

## EQUALITY COMMISSION FOR NORTHERN IRELAND

### Investigation of a complaint made under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998

#### Complainants (the Committee on the Administration of Justice and the Pat Finucane Centre) & the Northern Ireland Office

#### Investigation Report

September 2021

## 1. Introduction and Summary

- 1.1 The duties set out in Section 75 of the Northern Ireland Act 1998 require that a public authority has due regard to the need to promote equality of opportunity and has regard to the desirability of promoting good relations, when it carries out its functions in Northern Ireland. The Northern Ireland Office is a public authority for the purposes of the Section 75 duties.
- 1.2 The Equality Commission for Northern Ireland (Commission) conducted an investigation into a complaint that the Northern Ireland Office (NIO) failed to comply with its approved Equality Scheme. The investigation was undertaken in accordance with the Commission's powers and duties, as set out in Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998 (the Act). This draft Investigation Report sets out the background to the complaint, the evidence gathered through the investigations, assessment and conclusions.
- 1.3 Two Complainants wrote to the Equality Commission asking that it investigate their complaint. The complaint alleged that the NIO failed to comply with its approved Equality Scheme, as the NIO failed to provide them with a copy, on request, of the screening document. They alleged this failure was contrary to the commitment set out at paragraph 4.13 of the NIO's Equality Scheme. The Complainants understood and expected screening to have been performed in relation to legislation to address the legacy of the past in Northern Ireland (a "new legacy bill").
- 1.4 Paragraph 4.13 of the NIO's Equality Scheme relates to making a screening document available and states: *"As soon as possible following the completion of the screening process, the screening template will be signed off and approved by the senior manager responsible for the policy. Screening documents will normally be published on our website every six months and made available on request by contacting:*

*Corporate Governance Team  
Stormont House  
Stormont Estate  
Belfast  
BT4 3SH  
...*

- 1.5 Public authorities to which the duties in Section 75 of the Act apply are required, by Schedule 9 (2) of the Act, to submit an Equality Scheme to the 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 NIO's Equality Scheme was approved on 13 December 2013 and updated on 10 December 2019.<sup>1</sup>
- 1.6 The Commission's Statutory Duty Investigations Committee (the SDIC) decided to investigate this complaint.
- 1.7 In the course of the investigation, the Commission has considered documentary evidence on the matter, supplemented by an investigation meeting held with NIO representatives on 13 April 2021. The Commission has assessed this evidence against the commitments the NIO made in its equality scheme, and the Commission's advice and guidance.
- 1.8 The Commission finds that the NIO failed to comply with its approved Equality Scheme at paragraph 4.13 because it failed to address the matters complained of in the way that it should have and in keeping with the purpose of screening as one of its Equality Scheme arrangements.

### Recommendations

- 1.9 In light of the finding on the complaint, the Commission recommends 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.
  - NIO staff, including policy leads and senior managers, are aware of and can articulate the purpose of the Equality Scheme arrangements when asked.
  - the NIO reviews its processes to complete and sign off a screening form so that it can be presented as the NIO's assessment of the potential equality impacts of proposals to inform the decision maker and what is then announced in terms of legislative proposals.

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<sup>1</sup> NIO Revised Equality Scheme 2019, available at [Publication of the reviewed Equality Scheme for the Northern Ireland Office - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/414444/Publication_of_the_reviewed_Equality_Scheme_for_the_Northern_Ireland_Office_-_GOV.UK.pdf).

- 1.10 In light of the wider circumstances of this matter that contributed to the finding, the Commission also recommends that:
- the NIO fulfills its commitment made in the Consultation Report of 2019 that it will conduct a full Equality Impact Assessment of the matter.
  - the NIO is mindful of the way it communicates with any enquirer on their statutory equality and good relations duties, and Equality Scheme arrangements, ensuring that communication is accurate, clear and consistent.

## 2. Background

- 2.1 The Stormont House Agreement 2014<sup>2</sup> (SHA) set out proposals for dealing with the legacy of the past in relation to the Troubles in Northern Ireland. The NIO was tasked to develop legislation giving effect to the proposals laid down in the SHA.
- 2.2 The NIO prepared a draft bill and presented it for public consultation in 2017-2018<sup>3</sup> accompanied by a screening form dated May 2018. In the screening form, the policy concerned is named as “*Assessing the legacy of Northern Ireland’s past*”<sup>4</sup>. In the section that prompts for what the policy is trying to achieve, there is general background information on the accompanying policy proposals in the consultation document and reference to: “*The aim of the proposals is to reform the current system in order to deliver more balanced and expeditious outcomes for victims.*”<sup>5</sup>
- 2.3 This screening document presents the NIO’s equality assessment of the matters subject to public consultation at that time, such as the identified needs/experiences/priorities of the equality groups covered by Section 75. The document also sets out the NIO’s assessment of major potential impacts of the matters on specific equality groups<sup>6</sup>.
- 2.4 The conclusion in the screening form is: “*The Government gave a commitment in the Stormont House Agreement to establish new mechanisms for addressing the legacy of the past in a way that has confidence for the community in Northern Ireland. The Government is aware of stakeholders’ differing opinions on dealing with the past. This evidence has emerged through intensive engagement with stakeholders, which includes victims’ representatives groups and Northern Ireland’s political parties.*

*The proposals are intended to contribute to the transition towards social cohesion and reconciliation in NI and long term peace and stability of the region.*

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<sup>2</sup> Full SHA text is available online at [The Stormont House Agreement - GOV.UK \(www.gov.uk\)](http://www.gov.uk).

