



Bob Collins,
Chief Commissioner,
Equality Commission
for Northern Ireland,
Equality House,
7 - 9 Shaftesbury Square
Belfast
BT2 7DP

15 January 2010

Dear Chief Commissioner,

Re: Paragraph 11 complaints against the Northern Ireland Office

NICEM has a range of concerns about the Northern Ireland Office (NIO) Consultation Paper, 'A Bill Of Rights For Northern Ireland: Next Steps'. We are writing to you today specifically to make three complaints under paragraph 11 of Schedule 9 of the Northern Ireland Act 1998.

In our view, the NIO has failed to comply with its Equality Scheme in three regards.

working together against racism

First, it has failed to carry out a screening exercise on this policy-making document.

Secondly, it has failed to carry out a necessary equality impact assessment (EQIA) on this policy-making document.

Thirdly, it has failed to provide an adequate period for consultation.

We set out our initial analysis below and will be happy to make further submissions to the Commission once it has decided on its course of action in relation to these complaints.

1 Failure to conduct a screening exercise

At para 11.3 of the Consultation Document, it is stated:-

“Equality and good relations are central themes of this consultation, spanning considerations across all five categories ... and all are intended to have a positive impact on people across the section 75 categories. As mentioned above, policy development will be affected by the outcome of this consultation. Any policies that arise from this consultation will be screened for their impact on equality of opportunity in accordance with guidance produced by the Equality Commission for Northern Ireland. If it emerges that a policy could have adverse implications for equality of opportunity for any of the section 75 equality categories, an Equality Impact Assessment will be carried out and ways of either avoiding or mitigating the effect considered.”

According to the Commission’s Guidance,

“2.12 With regard to policies, three particular points should be noted. First, policy is a broad, inclusive term. A policy is defined in the New Oxford Dictionary of English as:

“a course or principle of action adopted or proposed by a government, party, business or individual”.

2.13 In the present context, the term policies covers all the ways in which an authority carries out or proposes to carry out its functions relating to Northern Ireland.”

In his Foreword to the Consultation Paper, the Secretary of State states:-

“What the Government has set out to do in this consultation paper is to

take those aspirations – to which everyone could subscribe – and to see how they can be given legislative form through a Bill of Rights for Northern Ireland thus following through on our commitments in the St Andrews Agreement and, before that, in the Belfast Agreement. I am very grateful to the Northern Ireland Human Rights Commission for their commitment and energy in leading the debate on a Bill of Rights over the past ten years.” (emphasis added)

In our view, this is a clear ministerial statement to the effect that this Consultation Paper sets out proposals on how the NIO “proposes to carry out its functions relating to Northern Ireland”.

There are various rather feeble attempts to resile from this assertion in the text of the Consultation Paper, other than the unsustainable assertions in para 11.3 itself. At para 1.3, it is stated, *“The Government is seeking views in this consultation paper on precisely what those protections might be, how they might be expressed and how they might operate in practice.”* Later in this paragraph, it is stated, *“In the later chapters of this consultation paper, the recommendations made by the NIHRC in these areas are discussed in detail and views are sought on a number of questions.”*

The NIO’s Equality Scheme, at para 1.7, refers to the aims of the Political Directorate as being:-
“The Political Directorate’s aim is to support Ministers in working to secure a lasting peace based on the Good Friday Agreement, with full respect for the rights and identities of the two main traditions in Northern Ireland. In doing so, the Directorate provides advice to Ministers on the operation of the devolution legislation and the new institutions generally, and on certain reserved matters including elections and human rights. The Directorate also provides funding for the Human Rights Commission and the Chief Electoral Officer.”

The ‘Policy Functions’ of the Political Directorate include:-
“Constitutional oversight & political development– Ensuring that appropriate legislative and administrative structures are in place to support the existence of the devolved institutions in Northern Ireland”
and *“Human Rights– Developing and promoting systems to protect human rights within Northern Ireland.”*¹

¹ Para 1.14.

