

## **‘PARAGRAPH 10’ COMPLAINT TO EQUALITY COMMISSION FOR NORTHERN IRELAND IN RESPECT OF THE FAILURE BY THE DEPARTMENT FOR COMMUNITIES TO COMPLY WITH ITS EQUALITY SCHEME IN RELATION TO THE “TWO CHILD” RULE IN UNIVERSAL CREDIT**

This is a formal complaint under paragraph 10 of Schedule 9 of the Northern Ireland Act 1998 that the Department for the Communities’ (“DfC”) has breached its equality scheme in failing to, inter alia, equality screen and EQIA the above policy.

### **Complainant and our direct affect:**

This complaint is issued by the Committee on the Administration of Justice (CAJ) which is directly affected by the course of action taken by DfC in relation to the above issue. DfC have erred in taking a position that Section 75 does not apply at all in relation to its functions over the Two Child Rule in Universal Credit (UC), and hence CAJ has not been able to engage in any of the scrutiny or compliance processes set out in the Equality Scheme that could and should have led to the application of the duties. CAJ is a public watchdog<sup>1</sup> which scrutinises the implementation of the Section 75 duty and seeks to promote the equality agenda within Northern Ireland. Along with UNISON, CAJ is co-convenor of the Equality Coalition which is an umbrella network for the Section 75 sector many of whose members are engaged in seeking to challenge the Two Child Rule. CAJ is a consultee in the DfC’s equality scheme. CAJ is organisation with a body of work on the combating of poverty and inequality and has successfully challenged the Northern Ireland Executive’s failure to adopt an anti-poverty strategy;<sup>2</sup>

CAJ have not been able to engage with DfC regarding Section 75 compliance and the UC Two Child Rule: we have not been consulted on the policy, nor have we –as a consultee- had the opportunity to trigger a review of a screening decision not to conduct an EQIA. The Two Child Rule, by definition, clearly has significant impacts on equality of opportunity and is one of the circumstances whereby DfC is obliged under the terms of its equality scheme to proceed to an EQIA. This has not happened

and we have therefore not been able to engage in it, nor facilitate engagement with the broader Equality Coalition network. CAJ are directly affected by the DfC approach in declining to engage in any Section 75 scrutiny at all on the two child policy, which itself is derived from a failure to comply with the provisions in section

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<sup>1</sup> For definition in ECHR jurisprudence see *Magyar Helsinki Bizottság v. Hungary*, (application no. 18030/11) ECtHR, 8 November 2016 [166-168].

<sup>2</sup> *In the Matter of an Application by the Committee on the Administration Of Justice and Brian Gormally for Judicial Review and In the Matter of Section 28 Of the Northern Ireland Act 1998 and In the Matter of a failure to act by the Executive Committee of the Northern Ireland Assembly*, [2015] NIQB 59

4.3 to use the tools of screening and equality impact assessment to assess the impact of DfC 'policy'; policy itself being defined broadly in paragraph 4.1.

### **Pre-Complaint Procedure**

CAJ has already brought our complaint to DfC and DfC has responded. This has taken the form of extensive and detailed correspondence setting out the DfC position. DfC have stuck to their position after what appears to be lengthy consideration and there would be little point (from the perspective of either CAJ or no doubt the DfC) in pursuing the matter further with them, and hence any remedy through an internal process is exhausted.

On the basis of our correspondence with DfC we believe that it has failed to have *due regard* to the need to promote equality between the protected Section 75 groups likely to be most affected by this legislation, which includes but may not be limited to: people with dependents, children, women, members of the Traveller community, Catholics, and members of ethnic minorities. Further, DfC has acted in breach of its own Equality Scheme and, given that the policy is projected to significantly increase levels of child poverty in Northern Ireland<sup>3</sup> and adversely impact the abovementioned Section 75 groups, this breach is substantive as well as procedural.

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<sup>3</sup> “Child poverty in Britain set to soar to new record, says thinktank”, Guardian, 2 November 2017 which cites the author of a recent report from the Institute for Fiscal Studies as saying “Every region and nation is projected to see an increase in child poverty, with the largest increases in the north-east, east Midlands, Wales, and Northern Ireland...” and “The larger projected rises occur in areas where families with children are more reliant on benefits than earnings for their income, and where more families are likely to be adversely affected by the new two-child limit on means-tested benefits.”  
<https://www.theguardian.com/society/2017/nov/02/child-poverty-britain-set-to-soar-to-new-record-ifs>

## **Failure to have due regard to the equality impact of the policy (summary)**

DfC has misinterpreted “functions” under its equality scheme to exclude matters emanating from Westminster legislation and has sought to abdicate responsibility for its equality duty to the Department for Work and Pensions (DWP). This *inter alia* misinterprets the continuing nature of the equality duties.