<sup>3</sup> Addressing the Legacy of Northern Ireland’s Past, 2018. Available online at [Consultation Paper Addressing the Legacy of Northern Ireland’s Past.pdf \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

<sup>4</sup> [EQUALITY SCREENING FORM \(publishing.service.gov.uk\)](http://publishing.service.gov.uk)

<sup>5</sup> Ibid, p5

<sup>6</sup> Ibid, p19-20

*It has been assessed that the impact of the proposals would be major, in terms of making a positive difference to people's lives.*

*It has therefore been decided that conducting an Equality Impact Assessment would fully assess the impact on as wide a range of stakeholders as possible.*

*In order to assess the views of those affected by the Troubles, the consultation, entitled 'addressing the legacy of the past –moving Northern Ireland forward' invites extensive stakeholder feedback on addressing legacy issues.*

*The Government especially seeks the views of those who have suffered as a result of the Troubles. A greater number of people falling within section 75 categories: 'political opinion', 'gender' 'age', 'disability' and 'dependents' are likely to benefit from the proposals and, by conducting an Equality Impact Assessment the Government will take account of all views on the establishment of these institutions."*

- 2.5 The report on the public consultation responses and their analyses was published in July 2019.<sup>7</sup> The NIO response to the feedback it received concludes: *"The Government remains fully committed to the implementation of the Stormont House Agreement and it is essential that our work continues. The Government will work closely with a newly restored Executive - or, in the absence of an Executive, the NI parties - to discuss the key issues raised and to agree the way forward. The people of Northern Ireland and others affected by the Troubles deserve to see progress on this important issue and the Government is determined to deliver that progress"*.
- 2.6 The report of the public consultation stated: *"The equality information collected from the consultation will be used to inform the full Equality Impact Assessment that will accompany the legislation"*<sup>8</sup>.
- 2.7 On 18 March 2020 the Secretary of State for Northern Ireland announced the next steps in his Written Ministerial Statement (WMS) to the House of Commons, titled "Addressing Northern Ireland Legacy Issues"<sup>9</sup>: *"It is clear that, while the principles underpinning the draft Bill as consulted on in 2018 remain, significant changes will be needed to obtain a broad consensus for the implementation of any legislation. We believe that the proposals set out below provide a framework for doing this"*
- 2.8 The WMS went on to say "... [W]e believe that the proposals... provide a framework for doing this"; and *"Our proposals have therefore evolved to remain true to the principles of the Stormont House Agreement with greater emphasis on gathering information for families"*; The Government stated that it "...wants information recovery and reconciliation to be at the heart of a revised legacy system that put

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<sup>7</sup> [Addressing the Legacy of the Past - Analysis of the consultation responses.pdf \(publishing.service.gov.uk\)](#)

<sup>8</sup> Ibid, p35

<sup>9</sup> [Written Ministerial Statement 18 March 2018](#)

*victims first.” and “The Government is committed to introducing legislation in line with our commitments in ‘New Decade New Approach’.”*

- 2.9 On 20 July 2020, in a debate in the House of Lords on the Overseas Operations (Service Personnel and Veterans) Bill, the Minister of State for Defence stated “... a Northern Ireland Bill is coming forth to deal with similar issues; the Northern Ireland Office is currently in the process of preparing it. We expect more information in early course.” The Complainants refer to this statement in their initial enquiry to the NIO.

### **3. Investigation**

- 3.1 The SDIC, at its meeting of 18 November 2020, decided to authorise an investigation into the Complainants’ allegation that, contrary to its Equality Scheme paragraph 4.13, the Northern Ireland Office failed to provide a copy of the screening document on request.
- 3.2 Paragraph 4.13 of the NIO’s Equality Scheme states:  
*“As soon as possible following the completion of the screening process, the screening template will be signed off and approved by the senior manager responsible for the policy. Screening documents will normally be published on our website every six months and made available on request ...”*
- 3.3 Paragraph 10 of Schedule 9 of the Act requires the Commission to investigate complaints, made by persons who claim to have been directly affected, alleging that a public authority has failed to comply with the commitments in its approved Equality Scheme, or to give the person reasons if the decision is not to investigate.
- 3.4 The Commission’s Procedures for Complaints and Investigations (2019) (Procedures) say, at paragraph 7.2, that *“[w]hen the Commission authorises an investigation, it will proceed to establish whether the allegations made in the complaint ... can be substantiated.”*
- 3.5 The decision to investigate the complaint was notified to the parties concerned and, in accordance with the Procedures, the SDIC also considered a request from the NIO that it review its decision to investigate. The SDIC considered that request, and confirmed its decision to investigate; the investigation commenced on 24 February 2021.
- 3.6 Given the correspondence relating to the complaint, the SDIC decided that the investigation would seek to establish, in particular:
- (i) whether a screening document existed at the time it was requested;
  - (ii) what stage of completion any document had reached, and the reasons for that;

- (iii) the NIO's procedures for signing off screening documents; and
- (iv) when the policy was initiated and how long the NIO had to develop the policy in question, and its equality assessment of it.

3.7 The investigation considered the correspondence relating to the complaint and the request for a review; the documentary evidence that is referred to in the background section above; and evidence provided during an investigatory meeting held with NIO representatives on 13 April 2021.