After a major NIHRC consultation exercise in 2001, an elaborate Bill of Rights Forum in 2006-08 and the publication of the NIHRC advice in December 2008, the NIO is claiming that it is 'seeking views' on the 'ideas' in the Consultation Paper without yet engaging in any stage of 'policy development'.

It is not credible to attempt to pass off what ought to have been a most significant set of constitutional proposals as an 'ideas paper'.

Para 2.1 of the NIO's Equality Scheme provides:-

"The Department will assess over a five year period the extent to which each of its current and future policies has an impact on the promotion of equality of opportunity and the promotion of good relations within the terms of section 75 of the Act. This will be done first, through an inclusive and interactive process of screening policies, in consultation with representatives of affected groups, and second, through equality impact assessments (see below Part Three) and the timetable at Part Eleven will be followed."

Consistently throughout the Equality Scheme timetable, in Part Eleven of the Scheme, the NIO makes the commitment to:-

"Screen, and where necessary, carry out Impact Assessments on all new policies, duties and functions". (original text)

Returning to the definition of 'policy' set out by the Equality Commission, namely "a course or principle of action", there is ample case law authority for the proposition that the terms 'act' and 'action' are presumed to include 'failure to act' and 'omission'. Given the nature of the statutory process whereby the NIHRC gave advice to the Secretary of State in accordance with the provisions of Northern Ireland Act 1998, this Consultation Paper is clearly 'policy development' in that the vast majority of the NIHRC's advice has been rejected. It is also one of the most important performances of "duties and functions" which the Political Directorate of the NIO has had to perform.

Our first complaint is that the refusal of the NIO to conduct a screening exercise on the Consultation Paper is a failure on its part to comply with para 2.1 and Part Eleven of its Equality Scheme.

2 Failure to conduct an EQIA

In NICEM's view, the rejection of many elements of the NIHRC's advice by the NIO will have most significant adverse impacts on all ethnic and religious minorities (and other disadvantaged groups covered by section 75) in Northern Ireland. For example, in relation to the policy, enunciated in the Consultation Document, of total rejection of the NIHRC's advice on economic and social rights, the application of each one of the four screening criteria in para 3.2 of the NIO's Equality Scheme would have resulted in evidence of high levels of adverse impact on ethnic and religious minorities in NI.

It is also worth recalling that the 'prioritisation' criteria in para 3.5 of the Equality Scheme are set out as follows:-

"The consultation process led to the establishment of a timetable for conducting equality impact assessments on the Department's current policies. These have been prioritised on the basis of:
relevance to social need
effect on people's daily lives
effect on economic, social and human rights
cultural or political impact on people."

A policy of rejecting economic and social rights for disadvantaged and vulnerable communities in NI meets all these criteria.

Para 3.1 of the NIO Equality Scheme provides:-

"In identifying the policies to be subject to equality impact assessments, the Department will consider all of its current policies listed at paragraphs 1.6 to 1.14 and look forward to all new policies which may be proposed for adoption during the first term of the Scheme."

Once again, it should be recalled that, in Part Eleven of the Scheme, the NIO makes the commitment to:-

"Screen, and where necessary, carry out Impact Assessments on all new policies, duties and functions".

If any screening exercise had been undertaken into the contents of the Consultation Paper, an EQIA would have immediately been seen as being necessary.²

² We refer the Commission to its reasoning on the NIO's failure to undertake an EQIA in relation to anti-social behaviour legislation, *Final Report of the Equality Commission Investigation Under Paragraph 10 of Schedule 9 of the Northern Ireland*

Our second complaint is that the refusal of the NIO to conduct an EQIA on the Consultation Paper is a failure on the part of the NIO to comply with para 3.1 of its Equality Scheme and the timetable in Part Eleven of the Scheme.