The Two Child Rule in UC was introduced into Northern Ireland by **The Welfare Reform and Work (Northern Ireland) Order 2016** an Order in Council passed through Westminster under temporary powers in the **Northern Ireland (Welfare Reform) Act 2015**, which lapsed on the 31 December 2016. The 2016 Order amended the Welfare Reform (Northern Ireland) Order 2015 (which provided for the introduction of UC per se), to add the Two Child Rule. A Transitory Provision under article 4 of the 2015 Order transfers the power to make ‘regulations or an order’ to the 2015 Order itself out of the functions of DfC to the Secretary of State, until such day as the latter transfers them back. Whilst this temporarily limits DfC’s functions in relation to the UC Two Child Rule, this does not mean DfC no longer has any functions, and hence policy in relation to the UC Two Child Rule. For example it is within the functions of DfC to:

- 1: Introduce any mitigating measures to the Two Child Rule that do not require ‘regulations or an order’. This has happened with other aspects of welfare reform. Other aspects of welfare reform have so far been mitigated almost entirely, and thus could be held to constitute an alternative policy.
- 2: The DfC could seek the return of powers from the SoS to make ‘regulations or an order’ in relation to the UC Two Child Rule in the 2015 Order, and then make regulations or order to mitigate or pursue alternative policies;
- 3: The powers to legislate on orders and regulations in relation to other social security provision are retained by the Department; the parallel powers for Orders in Council have lapsed and the devolved administration has powers to legislate on social security matters which could include reconsidering the UC Two Child Rule;

Any one of the above matters, within the functions of the Department, could have been recommended as a result of equality screening and an EQIA and the consequent duties to consider alternative policies and mitigating measures.

It is the case that some of the above measures would require a devolved Minister to be in place, which has not been the case in most of 2017. However this is not relevant as the Section 75 duties continue to apply to the Department, who can screen, EQIA without a minister, and come up with options some of which could be

taken up by a future minister, or some of which could be taken forward administratively in an interim period before the appointment of a minister.

UC is being rolled out incrementally in NI from September 2017 however, given the staggered commencement there is still time for mitigating measures and alternative policies to be considered before it is fully implemented. The duties are also continuing, even after implementation, particularly when significant equality impacts transpire.

Amendments providing for exceptions to the UC two Child Rule were introduced by The Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) (Amendment) Regulations (Northern Ireland) 2017, of April 2017. The Explanatory Memorandum to the exemptions was prepared “by the Department for Communities” who in exercising their functions in supporting DWP tabling the exemptions Order should have paid due regard to the duty to promote equality of opportunity. As the exemptions simply replicate those in Great Britain there is no evidence that DfC in its work preparing the Regulations paid any regard to Northern Ireland specific equality implications.

As a result of its position DfC did not undertake equality screening prior to the commencement of Universal Credit (UC) and the Two Child Rule on a rolling basis from September 2017; did not conduct an EQIA; and failed to consider alternative policies/mitigating measures as obliged under Schedule 9 of the 1998 Act, when there were matters within DfC functions that the Department could have progressed.

## Documents and principles informing this submission

1. Interim Equality Scheme of DfC [May 2016]
  2. DfC's section 75 screening forms on Social Sector Size Criteria and Mitigation ("the Bedroom Tax") [July and December 2016]
  3. DfC's section 75 screening form on the Bedroom Tax and Mitigation – Welfare Supplementary Payments [January 2017]
  4. Correspondence between CAJ and DfC in the period [30 May 2017 to 1 September 2017]
  5. Impact Assessment of HM Treasury/DWP on the Welfare Reform and Work (Northern Ireland) Order 2016 [July 2016]
- The Brown Principles established by caselaw in relation to the compliance with the statutory "due regard" equality duties.<sup>4</sup> These six principles have been summarised by the Equality Commission as providing that:
    1. a decision-maker must be aware that he/she is obliged to comply with the public sector duties;
    2. the duties must be fulfilled before and at the time that a particular decision is being considered, and not afterwards;
    3. the duties must be exercised in substance, with rigour and an open mind; and not as a "tick boxing" exercise;
    4. the duties are non-delegable; meaning that it is the actual decision-maker who must comply with the duties, and not some other person;
    5. the duties are continuing ones;
    6. it is good practice to keep adequate records that will show that the statutory goals have actually been considered and pondered and to promote transparency and discipline in the decision-making process.<sup>5</sup>

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<sup>4</sup> *Brown v SOS for Work and Pensions and Ors* [2008] EWHC 3158 (Admin)

<sup>5</sup> Section 75 Statutory Equality and Good Relations Duties Acting on the evidence of public authority practices, Report for Consultation, October 2017.

