mattersⁱ. The Investigation Report (September 2021) made a number of recommendations for the NIO, including that:

"the NIO reviews its approach to equality assessment of the planned legislation for legacy matters, to ensure that it applies its Equality Scheme arrangements of screening and EQIA for their stated purpose and as early as possible in the policy development process" and

"the NIO fulfils its commitment made in the Consultation Report of 2019 that it will conduct a full Equality Impact Assessment of the matter".

23. The Investigation Report also contained the following:

"The Commission notes that, in the period during which this Investigation Report has been drafted and has gone through the procedural stages to finalisation, the NIO published its Command Paper "Addressing the Legacy of Northern Ireland's Past", on 14 July 2021, and also a screening form containing its initial equality assessment of the Northern Ireland Legacy Proposals. It published the screening document on 19 July 2021. The NIO also reported continuing work on its full Equality Impact Assessment of the Legacy Proposals. The Commission expects this work to continue and reach its conclusions, in accordance with the NIO's Equality Scheme arrangements".

24. The NIO published a screening form in July 2021ⁱⁱ, alongside the Command Paperⁱⁱⁱ. The assessment contained in the form includes concludes that a full Equality Impact Assessment will be carried out and provides an explanation for this.
25. The Equality Impact Assessment, published in May 2022, says:

"Assessment of impacts

As stated above, the 2018 publication of the draft Northern Ireland (Stormont House Agreement) Bill was accompanied by the publication of a Section 75 Equality Screening Form. A further equality screening form was published on 19 July 2021 to reflect the revised proposals put forward by the Secretary of State in a Command Paper published on 14 July 2021.

The analysis in this document is based on both Section 75 screenings, the evidence provided during the 2018 consultation process, are view of the publications and evidence listed above and more recent research and

engagement with key stakeholders over the course of 2020/2021 and ongoing”.

26. The NIO, in its response to the Commission’s concerns of 29 June 2022, advised:

“The publication of the EQIA on 16 May 2022 builds on years of consultation and engagement. This includes the evidence and information gained through the 2018 & 2021 equality screenings, the widespread public consultation on the draft Stormont House Agreement Bill in 2018, and significant subsequent engagement with a wide range of stakeholders that have an interest in or may be affected by the proposals.”

“For this reason, and following careful consideration, we took the decision to run the consultation alongside the early stages of the parliamentary passage, with both processes beginning on 17 May. We have worked with parliamentary Business Managers to ensure that the Bill remains in amending stages following the closure of the consultation period. This means that we can subsequently address and reflect responses to the consultation via amendments to the Bill should this be required” and

“The NIO is committed to having due regard to the need to promote equality of opportunity in carrying out its functions on legacy matters, and will take account of all responses received as part of the consultation on the EQIA during amending stages of the parliamentary process and as proposals are refined”.

Assessment

The function and policies concerned

27. The Commission’s advice and guidance anticipates that, in order to fulfil its statutory equality and good relations duties in Section 75 when it carries out its functions, a public authority will implement the arrangements and methods it has committed to in its Equality Scheme.
28. From Schedule 9 of the Northern Ireland Act, the NIO is carrying out functions on legacy matters which are considered relevant to the need to promote equality of opportunity. The arrangements and commitments in the NIO’s Equality Scheme should be applied by the NIO to enable it to fulfil its statutory duties in the circumstances of this investigation.
29. The standards expected from the NIO to comply with its Equality Scheme generally and paragraph 4.2 of it are set out in Commission guidance, Schedule 9 of the Northern Ireland Act 1998 and on principles established in caselaw.
30. The Commission’s guidance, caselaw principles established for the statutory duties in Section 75 and the NIO’s Equality Scheme commitments require that

an equality assessment of proposed policies is considered by the public authority as part of the policy development process and prior to its decisions on those policies.