3 Commentary on the first two complaints

Section 75 is supposed to be a duty to ‘mainstream equality of opportunity’ into policy development. Instead, the NIO has attempted (and failed) to disguise the Consultation Paper as a pre-policy formation document and, after nearly a decade of consultation and debate, leaves it to consultees to come up with any ‘perceived’ adverse impacts. This is the opposite of ‘mainstreaming’. It is ‘sidelining equality of opportunity’.

The section 75 duty should not rest more heavily on the NIO than other designated public authorities. Nonetheless, as section 75 is a reserved matter, the NIO is ultimately responsible for its operation. It must transparently comply with its Equality Scheme at all times.

The Consultation Paper consistently lauds the impact of section 75 while evading its application. A leading academic has described some aspects of the Consultation Paper as being ‘mischievous’. NICEM considers the NIO’s evasion of its section 75 responsibilities to be mischievous and totally unacceptable.

Clearly, this Consultation Paper is an exercise in ‘policy formation’ within the functions set out in the Equality Scheme. Central paragraphs and the timetable in the Scheme provides for the screening of and, “where necessary”, an EQIA on any policy document.

In seeking to disguise this policy-making Consultation Paper as a ‘pre-policy paper’, by failing to conduct a screening exercise and a necessary EQIA, we submit that the NIO has failed to comply with paragraphs 2.1 and 3.1 of its Equality Scheme and the timetable in Part Eleven of the Scheme.

Act 1998 (HC959, March 2006).

4 Inadequate consultation period

The Consultation Paper was launched on 30 November 2009 with a closing date of 1 March 2010, a period of 12 weeks.

The NIO Equality Scheme states, at para 4.6:-

“In consulting representative groups of the section 75 categories the Department will aim to provide a period for response of at least eight weeks and to begin consultation as early as possible.”

In its response to a complaint from the NI Commissioner for Children and Young People (NICCY) on the ASBOs legislation,³ the NIO indicated that it also sought to adhere to Cabinet Office guidelines of 12 weeks. The Commission’s Investigation Report states:-

“The Northern Ireland Office emphasised that it consulted on the (entire) policy process on ASBOs (initial policy proposals and subsequent legislative stages) for longer than the 8 weeks required by the Guide to the Statutory Duties and the longer 12 weeks stipulated in the Cabinet Office Guidelines.”

The Consultation Paper itself sets out the ‘consultation criteria’,⁴ including:-

“Criterion 2 Duration of consultation exercise

Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.”

This criterion does not specifically refer to what is now a BERR Code of Practice on Consultation (administered by BIS), which is specifically applicable to the NIO. There, it is stated:-

“2.1 Under normal circumstances, consultations should last for a minimum of 12 weeks. This should be factored into project plans for policy development work. Allowing at least 12 weeks will help enhance the quality of the responses. This is because many organisations will want to consult the people they represent or work with before drafting a response to Government and to do so takes time.

2.2 If a consultation exercise is to take place over a period when consultees are less able to respond, e.g. over the summer or Christmas break, or if the policy under consideration is particularly complex,

³ Final Report of Commission Investigation under Paragraph 11 of Schedule 9 of the Northern Ireland Act 1998, Northern Ireland Office (NIO) (By Way of Northern Ireland Commissioner For Children & Young People (NICCY).

⁴ At para 12.10.

consideration should be given to the feasibility of allowing a longer period for the consultation.” (emphasis added)

In light of the reference in para 4.6 of the NIO Equality Scheme to “at least eight weeks”, we consider that all Government consultations should normally be in accordance with the ‘BERR Code of Practice’ and that the NIO Equality Scheme must be read in this light. This consultation period has been conducted over the Christmas break. The Consultation Paper is a ‘complex’ 116-page document, which ought to have been of vast significance to all the people in Northern Ireland.

Our third complaint is that the NIO, by conducting a 12-week consultation over the Christmas break into a complex policy document, has failed to comply with para 4.6 of its Equality Scheme.

Thank you for your consideration of these complaints. We will forward a copy to the Equality Officer in the NIO.

We look forward to hearing from you.

Yours sincerely,

Barry Fitzpatrick
Deputy Director