## The Two Child Rule: Background

Appendix 1 contains a summary of the legislative background of the introduction of the Two Child Rule for Universal Credit in Northern Ireland. We set out below a brief summary of the policy background (which also refers to the Two Child Rule for Child Tax Credits).

In the Summer Budget of 2015 UK Chancellor George Osborne announced significant cuts to Tax Credits and Universal Credit including the Two Child Rule - i.e. that these tax and benefits would only now be available for a families first two and not subsequent children. The stated reason for the policy was to reduce costs and essentially punish out-of-work families for having children, the Summer Budget 2015 states:

*“On top of Child Benefit for every child, an out of work family with 5 children can currently claim over £14,000 a year in tax credits alone. The government believes that those in receipt of tax credits should face the same financial choices about having children as those supporting themselves solely through work.”<sup>6</sup>*

The changes will affect in work families as well as out of work families who would have relied on Tax Credits/UC in the future. A DWP-HMRC October 2016 consultation document on exemptions to the policy elaborated:

*“The Government is delivering a new deal for working families, which includes incentives to ensure that those who are in work are rewarded fairly with the National Living Wage and the raising of the income tax personal allowance. By limiting support to a maximum of two children or qualifying young persons in Child Tax Credit and Universal Credit, the Government is ensuring that the system is fair to those taxpayers who fund it and support themselves solely through work, as well as those who benefit from it.*

*Currently, benefit entitlement adjusts automatically to family size, whilst families supporting themselves solely through work do not see their incomes rise in the same way when they have more children. Households will need to think carefully about whether they are financially prepared to support a new child without relying on the tax credits or means-tested benefit systems. However, Child Benefit will continue to be paid regardless of family size, as the basis of the Government’s contribution towards the cost of bringing up a child.”<sup>7</sup>*

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<sup>6</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/443232/50325\\_Summer\\_Budget\\_15\\_Web\\_Accessible.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/443232/50325_Summer_Budget_15_Web_Accessible.pdf) Summer Budget 2015, [HC264, at para 1.145]

<sup>7</sup><https://www.communities-ni.gov.uk/sites/default/files/consultations/communities/exceptions-to-the-limiting-of-the-individual-child-element-of-child-tax-credit-and-the-child-element-of-universal-credit-to-a-maximum-of-2-children.pdf> (at paras 11 and 12).

Thus the policy aim appears to assume that they will incentivise families who know they are going to be out of work before they have any (further) children not to do so. It is not clear how a family would be aware whether they will be out of work in say five years time before they take the irreversible decision to have a further child. The Equality and Human Rights Commission (EHRC Great Britain) has observed that “There is no evidence provided to support DWP's assumption that the measures will incentivise families to have only two children if they cannot afford to have more.” The EHRC urged government to delay the implementation of the Two Child rule until full human rights and equality impact assessments had been conducted.<sup>8</sup> This did not happen.

Prior to the EHRC taking the position that the implementation of the Two Child Rule be suspended until equality impacts be properly conducted a further general Impact Assessment had been conducted by DWP/Treasury in June 2016 into the Two Child Rule in Northern Ireland, which contains similar flaws. This is a general impact assessment which incorporates a cursory treatment of equality issues in a handful of paragraphs at the end. This Assessment proceeds on a mistaken premise that the Two Child Rule was covered by the Fresh Start Agreement, which is not the case. Whilst the equalities paragraphs (in reference to the GB Equality Act 2010) conceded there are some impacts on women (but qualifies this to only be the case “in the absence of behavioural change”) and ethnicity, it neither proposes any mitigation nor is not Northern Ireland specific, instead making general reference to maintaining parity with Great Britain as if there were no particular circumstances to take into account. The Assessment also notably makes the assertion that it would not expect claimants to be adversely affected on grounds of religious belief or political opinion, which is clearly erroneous.

## **Background to this request**

In light of the Commencement Order and exemptions Regulations on 30 May 2017 the CAJ wrote to DfC’s Director of Social Security Policy & Legislation requesting a copy of DfC’s screening review in respect of the proposed implementation of the two child policy in Universal Credit.