### Preliminaries to the Complaint

3.8 On 27 July 2020, the Complainants wrote to the NIO and requested that the NIO provide them "*a copy of the Equality Screening exercise that has been conducted in the policy development stage that has **preceded the preparation of this bill***" [emphasis added].

3.9 The Complainants stated that they were referring to: "*...the statement by the Minister of State for Defence in the Lords last week that the NIO are now preparing a new legacy bill (with reference to similar provisions that are presently contained in the overseas operations bill)*".

3.10 The complainants quoted an extract from paragraph 4.13 of the NIO's Equality Scheme:  
*"4.13 ....Screening documents will normally be published on our website every six months and made available on request"*

3.11 On 5 August 2020, the NIO responded as follows:  
*"The Northern Ireland Office is committed to completing an equality screening for all new policies in line with our departmental Equality Scheme and the Equality Commission NI guidance. This will be completed at the earliest opportunity, and is an important part of the policy development process.*

*The Government has made clear that it will bring forward legislation to address the legacy of the Troubles. As part of this process we will continue to keep the equality impacts of any legislation under careful consideration. An equality screening document will be made publicly available alongside the publication of the Bill."*

3.12 There were further exchanges between the Complainants and the NIO on 6 and 7 August 2020: the Complainants were seeking to clarify and confirm whether an "*Equality Screening exercise has or has not already been undertaken.*"; the NIO indicating that an "*equality screening document will be made publicly available alongside the publication of the Bill.*"

3.13 On 7 August 2020, the Complainants repeated their request in an email to the NIO, stating: "*In particular we would be keen to feed evidence into the ongoing process*

*of review of the equality impacts of the new policy but cannot do so without sight of the document.”*

### Complaint to the NIO

- 3.14 The Complainants submitted a written complaint to the NIO on 12 August 2020 under paragraph 10 of Schedule 9 of the Act.
- 3.15 The Complainants, explained to the NIO that they had *“a long track record of engagement on legacy policy .... We have been hindered in doing so due to the decision not to make the screening document available, which would provide further information on the policy, its equality impacts and reveal the screening decision as to whether to proceed to an EQIA/consideration of alternative policies and mitigating measures. If the screening exercise was undertaken in conformity with the Equality Scheme it is highly likely to have identified adverse impacts against a number of section 75 groups and prompted a full Equality Impact Assessment and consequent consideration of alternative policies and mitigating measures, a process to which we could contribute. If the screening decision does not identify adverse equality impacts, and consequently not consider alternative policies, this is something we would be likely to challenge, through the procedures in the Equality Scheme. We have been hindered in doing any of these things as the screening template has been unduly withheld”*.

### NIO's Response to the Complaint

- 3.16 The NIO responded to the Complainants in a letter dated 9 September 2020, which included an offer of further discussion with the Complainants.
- 3.17 In the letter, the NIO stated: *“...Turning to the issue of your complaint, [NIO] would advise that in accordance with paragraph 4.13 of our Equality Scheme, the Department is committed to publishing screening documents as soon as possible following the completion of the screening process and after they have been signed off by the senior manager responsible for the policy. Screening documents will then normally be published on our website every six months and made available on request.*

*The Department has been clear that the screening process for this proposed policy is still ongoing and will be completed at the earliest opportunity. The Department has also been clear that relevant documentation will be made available in due course, following completion of the screening process and appropriate sign off, as set out above.”*

### Written Complaint to the Commission

- 3.18 Dissatisfied with this response, the Complainants submitted their complaint in writing to the Commission on 10 September 2020. The allegation of failure was as

stated in paragraphs 1.3 and 1.4 above. They indicated that “... **the policy in question [is] the new Legacy Bill** under development following the Written Ministerial Statement by the NI Secretary of State of 18 March 2020.” They set out the matters alleged as “...the NIO had completed an Equality Screening Exercise on their new Legacy Bill, but were declining to release same on request in spite of the clear wording of paragraph 4.13 of their Equality Scheme.” [emphasis added]

- 3.19 They referred to the NIO’s response of 9 September 2020: “[t]his response however still declines to release the requested initial completed Screening Document referred to in the Departments [sic] email of the 7th August. It also states that the Equality Screening document will not be made available until some unspecified point in the future. The response also does not retreat from the position set out in the Departmental correspondence of 5th August that the Screening will only be made available once the Legacy bill is published. Publication of the bill (rather than a draft bill) will presumably be through its introduction to Westminster, when related duties under the Equality Scheme to conduct an EQIA and consider alternative policies and mitigating measures where adverse impacts are identified, are likely to be entirely academic, undermining the statutory purpose of the equality duty. The NIO seeks to justify this by reference to the screening process being ongoing. This of course is always the case when a policy is underdevelopment...”

#### Further correspondence relating to the Complaint and request for review

- 3.20 The Complainants forwarded to the Commission a copy of a letter which they had received from the NIO, on 29 September 2020. In this letter, NIO stated, with reference to the complaint to the Commission, that it wished: “... to clarify what we believe may have been a misunderstanding relating to the status of the equality screening process.