31. The commitment in Paragraph 4.2, as stated above, is specifically a “duty” on the public authority concerned, required by Schedule 9, paragraph 9 (2) of the Northern Ireland Act 1998: “In making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation as is mentioned in paragraph 4(2)(b) carried out in relation to the policy”.

Paragraph 4.2 of the NIO Equality Scheme

32. As stated above, it is both an Equality Scheme commitment, at paragraph 4.2, and a duty on the NIO arising from its Equality Scheme, that in making any decision with respect to a policy ... proposed to be adopted...it shall take into account any such assessment and consultation [as is mentioned in paragraph 4(2)(b)] carried out in relation to the policy.
33. In this case, the policies proposed to be adopted are set out on a number of occasions, but specifically, in the Command Paper and subsequently in the Bill.
34. The policies proposed in the Command Paper are accompanied by the NIO’s equality assessment at that stage, as set out in the Equality Screening Form of July 2021. However, it is clearly incomplete as the NIO continued to commit to undertaking a full Equality Impact Assessment of the proposed policies.
35. The Equality Impact Assessment published on 16 May 2022 sets out the NIO’s full assessment of the policies proposed that are subject to this investigation. It is also the first time that the NIO’s assessment is presented for public consultation, in keeping with the Commission’s guidance on the stages for an Equality Impact Assessment.
36. The assessment presented is, however, of policy proposals that are now contained in a Bill, which was published on 17 May 2022 as it was introduced for its first reading in Parliament.
37. Caselaw in Britain for equivalent duties on public authorities has established that the Public Sector Equality Duties contained in Section 149 of the Equality Act 2010 do not apply to a proposed policy that is set out in a Bill. This principle would apply to proposed policies contained in a Bill and the duties in Section 75. Once a Bill is introduced into Parliament, it is not a function of the designated public authority concerned, nor is it during its passage to becoming an Act.^{iv}
38. The NIO should have been aware of this; in the complaint that was investigated by the Commission in 2021, the Complainants made an equivalent point to the NIO on their concerns at the time.
39. It is also noted that the NIO could not have taken any consultation responses to its equality assessment into account in this case for its decisions on the policies

proposed in the Bill. The duties arising from Equality Schemes as set out at Paragraph 9(2) of Schedule 9 of the Northern Ireland Act 1992 include reference to both the equality assessment and consultation being taken into account.

Findings

40. Based on the evidence and assessments set out in the preceding paragraphs, the Commission finds that the NIO failed to comply with its Equality Scheme at paragraph 4.2. The Northern Ireland Troubles (Legacy and Reconciliation) Bill, having been introduced into Parliament at the same time as the Equality Impact Assessment was published for consultation, contains the proposed policies assessed. The NIO cannot have taken any consultation responses to its equality assessment into account for its decisions on the policies proposed in the Bill.

Recommendations

41. Based on the findings, the Commission makes the following recommendations:
 - The NIO must in future undertake its equality assessment of policies as part of the development process and ensure that such assessments are presented for proposed policies that are brought forward or announced.
 - The NIO must make its equality assessments, and any consultation on them, available to its decision makers.
 - The Secretary of State should ensure that his decisions are informed by the full information required; if the equality assessment is not presented with other information to inform his decision making, the Secretary of State should ask for it.

Endnotes

ⁱ [Complainants \(the Committee on the Administration of Justice and the Pat Finucane Centre\) & The Northern Ireland Office](#), ECNI (September 2021)

ⁱⁱ [Northern Ireland legacy proposals - equality screening](#), NIO (July 2021)

ⁱⁱⁱ [Addressing the Legacy of Northern Ireland's Past](#), CP 498 (July 2021)

^{iv} In *R (Adiatu) v HM Treasury* [2020], the High Court Judges ruled the following: "In our judgment, it is clear that the "functions" of a public authority...do not include the preparation and promotion of an Act of Parliament or an amendment to an Act of Parliament. The making of primary legislation is a matter for Parliament and not the Executive." [2020] EWHC 1554 (Admin)

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