No screening review form was provided and by letter dated 26 June 2017 the Director stated that the legislation (the Welfare Reform (Northern Ireland) Order 2015 as amended by the Welfare Reform and Work (Northern Ireland) Order 2016) was made at Westminster by the Secretary of State for Work and Pensions (DWP) and not be DfC and that responsibility for equality screening “*therefore rests with the*

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<sup>8</sup> Response of the Equality and Human Rights Commission to the consultation: Universal Credit and Child Tax Credit: exceptions to the 2-child limit, 25 November 2016, <https://www.equalityhumanrights.com/en/legal-responses/response-department-work-and-pensions-and-hm-revenue-and-customs-consultation>

*Secretary of State for Work and Pensions, rather than DfC.*” She highlighted that Section 75 does not apply to the Secretary of State for Work and Pensions.

The Director set our request in “context” by referring to the consultation document on the Equality Impact Assessment of the Welfare Reform Bill and the changes to the welfare system (conducted between September and November 2011) and to the 2013 Welfare Reform Bill Section 75 Update. She also referred to the fact that the Northern Ireland Ad Hoc Committee on Conformity with Equality Requirements concluded that it could not identify any specific breaches of equality or human rights aspects of the then Welfare Reform Bill and to an EQIA on “*policy design issues in Universal Credit*”.

Further justification for not conducting a EQIA on the Welfare Reform (Northern Ireland) Order 2015 appears to be based on the assertion that “*...the welfare changes which the Westminster Government legislated for in Northern Ireland corresponded to those for Great Britain, added to which a consultation on the Equality Impact Assessment was carried out in Northern Ireland in 2011 and a section 75 Update was provided in 2013...*”.

In our reply of 10 August 2017 (following consultation with our Equality Coalition members) we advised DfC that we believe it had erred in its interpretation of its Section 75 duties. We highlighted that responsibility for implementing the Two Child Rule sits within the functions of DfC and thus DfC has a continuing duty under Section 75 to screen the implementation of the rule and to provide for mitigating measures as appropriate. We also referred to the apparently contradictory position DfC was taking in respect of the Two Child Rule for UC compared to its position on the Bedroom Tax (“Social Sector Size Criteria”) which was equality screened by DfC on two occasions. The Bedroom Tax was enacted by the same Westminster legislation (the Welfare Reform (Northern Ireland) Order 2015 as amended by the Welfare Reform and Work (Northern Ireland) Order 2016). We proposed that DfC could equally equality screen the Two Child Rule and delineate appropriate mitigating measures which could be taken forward by the Department in the absence of a Minister, and those which would require a Minister. We also suggested that an incoming Minister could introduce into the Assembly a change in the legislation in relation to the Two Child Rule.

Our letter of 10 August also highlighted that:

- the EQIA of 2012 and the update of 2013 pre-dated the Two Child Rule;
- the 2013 Ad Hoc Committee on conformity with equality requirements also pre-dated the Two Child Rule (and in any event the DfC’s interpretation of the findings of that Committee was partly misleading);

- the Fresh Start Agreement of November 2015 provided for an LCM to be passed in the Assembly to give effect to the 2012 welfare changes in GB and the welfare clauses of the Welfare Reform and Work Bill but that this Bill did not include provision for the Two Child Rule in Northern Ireland; and
- reference to the Westminster government having met its obligations under the Public Sector Equality Duty (section 149 of the Equality Act 2010) in respect of the two child policy was not correct as the process was deemed to fail to meet the requirements of the duty by the Equality and Human Rights Commission and, in any event, did not address any of the issues specific to Northern Ireland.

We stated that no real compliance had taken place and requested urgent clarification within 14 days as to whether DfC was intent on commencing the roll-out of UC and the Two Child Rule without any equality screening. DfC replied by letter dated 1 September 2017 confirming that Westminster “*will legislate for the introduction of Universal Credit in Northern Ireland on 27 September 2017... which will include provision for the “two child rule”*”. DfC summarised its position on our correspondence as follows:

*“(a) In accordance with Fresh Start, and the subsequent legislation, DWP is responsible for legislation in relation to welfare reform in Northern Ireland,*

*(b) Responsibility for discharge of the functions imposed by the Northern Ireland (Welfare Reform) Act 2015 rests with DWP; DfC can only implement within that legislative framework.*

*(c) DWP are subject to the requirements of the Equality Act 2010, as opposed to section 75 requirements*

*(d) DfC carried out an EQIA in relation to the Social Sector Size Criteria (“Bedroom Tax”) prior to the original Welfare Reform Bill falling, and before responsibility transferred to Westminster, therefore there is no inconsistency in the Department’s approach.*

*(e) A composite evaluation framework which has been developed will measure the impact of Welfare Reform (including the two child rule) in NI and impacts will be reported by 75 group where possible.*

*(f) Officials both in this Department and DWP are not aware of a decision by the Equality and Human Rights Commission that the two child rule failed to meet the requirements of the Public Sector Equality Duty.”*

DfC also stated that mitigation schemes for welfare reform which are its responsibility are restricted to the matters proposed by the working group on

mitigation set up under the Fresh Start Agreement and it is not open to DfC to extend those mitigations. Thus DfC maintain “*no impact assessment could sensibly be carried out in relation to the “two child provisions”*”.