*This complaint appears to have been made on a misunderstanding that the screening process has been fully completed, and that a duly signed off screening is being withheld by the Department.*

*For the avoidance of doubt, and as stated in my correspondence dated 9 September 2020, the screening process is ongoing and not yet complete. The Department is committed to completing this process at the earliest opportunity, and will then make the screening decision publicly available.*

*The Government remains committed to making progress on legacy issues, and recognises the importance of engagement with stakeholders on legacy issues. NIO Officials remain happy to discuss progress on our screening considerations in due course should you wish.”*



- 3.21 The SDIC's decision to investigate the complaint was notified to both parties on 2 December 2020. The NIO requested a review of the SDIC's decision on 30 December 2020. In a further letter to the Commission of 26 January 2021, the NIO set out information on the grounds on which it requested a review.
- 3.22 The scope of the investigation, as set out in paragraphs 3.1 and 3.6 above, had been communicated to the NIO in the Commission's letter of 2 December 2020, setting out the SDIC's decision to investigate. The NIO's letter of 26 January 2021 addresses the specific matters in point (i) of the matters that the investigation would examine in particular: *"It is our view that the complainant has misrepresented the NIO's position by suggesting that the NIO has completed a screening document but is declining to release it"*.
- 3.23 It continues: *"Our position is unchanged in that the policy in question remains under development and is subject to ongoing engagement with stakeholders to further inform this.*

*We are therefore not yet in a position to finalise an equalities screening process. We have sought to address the complainant's concerns regarding the timing of a screening document being made available by clarifying that this **will be in advance of any decision to introduce draft legislation** on this matter. We have also offered the complainant the opportunity to meet and discuss any concerns they may have so that these can be considered as part of developing the screening document."* [emphasis added]

#### Investigation meeting

- 3.24 On 13 April 2021, Commission staff met with NIO representatives to take evidence for the purposes of the investigation.
- 3.25 The NIO representatives outlined the history of policy making in relation to the Troubles-related legacy of Northern Ireland, with particular reference to work carried out around the SHA, the WMS and subsequently. They noted the complexities and sensitivities of all the matters concerned, as well as reflecting the impact of the Covid19 pandemic on their work.
- 3.26 They described the stages of typical policy development as follows: evidence gathering, building up an evidence base about the policy matter which allows the government to look at possible options and to make an informed choice on the most comprehensive way forward; discussions within the government on these options and finding a way forward; taking a steer from Ministers alongside discussions; and, finally, developing a method of policy implementation which can either be by way of a legislative process or executive operational decision-making procedures.

- 3.27 It was noted that “...*discussions within government around the way forward which can involve key stakeholders as well and then ...policy implementation, in some case legislation and in other cases more operational decisions*”. They added that the NIO would also take “... *steers from Ministers along the way as to their views on how the policy is progressing and next steps*”.
- 3.28 NIO representatives confirmed that this process applied to the **new policy proposals** contained in the WMS and is currently a work in progress.
- 3.29 In terms of how the policy proposals had evolved, NIO representatives indicated that they had prepared a draft bill following the SHA, a draft bill on addressing legacy issues, had presented it for public consultation and had produced an equality screening form in respect of it, published in May 2018. As that consultation had highlighted issues with regard to the SHA draft bill, the NIO, through discussions, had been developing policy proposals which they anticipated were to be reflected in the WMS.
- 3.30 Although some assumptions about these new proposals had been discussed in early 2020. NIO representatives stated that a publication-ready version of the proposals in the WMS was only settled shortly before the announcement was made on 18 March 2020.
- 3.31 They stated that although they considered these new proposals to constitute a “...***slight shift in the government’s approach***...” to those outlined in the SHA, the WMS had merely set out a framework of new policy **ideas** as to how the government intended to address legacy matters going forward. The NIO representatives stated that policy development remained a work in progress. Describing the policy development as having been in a substantial state of flux, they reiterated that, even at the date of the evidence taking session in April 2021, the new policy proposals were still under development.
- 3.32 The NIO representatives also described their actions in the course of July and August 2020 to progress engagement on the matters concerned and that engagement was ongoing with a wide range of stakeholders at the time of the meeting.
- 3.33 In relation to having produced **any equality assessment of the policy**, the NIO representatives stated that “*the clock hadn’t ever really started because we didn’t have a settled policy position. A framework was set out in March and that evolved continuously since then...*”
- 3.34 They did however, state that at the time of the WMS in March 2020, an “early draft” but incomplete, screening form existed. They stated that the NIO “*had started looking at a **screening document and we would have taken it into account in terms of advising the [SoS]***” adding that the NIO “...*had multiple discussions*

*which very much touched on all of these issues around equality, **which played an important part in the WMS setting out that need for further engagement***".

- 3.35 They also explained that, as at 18 March 2020, initial screening assessments had been carried out, and discussions took place in which the Secretary of State for Northern Ireland was advised about the equality screening process on any potential new policy proposals.
- 3.36 It is noted that the NIO did not provide any documentary evidence of these discussions as reported, nor any copies of the incomplete/draft screening form.
- 3.37 The NIO representatives confirmed their understanding that **the purposes of screening are to improve decision-making and to support an "evidence based" policy making process**.
- 3.38 The NIO representatives referred to Paragraph 4.13 of the NIO's Equality Scheme (see para 1.4 above), which outlines a six monthly cycle of publication for the completed and signed off screening documents. The NIO representatives explained that a biannual cycle of publication was initially designed, as one of the NIO's approved Equality Scheme commitments, on the basis that the department had a much-reduced remit in Northern Ireland following the devolution of policing and justice functions in 2010. There was an expectation that screening documents would be related mainly to NIO's internal policies, for instance, Human Resource as they applied to staff working in Belfast and routine governance policies. However, the department's influence on Northern Ireland policy matters had changed in recent years in light of commitments contained in the New Deal New Approach agreement, for example.
- 3.39 This publication mechanism applies generally to the release of completed and signed off screening documents into the public domain. However, the document would be released to anyone on request earlier, provided that it had been completed and signed off by the senior officer responsible for the policy development, regardless of this periodical publication rule.
- 3.40 The NIO representatives stated that, in general, the NIO tended to start screening *"...as early as possible in the process once we've got a clear view of policy direction. A junior official [the policy lead] will start work on this and it will be developed over weeks or in some cases months before we get to the final product that will then be signed off at deputy director level"*.
- 3.41 They explained that in this case *"... initial screening draft was based on a number of assumptions officials had made... the Ministerial statement in March changed the direction of travel and some of those assumptions were actually incorrect"*.

- 3.42 The NIO representatives stated that the NIO “...had not resumed looking at [the screening form] because our policy had been in such significant flux and development...” and that as a result the “... draft screening document really quickly became out of date according to the current thinking”.
- 3.43 As such, they stated that the screening form “would require comprehensive review to take account of where we are now [ie even as at April 2021] ... it will need a significant amount of work”.
- 3.44 They stated that they did not consider it to be unreasonable that the NIO has not completed a new screening document each time the policy had changed.
- 3.45 The NIO representatives also confirmed that when the Complainants made their formal complaint to the NIO on 12 August 2020 the screening form remained an incomplete “working draft”.
- 3.46 In relation to the complaint made to the NIO, the NIO representatives confirmed that despite the wording of Equality Scheme paragraph 4.13, on occasion, it was NIO practice to release partially completed screening forms to consultees. They stated that the NIO has released partially completed forms: “...in the past as part of the engagement to help inform the screening form” adding that “...we would have been quite happy if we had have had one more developed to share... but as I’ve already stated we did have an early draft, and then things had moved on, it wouldn’t have been in a state that it would have been helpful to release it”.
- 3.47 It was noted during the meeting that the NIO’s Equality Scheme paragraph 4.13 was not precisely and consistently reproduced in the correspondence in relation to the complaint. The NIO representatives acknowledged that some of the correspondence could have been misleading, but that they believed that this had been rectified.
- 3.48 For example, they stated on several occasions that they believed, in their communications with the Complainants, that: “...ever since the 12th August we have consistently reiterated our position, which is that a screening document has not been finished, completed, signed off and that is the reason that we have not released it to the complainant.”
- 3.49 The NIO representatives stated that they accepted that the NIO’s correspondence with Complainants had been confusing in relation to when the completed screening form would be published:
- it stated to the Complainants (5 August 2020) that the screening form would be published “alongside publication of Bill”. The Complainants had raised this as a concern in its written complaint to the Commission (10 September 2020);

- at a later date, in response to the complaint made to it, the NIO had stated that the screening form would be released “in due course” (9 September 2020);

3.50 It is noted that in subsequent correspondence with the Equality Commission, the NIO had stated that the screening would be published “*at the earliest opportunity*” (30 December 2020) and that it was committed to “*publishing an equality screening document when the policy intent is sufficiently developed for us to make an informed assessment of the impacts*” (26 January 2021) (see also paragraph 3.23).

3.51 It was clear from the NIO’s correspondence of 9 September 2020 and 29 September 2020 that the NIO had offered to meet with Complainants.

3.52 During the investigation meeting the Commission asked a number of supplementary questions about the clarity and consistency of the NIO’s communications with the Complainants in relation to (i) the NIO’s expression of the commitments set out at Equality Scheme paragraph 4.13, (ii) the screening form and (iii) the timing of the release of the completed screening form, given the documentary evidence as presented above as background to the complaint made. A number of points from the meeting were noted, specifically that the NIO representatives acknowledged that their early correspondence with the Complainants of 7 August 2020 had been incorrect in stating that “*an initial assessment has been made*” but believed that later correspondence had made the position clear.

## 4. Assessment and conclusions

4.1 The investigation of this complaint is whether the NIO failed to comply with its Equality Scheme at paragraph 4.13 (see paragraph 1.4 and 1.5 above). The scope of the investigation also sets out that it would seek to establish, in particular, the four matters set out at paragraph 3.6 above. They are assessed in turn below.

4.2 The Complainants allege that the NIO failed to comply with the commitment contained in paragraph 4.13 of its Equality Scheme by failing to provide them with a copy of the relevant screening form in relation to the “*new legacy Bill ‘on request’*”.

4.3 A determination of whether the NIO failed to comply with its paragraph 4.13 commitment, as alleged, requires examination of the commitments it contains. These are set out in the two sentences.

4.4 The first sentence sets out what the NIO commits to, broadly, in relation to when a screening form will be signed off and approved and by whom. It gives a sequential outline i.e. completion of the screening process, and as soon as possible thereafter sign off and approval. The second sentence sets out what the NIO commits to in relation to when/where/by whom screening documents will normally be published

and made available (i.e. normally on NIO's website every 6 months and made available on request).