The letter also referred to an impact assessment completed by DWP on the Welfare Reform and Work (Northern Ireland) Order 2016.

It is clear from this letter that DfC does not believe it has a duty under Section 75 to equality screen the Two Child Rule for UC and that it would be futile for us to engage in any further correspondence or complaint process with DfC on this matter.

### **The complaint for failure to comply with the Equality Scheme**

As our correspondence with DfC has not provided us with evidence that the department has complied with its Section 75 duty we are making a formal complaint under paragraph 10 of Schedule 9 of the Northern Ireland Act 1998 that DfC has breached its equality scheme both substantively and procedurally in failing to equality screen the two child policy for UC.

We request the Equality Commission to investigate this complaint as a matter of priority because

- (i) the Two Child Rule is a likely to have a significant detrimental impact on several Section 75 groups; and
- (ii) DfC errs in its interpretation of matters which fall within its functions by taking a new position that whereby functions are exercised to bring in legislation in Westminster, a matter permanently falls outside its functions. DfC appears unaware that the Section 75 duties are continuing duties. In light of the potential for a form of direct rule in the future this would have serious implications for limiting the scope of Section 75.

## Impact of the Two Child Rule

Whilst it is projected that there will be a severe impact on child poverty and gender inequality across the UK as a result of the measures, there are specific impacts in Northern Ireland. Family sizes are on average larger in NI than GB *per se*<sup>9</sup> and the data also demonstrates differentials among Catholics and Protestants.<sup>10</sup>

In addition to child poverty and gender discrimination there are also questions as to whether the policy is indirectly discriminatory in relation to NI in respect of Catholic families. The Institute for Fiscal Studies has held that tax and benefit changes are to be the single biggest driver of child poverty here in coming years<sup>11</sup>.

An impact assessment completed by DWP on the Welfare Reform and Work (Northern Ireland) Order 2016 in July 2016 found that, “... *approximately 123,000 households in Northern Ireland will have a lower rate of payment than would otherwise have been the case once the policy is fully rolled out.*”<sup>12</sup> The impact assessment found that:

- on an individual basis, women may be more likely to be affected than men by the new rule; and
- ethnic minority households may be more likely to be impacted because, on average, they are more likely to be in receipt of benefits and, on average have larger families.

There was no detail in the impact assessment as to the potential level of impact on women or people from ethnic minorities and no consideration of any measure that could be taken to ameliorate such adverse impact.

The impact assessment provided no analysis of likely impact on grounds of religious belief or political opinion as such categories are not “as a matter of course” monitored for the purpose of administering the social security system in Northern

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<sup>9</sup> Labour Force Survey, office for National Statistics for 2015 show average family size in Northern Ireland as 2.96 persons per family compared to UK average of 2.84. See: <https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/adhocs/006257averagefamilysizeukandconstituentcountries2015>

<sup>10</sup> Religion and Fertility in Contemporary Northern Ireland, European Journal of Population, 28 September 2016:

The results show that the marginal effect of a being a Catholic woman is a 4 % higher fertility compared to a Protestant

<sup>11</sup> IFS Report Living standards, poverty and inequality in the UK: 2016–17 to 2021–22, 2 March 2017: “...we project that absolute AHC child poverty will rise from 27.5% in 2014–15 to 30.3% in 2021–22”, <https://www.ifs.org.uk/publications/8957>

<sup>12</sup> This is the projected figure “If households continue to make the same choices about whether to have a family and the size of their family as they do currently do...”  
[www.legislation.gov.uk/ukia/2016/203/pdfs/ukia\\_20160203\\_en.pdf](http://www.legislation.gov.uk/ukia/2016/203/pdfs/ukia_20160203_en.pdf), page 6.

Ireland.<sup>13</sup> There was no reference to other potential sources of data such as data already cited in this complaint.

On the basis of information from Equality Coalition members, research by bodies such as IFS and CPAG and the DWP 2016 impact assessment it is clear that the Two Child Rule will have an adverse impact on: children, women, ethnic minorities (including members of the Traveller community)<sup>14</sup> and people of particular religious belief.

### **The applicability of section 75 to legislation emanating from Westminster**

It is of significant concern that DfC has sought to absolve itself of responsibility from any duties arising under section 75 on the grounds that the underlying legislation has been enacted by Westminster rather than the Assembly.

Section 75(1) of the Northern Ireland Act 1998 requires a public authority to promote equality of opportunity *“in carrying out its functions”* and section 98(1) of the Act defines functions widely as including *“powers and duties”*.

Through its correspondence to us it is apparent that DfC is seeking to rely on a narrow interpretation of *“functions”* (restricting it to the enactment of legislation) as justification for not undertaking section 75 screening.

We note that DfC states at paragraph 2.2 of its Equality Scheme that it *“...is committed to the fulfilment of Section 75 obligations in **all parts of its work**”* (our emphasis).

We also note that paragraph 4.1 of the Scheme states:

*“In the context of Section 75, “policy” is very broadly defined and it covers the ways in which we carry out or propose to carry out our function in relation to Northern Ireland. In respect of this equality scheme, the term policy is used for any (proposed/amended/existing) strategy, policy initiative or practice and/or decision, whether written or unwritten and irrespective of the label given to it, eg. “draft”, “pilot”, “high level” or “sectoral”.”*

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<sup>13</sup> Ibid

<sup>14</sup> Impact of universal credit and welfare reforms on the Gypsy and Traveller communities, May 2013 <http://www.travellermovement.org.uk/wp-content/uploads/2014/01/Impact-of-universal-credit-and-welfare-reforms-on-the-Gypsy-and-Traveller-communities.pdf>

Further, in Appendix 1 Glossary of Terms of the Scheme further definition of Policy is given as:

*“The formal and informal decisions a public authority makes in relation to carrying out its duties. Defined in the New Oxford English Dictionary as a “course or principles of action adopted or proposed by a government party, business or individual”. In the context of Section 75, the term **policies** cover all the ways in which a public authority carries out or proposes to carry out its functions relating to Northern Ireland. Policies include unwritten as well as written policies.”*

DfC’s definition of “policy” in its Scheme accords with Equality Commission guidance and its own decisions. In its final report on *Gerard Marshall & Omagh District Council*<sup>15</sup> the Commission stated:

*“The definition of what is a policy in the Guide to the Statutory Duties is extremely wide...”*

The Commission went on to find that inaction by the council in allowing the presence of a memorial constituted a “policy”.

A wide definition of “policy” is also contained in the Equality Commission’s final investigation report on *Complainant & the former Lisburn City Council*:

*“9.7...It should be recognised however, that some policies are less readily identifiable than others. This is particularly so when matters move from higher to lower levels – and **especially when they may be in danger of being characterised as ‘merely the outworkings’ or ‘operationalizing’ of a higher level strategy/policy.**” [our emphasis]*

In that report the Commission also highlighted the importance of a public authority correctly identifying policies for the purpose of complying with its Section 75 duty:

*“9.8 Public authorities have recourse to various sources of assistance in identifying policies – both in house and external. It is also to be expected that they would derive some additional assistance in such policy recognition by having advertence to the inherent /potential consequential effects of the function in question. The greater the potential for impact on any of the equality groups, the sharper should be the public authority’s equality focus. Policy recognition is the first step to further analysis in accordance with the process set out in Equality Schemes. Other red flag indicators include, for example, complaints which the subject area has generated/might generate.”<sup>16</sup>*

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<sup>15</sup> ECNI Final Report of Commission Investigation Under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998, 28 February 2007

<sup>16</sup> Equality Commission Northern Ireland Final Investigation Report September 2017 at paragraph 9.7.

DfC has refused to recognise the Two Child Rule as a policy which triggers a Section 75 duty and has sought to categorise its role as being that of “operationalizing” central government legislation. This misrepresents the role of DfC.

In Northern Ireland, DfC has overall responsibility for policy, legislation and delivery of social security. The Fresh Start Agreement of 17 November 2015 provided for a temporary transfer of social security powers back to Westminster but this agreement did not extend to the Two Child Rule. We have set out in Appendix 1 the legislative history of the Two Child Rule in Northern Ireland and our concerns of some part of this legislation being *ultra vires*. However, even if the entire legislation in respect of the Two Child Rule were held to be *intra vires*, Westminster’s power to legislate on primary legislation relating to welfare reform (under the Northern Ireland (Welfare Reform) Act 2015) has now lapsed and DfC is solely responsible for said functions. In any event DfC has always retained responsibility for the delivery of social security in Northern Ireland including implementation of the Two Child Rule. Staff with responsibility for considering claims and for making decisions on UC are employed by DfC in Decision Making Services. DfC has issued detailed guidance on UC which is specific to Northern Ireland and there is specific guidance on the application of the Two Child Rule.<sup>17</sup> Any queries on the guidance is to be addressed to Decision Making Services. At no point in the decision making process is there provision for input by DWP.