- 4.5 The complaint essentially centred around the failure to supply a screening form which the Complainants assumed, as evidenced in paragraph 3.8 above from their email of 27 July to the NIO, would have been completed for the draft bill as referred to. At the stage where it became a complaint to the NIO, and subsequently the Commission, it is clear that the primary focus of the complaint was the NIO's non-release of the screening form, upon request.
- 4.6 The initial correspondence, of 27 July 2020, where the Complainants requested the screening exercise, sets out the Complainants' expectation that a screening exercise would/should have been done when the request was made, see paragraph 3.8 above. It makes explicit reference to policy development preceding the proposed bill.
- 4.7 The Commission's guidance is clear: "*The purpose of screening is to identify those policies that are likely to have an impact on equality of opportunity and/or good relations. Screening is one of the key tools to enable public authorities to fulfil their statutory obligations and mainstream the Section 75 equality and good relations duties **into policy development** and service delivery. It provides an opportunity to improve decision-making and support 'evidence based' policy making... **It should be completed at the earliest opportunity in the policy development process...***
- Screening will provide tangible evidence as to how a public authority has given 'due regard' to the promotion of equality of opportunity and 'regard' to the desirability of promoting good relations **in the initial stage of policy development***"<sup>10</sup>[emphasis added]
- 4.8 A further reason why the Complainants assumed that they should have received a copy of the relevant screening form was because of what they had been told by the NIO itself in its correspondence with the Complainants.
- 4.9 The NIO has acknowledged that its correspondence with the Complainants could have been misleading at times (see, for example, paragraphs 3.46 and 3.47 above), particularly regarding the existence of a completed screening form in relation to the policy
- 4.10 In terms of the confusion and any misunderstandings regarding when the completed screening form would be made available may have been avoided if the NIO had simply stated its understanding of the commitment in paragraph 4.13 of its Equality Scheme clearly i.e. when it was completed and signed off rather than

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<sup>10</sup> Section 75 of the Northern Ireland Act 1998 - A Guide for Public Authorities', ECNI (2010) pages 51-52

stating that it would be made available /published “in due course” or “alongside the publication of the Bill”.

- 4.11 In evidence, the NIO drew attention to the first sentence of paragraph 4.13 and reiterated that, at the time of the request for the screening form (27 July 2020) and at the time the complaint was made to the NIO (12 August 2020), it had not concluded the screening process it had described and had not completed nor signed off a screening form.
- 4.12 It is clear from the evidence that the NIO believed it had rectified any misunderstanding about the releasing of any screening form. See, for example, paragraphs 3.46 and 3.47 above.
- 4.13 The Complainants **were not satisfied with the response from the NIO to their complaint** and submitted it to the Commission, asking for an investigation of it.

*i) whether a screening document existed at the time it was requested*

- 4.14 The evidence shows that the NIO representatives understood that, prior to submission of the written complaint to the Commission, there was no completed screening form to be released to the Complainants. The reasons for this are in the terms set out in the NIO’s correspondence, confirmed from the investigation meeting, and set out in the section above.
- 4.15 The NIO’s correspondence, as set out above, provides a range of explanations for both the Commission and the Complainants for the screening process and any associated forms.
- 4.16 The NIO representatives did not, either prior to, for the investigation meeting, nor afterwards, provide a copy of the draft screening documentation referred to. They were asked again during the preparation of this report, but again declined to release a draft document.

*ii) What stage of completion any document had reached, and the reasons for that; and iii) the NIO’s procedures for signing off screening documents;*

- 4.17 As has been evidenced above, the process of screening on this occasion has been described as a continuing one, for all the difficulties set out on this highly political and contentious policy development process.
- 4.18 However, nowhere in the evidence is any acknowledgement or suggestion that the NIO understands that the statutory equality and good relations duties in Section 75 are also continuing duties. There is therefore no indication that the NIO has continued to apply its Equality Scheme commitments consistently or coherently

through this complex and lengthy process of policy development and draft legislation.

- 4.19 The NIO's procedures for signing off screening documents are, as evidenced above, those set out in paragraph 4.13 of its Equality Scheme. The NIO representatives indicated that there can be a good deal of time between the screening form's completion and sign off. (see paragraph 3.39 above).
- 4.20 It would have helped clarity of communication if the NIO had explained to the Complainants more fully why it was not prepared to release the draft screening document they had at the point of its request in July 2020.
- 4.21 The NIO indicated that it did not consider it appropriate or helpful in this instance to release to the Complainants a partially completed screening form, presumably of their equality assessment of the policy proposals, given the policy proposals continued to evolve and due to the sensitivity of the policy area.
- 4.22 However, there is no evidence that the NIO considers the timing of the sign off of their screening form within the wider process of presenting the equality assessment to a decision maker on the policy matters concerned.
- 4.23 The NIO also made no connections, either in the correspondence with the Complainants, nor the Commission, to the screening exercise presented with the policy proposals for planned legislation that were consulted upon in 2018. It had been completed and signed off in time for the consultation exercise in 2018.
- 4.24 The NIO stated in evidence that it had been reluctant to confirm to the Complainants that a partially completed form existed because it had related to previous policy proposals – although the Commission does not know what they might have been, nor whether they related to the outcome of the consultation. They also stated that the assessment was in draft and incomplete. They fully accepted that their correspondence could have more clearly conveyed to the Complainants that a screening form had not been completed.
- 4.25 However, if a connection had been made with the application of the Equality Scheme arrangements in earlier stages of the development of the planned legislation on legacy, the correspondence with the Complainants may have also been clearer.
- 4.26 The evidence suggests, particularly in the correspondence about when the screening form is likely to be made available, that the reported misunderstandings regarding when any completed screening form would be made available may also have been avoided if the NIO had been clearer in its articulation of its understanding of the purpose of screening. But the evidence from the correspondence with the Complainants and Commission also suggests that the NIO



is not clear on the purpose of screening. The NIO representatives confirmed their understanding of the purpose as set out at paragraph 3.37 above.