We also note that DfC drafted the Explanatory Memorandum to the Regulations that prescribed exceptions to the Two Child Rule for Universal Credit.<sup>18</sup>

Taking all the above into account, the assertion by DfC that “...[r]esponsibility for discharge of the functions imposed by the Northern Ireland (Welfare Reform) Act 2015 rests with DWP” is clearly not correct.

DfC undertook equality screening of the Bedroom Tax provisions which were also legislated for through Westminster and this is consistent with the Department being aware that it has a Section 75 duty in respect of implementation of social security law in Northern Ireland. (The assertion by DfC in its correspondence to us that the screening took place “prior to the original Welfare Reform Bill falling...” is incorrect).<sup>19</sup>

We do not accept that DfC has no Section 75 duty in respect of legislation passed by Westminster. However, even if this were the case, the duty under Section 75 is a

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<sup>17</sup> Advice to Decision Makers – Universal Credit – Two Child Limit, ADM Memo 12/17 available at: <https://www.communities-ni.gov.uk/publications/advice-decision-making-memos-2017>

<sup>18</sup> Explanatory Memorandum to the Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) (Amendment) Regulations (Northern Ireland) 2017, [http://www.legislation.gov.uk/nisr/2017/79/pdfs/nisrem\\_20170079\\_en.pdf](http://www.legislation.gov.uk/nisr/2017/79/pdfs/nisrem_20170079_en.pdf)

<sup>19</sup> Equality screening forms were completed in July and December 2016 and January 2017 (the latter being specifically on supplementary payments).

continuing one and thus, DfC should have screened the Two Child Rule once it had been passed.

In failing to screen the Two Child Rule prior to the commencement of its roll out in September 2017 DfC is in breach of the following paragraphs of its Equality Scheme:

#### 1.1 Section 75(1)

*“In carrying out the Department’s functions relating to Northern Ireland, the Department is required to have due regard to the need to promote equality of opportunity between:*

*Persons of different religious belief, political opinion, racial group, age, marital status and sexual orientation*

- *Men and women generally*
- *Persons with a disability and persons without*
- *Persons with dependants and persons without...”*

#### 2.2 Responsibilities and Reporting

*The Department is committed to the fulfilment of Section 75 obligations **in all parts** of its work. [our emphasis]*

*4. Arrangements for assessing the likely impact of policies adopted or proposed to be adopted on the promotion of equality of opportunity.*

Including in particular, paragraph 4.3:

*“The Department will use the tools of **screening** and **equality impact assessment** to assess the likely impact of a policy on the promotion of equality of opportunity and good relations. In carrying out these assessments the Department will related them to the intended outcomes of the policy in question and will also follow Equality Commission guidance:*

- *The guidance on screening, including the screening template, as detailed in the Commission’s guidance “Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities (April 2010)”;*...” [ DfC’s emphasis]

If DfC had applied its equality scheme to the Two Child Rule it would have screened the policy.

We note that DfC has stated that *“A composite evaluation framework which has been developed will measure the impact of Welfare Reform (including the two child rule) in NI and impacts will be reported by 75 group where possible.”* Again we believe that this demonstrates a contradictory approach by DfC to its responsibilities: on the one hand maintaining that responsibility rests with DWP,

while on the other hand proposing to assess impact by Section 75 group (albeit after the fact). The fact that DfC is proposing to assess impact on Section 75 groups is confirmation that the Department itself is fully aware that it has an obligation to comply with Section 75 in respect of the Two Child Rule.

**We ask the Equality Commission to address this “Paragraph 10” complaint as a matter of priority to ensure equality screening is done on this legislation and to clarify that section 75 duties apply to a government department**

We refer to the recent decision of the High Court in the case of *Toner*<sup>20</sup> and request that the investigation proceed as a matter of urgency as the failure in this case is not a “*some simple technical omission or procedural failing*” but, rather constitutes a substantive breach of the duty to have due regard to the impact of the Two Child Rule on several Section 75 groups. As in the case of *Toner*, this matter raises substantive equality issues which will affect a large number of people and thus requires a high level of consideration by the responsible public authority (DfC). In contrast to the case of *Toner* however (where the objected building works had already been completed), we believe that intervention by the Equality Commission at this stage could still serve to ameliorate the failings in respect of many of the people likely to be affected by the rule. This is because roll-out of the Two Child Rule for UC is staggered and will not take effect for new claims until November 2018<sup>21</sup>.