iv) when the policy was initiated and how long the NIO had to develop the policy in question, and its equality assessment of it

- 4.27 As stated above, the precursor of the complaint the Complainant's request for "a copy of the Equality Screening exercise that has been conducted in the policy development stage that has preceded the preparation of this bill" (see paragraph 3.8 above)
- 4.28 The Complainants pursue this reasoning in later correspondence, as set out above: "Publication of the bill (rather than a draft bill) will presumably be through its introduction to Westminster, when related duties under the Equality Scheme to conduct an EQIA and consider alternative policies and mitigating measures where adverse impacts are identified, are likely to be entirely academic, undermining the statutory purpose of the equality duty".
- 4.29 The inclusion of this fourth point for examination in the scope of the investigation has enabled a wider consideration of the evidence of the NIO's practices on its equality assessment, in accordance with its Equality Scheme arrangements, of the legacy matters as raised in the complaint.
- 4.30 Schedule 9 of the Act and the Commission's guidance is clear in the purpose of any equality assessment: "Schedule 9 paragraph 9 (2)- A scheme must include a commitment that, **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.**" [emphasis added]
- 4.31 The NIO's Equality Scheme, at paragraph 4.2, reflects the requirement in paragraph 4.30 above as a commitment and in the same terms as above: "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".
- 4.32 The Commission's guidance is also clear, informed by relevant caselaw, on where screening and Equality Impact Assessment fit within the policy development process, and also that the equality assessment set out in a Screening form should be presented to the decision maker for their consideration in advance of the decisions<sup>11</sup>. Caselaw and the Commission's guidance are also clear that the decision maker may be a Minister or Secretary of State.

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<sup>11</sup> [Public Sector Equality and Disability Duties-Short Guide.pdf \(equalityni.org\)](#), page 3

- 4.33 The evidence considered for this investigation does not make any direct reference to the purpose of screening in the terms above. The correspondence from the NIO of 26 January 2021 makes reference to decision making: *“We have sought to address the complainant’s concerns regarding the timing of a screening document being made available by clarifying that this will be in advance of any decision to introduce draft legislation on this matter”*.
- 4.34 The scope of the investigation identified the need for an examination of when the policy was initiated. The evidence through this investigation highlights that the individual policies remain in flux, for all the reasons set out about above on the legacy matters. However, in the course of the investigation, the evidence is clear (see paragraphs 2.1 and 2.2 above) that the NIO had previously applied its Equality Scheme arrangements in terms of the planned legislation.
- 4.35 As set out in the Background section, the NIO consulted on policy proposals for legacy matters in 2018; it was accompanied by a completed and signed off screening form. The outcome of the consultation was a commitment to Equality Impact Assess the planned legislation.
- 4.36 The Complainants have also consistently referred to the planned legislation or legacy Bill.
- 4.37 The NIO’s correspondence with the Complainants has generally made reference to the screening being made available with the planned draft Bill.
- 4.38 On examination of the matters preceding the WMS and the WMS in March 2020, it is explicit that the WMS follows what was consulted upon, see paragraph 2.8 above
- 4.39 The duties in Section 75 are continuing duties<sup>12</sup>. Also, Commission Guidance states that *“To undertake screening after policy proposals have been developed may be inefficient in terms of time and may be ineffective if policy makers are reticent to make changes at a later stage.”*<sup>13</sup>
- 4.40 In this case the NIO contends that it did not yet have any clear policy proposals to screen and that progress with screening has been constrained by the ongoing development of the policy. However, it is assumed that the context for the proposals in 2018 was likely to have been similar, and the NIO took the approach described above in order to sign off and publish a screening form.
- 4.41 The evidence also shows that the policy development path was continuous from the SHA (see, for example paragraphs 2.8 and 3.29 above), however the application of the Equality Scheme arrangements appears not to have been.

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<sup>12</sup> [Public Sector Equality and Disability Duties-Short Guide.pdf \(equalityni.org\)](#), page 3

<sup>13</sup> *Section 75 of the Northern Ireland Act 1998 - A Guide for Public Authorities*, ECNI (2010), page 52

- 4.42 The NIO could have, and probably should have, made some reference not only to the processes to develop the legacy matters and legislation when initially asked by the Complainants, but also referred to or provided some continuity in relation to the Equality Scheme processes for the same.
- 4.43 The absence of clarity of policy proposals has been widely discussed on this issue, as have the terms of the announcement made by the Secretary of State in March 2020.<sup>14</sup> The evidence sets out clearly that the NIO representatives were, for instance, briefing the Secretary of State in relation to equality matters prior to the March announcement, but it is not clear how any of the Equality Scheme processes or arrangements were applied, either for the purpose of screening, to provide information on equality assessments to a decision maker, or for the continuing developmental work for the planned legislation and therefore the associated application of the Equality Scheme processes – of screening and Equality Impact Assessment.
- 4.44 Caselaw, the Commission guidance and Schedule 9 are clear:
- in order to fulfil the duties, the equality consideration must be part of the decision making, even when that decision is taken by a Minister or Secretary of State. The purpose of screening is to provide an equality assessment for those decisions, in advance.
  - The statutory duties in Section 75 are continuing and the NIO's Equality Scheme sets its commitments and arrangements to ensure it fulfils those duties.