If DfC were to conduct equality screening of the Two Child Rule at this stage potential mitigating measures could be identified and implemented by the Department. It is possible that Assembly could be functioning by the time equality screening has been completed in which case an incoming Minister would have powers to consider alternative mitigating measures, or could amend or repeal the legislation. It is clear that welfare reform generally and the Two Child Rule in particular is within the function of DfC.

**4 December 2017**

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<sup>20</sup> In the matter of an Application by Joanna Toner for Judicial Review [2017] NIQB 49

<sup>21</sup> Although we understand that a small number of families in receipt of Income Support dependent’s payment have been affected.

## Appendix 1

### Origins of the Two Child Rule in Universal Credit

The Welfare Reform and Work Bill was introduced into Westminster on 9 July 2015 and introduced the Two Child Rule for Universal Credit (UC) for GB only.

An equality impact assessment under the GB public sector equality duty (section 149 of the Equality Act) was conducted in July 2015 but the GB Equality and Human Rights Commission deemed it has failing to meet the duties under section 149.<sup>22</sup>

In March 2016 the Welfare Reform and Work Act 2016 became law and section 14 introduced the Two Child Rule for UC in respect of GB only.

In October – November 2016 (after the legislation passed) DWP-HMRC held a short (five week) consultation on exemptions to the Two Child Rule with no reference to an EIA.

### The Northern Ireland situation

The Fresh Start Agreement of 17 November 2015 agreed there would be a Legislative Consent Motion (LCM) tabled in the Assembly to approve:

1. An Order in Council to implement the 2012 GB Welfare Reform Bill in Northern Ireland;
2. The welfare clauses in the Welfare Reform and Work Bill as introduced in Westminster; and
3. An Order to return social security powers to Westminster temporarily with a sunset clause of 31 December 2016 and proviso that any changes to the Welfare Reform and Work Bill be brought back to the Assembly for debate and approval

18 November 2015 the Assembly passed a motion (not a formal LCM) to consent to the above matters but the consent did not extend to the Two Child Rule – it only covered the existing welfare provisions of the Welfare Reform and Work Bill. The **Northern Ireland (Welfare Reform) Act 2015** was passed on 25 November 2015.

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<sup>22</sup> See page 4 of the submission by Equality and Human Rights Commission submission to the House of Lords Committee Stage on Clauses 11 and 12 of the Welfare Reform and Work Bill, 7 December 2015 [http://www.equalityhumanrights.com/sites/default/files/uploads/documents/Parli\\_Briefings/2015-10-13%20SoS%20to%20R%20Hilsenrath%20-%20EHRC.PDF](http://www.equalityhumanrights.com/sites/default/files/uploads/documents/Parli_Briefings/2015-10-13%20SoS%20to%20R%20Hilsenrath%20-%20EHRC.PDF)

The **Welfare Reform (Northern Ireland) Order 2015** was passed on 9 December 2015 and Chapter 1 of Part 2 introduced Universal Credit in Northern Ireland. It did not include provision for the Two Child Rule.

### **Order in Council October 2016 to legislate for Two Child Rule in Northern Ireland**

13 September 2016 an Order in Council was tabled in Westminster to introduce the Two Child Rule for the child element of Universal Credit. **The Welfare Reform and Work (Northern Ireland) Order 2016** was passed on 12 October 2016 and Art 10 of that Order amended Art 15 of the 2015 Order to introduce the Two Child Rule. Art 10(6) of the 2016 Order also vested power in the Department (DfC) to make regulations in relation to the Two Child Rule.

The equality screening conducted by DWP/Treasury on this legislation was wholly inadequate. Nor was there consent from the Assembly despite this legislation being outside the Fresh Start Agreement.

**The Two Child Rule was commenced in Northern Ireland by the Welfare Reform and work (Northern Ireland) Order 2016 (Commencement No. 2) Order 2017 on 9 March 2017 pursuant to Art 4(1)(a) of the 2015 Order.** Universal Credit per se begun to be rolled out incrementally in September 2017.

The Northern Ireland (Welfare Reform) Act 2015 lapsed on 31 December 2016. Arguably, the “transitory provision” power retained permanently under Article 4(1) of the 2015 Order to empower the Secretary of State to make any regulations or an order for “any statutory provisions relating to social security” is a misuse of the intended purpose of this power.

**The Social Security (Restrictions on Amounts for Children and Qualifying Young Persons) (Amendment) Regulations (Northern Ireland) 2017** cover the exceptions to the Two Child Rule (including the “rape clause”). The Explanatory Note to these Regulations was drafted by DfC and is essentially their competence although legislated for in Westminster.

There has been no consultation or equality screening or adequate equality impact assessment under the GB public sector duty.