### Conclusion

- 4.45 At the time of request for the screening form, the NIO stresses that the screening exercise was ongoing and so, in these terms, the NIO did not have a completed and approved screening form which it could provide to the Complainants. A partially completed screening form reportedly existed, but due to the complexity and sensitivity of the subject matter involved was not sufficiently developed to share on this occasion. It is noted that as of April 2021 its content had reportedly further evolved since the complaint was made, but at no stage was the draft screening form made available for this investigation.
- 4.46 The NIO's document remained in draft and not signed off; the reported misunderstandings regarding when any completed screening form would be made available may have been avoided if the NIO had been clearer in its actions and articulation of the purpose of screening, as set out in its Equality Scheme at paragraph 4.2.

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<sup>14</sup> 'Addressing the Legacy of Northern Ireland's Past: the Government's New Proposals (Interim Report)' NI Affairs Committee 26 October 2020. Available online at: <https://committees.parliament.uk/publications/3186/documents/29458/default/>

- 4.47 However, in the wider context where the NIO had previously applied its Equality Scheme arrangements to the legacy matters that were subject to the complaint, it did so in terms of the planned legislation. The NIO should have maintained this approach through the further policy development stages of the WMS and subsequently.
- 4.48 The Complainants were clear in their complaint that they are concerned that the NIO's actions on the matter will not afford any opportunity to engage with the NIO's assessment of the equality impacts on the matters that will be brought forward in respect of the planned legislation.
- 4.49 There are a number of ways in which the NIO could have addressed the request made initially by the Complainants, on what are, of course, very highly politically sensitive matters. The NIO at the time could have, for instance, referred the Complainants to the commitment made in the 2019 consultation report, which was a commitment to equality impact assess the proposed legislation.
- 4.50 There is no evidence to suggest that, after the first enquiry from the Complainants was answered in the way it was by the NIO, there was any continuity or coherence with the NIO's previous actions to equality assess the planned legislation on legacy matters. It is the Commission's assessment that there should have been, given the approach taken by the NIO had been clearly aligned to equality assessing the planned legislation, with a screening form produced in those terms in 2018 and an explicit commitment to Equality Impact Assess the planned legislation in 2019. The Complainants were clearly asking the NIO for the "the Screening Document conducted on the new legacy bill currently under preparation by the NIO" in their complaint"

## **5. Findings**

- 5.1 In the specific terms of the commitment contained in paragraph 4.13 of the NIO's Equality Scheme, at the time of the Complainant's request for the screening form, the NIO had not completed the screening process and did not have a completed screening form available for release to the Complainants.
- 5.2 However, the commitment in paragraph 4.13 of the NIO's Equality Scheme is not standalone; it sits within wider arrangements that are to enable the NIO to fulfil its statutory equality and good relations duties set out in Section 75. What the NIO described for the process of screening to both the Complainants and to the Commission does not correspond with the purpose of screening as set out in their Equality Scheme at paragraph 4.2, so their justification of their action on paragraph 4.13 is not accepted for this investigation in the NIO's terms.

- 5.3 Within the wider terms of the established purpose of screening and the related Equality Scheme commitments in Section 4 of the NIO's Equality Scheme, the matters alleged in the complaint are clearly set within the wider and long standing framework of the planned legislation on legacy matters. The NIO was originally asked for *“a copy of the Equality Screening exercise that has been conducted in the policy development stage that has preceded the preparation of this bill”*.
- 5.4 The NIO could have and should have responded to the original enquiry in different terms:
- addressing the original email request in a way that aligned or acknowledged what went before in relation to the Equality Scheme arrangements applied to the policy matters to be covered by the planned legislation; and
  - providing clear information in the correspondence to the complainant that referred to the purpose of screening in terms of its equality assessment to be presented to aid decision making on the policy matters to be covered in the planned legislation.
- 5.5 Therefore, the Commission finds that the NIO failed to comply with its approved Equality Scheme at paragraph 4.13 because it failed to address the matters complained of in the way that it should have and in keeping with the purpose of screening as one of its Equality Scheme arrangements.

### Recommendations

- 5.6 In light of the finding on the complaint, the Commission recommends 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.
  - NIO staff, including policy leads and senior managers, are aware of and can articulate the purpose of the Equality Scheme arrangements when asked.
  - the NIO reviews its processes to complete and sign off a screening form so that it can be presented as the NIO's assessment of the potential equality impacts of proposals to inform the decision maker and what is then announced in terms of legislative proposals.
- 5.7 In light of the wider circumstances of this matter that contributed to the finding, the Commission also recommends that:
- the NIO fulfills its commitment made in the Consultation Report of 2019 that it will conduct a full Equality Impact Assessment of the matter.
  - the NIO is mindful of the way it communicates with any enquirer on their statutory equality and good relations duties, and Equality Scheme arrangements, ensuring that communication is accurate, clear and consistent.

5.8 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*”<sup>15</sup>, 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.

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<sup>15</sup> [Addressing the legacy of Northern Ireland's past - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/addressing-the-legacy-of-northern-ireland-s-past)