

Advice to the Department for Infrastructure on its Consultation on proposed changes to section 10B permits and guidance on minibus driving

8th December 2017

Introduction

The Office of the Commissioner for Children and Young People (NICCY) was created in accordance with 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003) to safeguard and promote the rights and best interests of children and young people in Northern Ireland. Under Articles 7(2) and (3) of this legislation, NICCY has a mandate to keep under review the adequacy and effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities. Under Article 7(4), NICCY has a statutory duty to advise any relevant authority on matters concerning the rights or best interests of children and young persons. The Commissioner's remit includes children and young people from birth up to 18 years, or 21 years, if the young person is disabled or in the care of social services. In carrying out her functions, the Commissioner's paramount consideration is the rights of the child or young person, having particular regard to their wishes and feelings. In exercising her functions, the Commissioner has regard to all relevant provisions of the United Nations Convention on the Rights of the Child (UNCRC).

International Children's Rights Standards

The UNCRC is a set of legally binding minimum standards and obligations in respect of all aspects of children's lives which the Government has ratified and must comply with in the discharge of its functions. The Northern Ireland Government Departments, including the Department of Education (DE), is obliged to comply with the obligations under the UNCRC by virtue of being a devolved administration of the UK Government, the signatory to the UNCRC. There are a number of UNCRC articles, Committee recommendations and Committee General Comments which are relevant to the Consultation on the proposed changes to section 10B permits and guidance on minibus driving. Article 29(1) of the UNCRC details the aims of education and adds a qualitative dimension to the general right

to education. Article 29(1) reflects the rights and inherent dignity of the child; it insists on the need for education to be child-centred, child-friendly and empowering and highlights the need for educational processes to be based upon the principles outlined in Article 29(1). General Comment 1 on the Aims of Education¹ provides insight into the obligations on Government under Article 29(1) of the Convention. According to the UNCRC Committee's General Comment on Article 29 of the Convention – a statement of its meaning and objectives - education must be child-centred, child-friendly and empowering.² The goal is to strengthen the child's capacity to enjoy the full range of human rights, to promote a culture which is infused by appropriate human rights values and to empower the child through developing his or her skills, learning and other capacities, human dignity, self-esteem and self-confidence. In this context, 'education' goes far beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, whether individually or collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.

Other articles are also relevant in the context of this consultation, not least the 4 principles of the Convention. The UNCRC principles require the Government to ensure that children are not discriminated against - Article 2; their best interests are upheld - Article 3; they develop to their maximum potential - Article 6; and they are able to meaningfully participate in all aspects of their lives - Article 12. Article 31 of the United Nations Convention on the Rights of the Child relates to the right of the child to participate in cultural, artistic, recreational and leisure activity. It states,

“That every child has the right to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

That member governments shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.”

The Committee on the Rights of the Child has issued a General Comment on Article 31, providing an insight into the obligations on State parties by virtue of Article 31. This General Comment emphasises the importance of the realisation of Article 31 to the lives of

¹ United Nations Committee on the Rights of the Child, General Comment No. 1 (2001) 'The aims of education' CRC/GC/2001/1.

² *Ibid.*

children and young people and states that,

*“Article 31 must be understood holistically, both in terms of its constituent parts and also in its relationship with the Convention in its entirety. Each element of Article 31 is mutually linked and reinforcing, and when realized, serves to enrich the lives of children. Together, they describe conditions necessary to protect the unique and evolving nature of childhood. **Their realization is fundamental to the quality of childhood, to children’s entitlement to optimum development, to the promotion of resilience and to the realization of other rights.**”³*

It also provides insight into what is meant by the phrase, ‘to participate freely’, and the resultant obligations on Government. It states that,

“The right of children to participate freely in cultural life and the arts requires that States parties respect, and abstain from interference in, the child’s access to, choice of and engagement in such activities, subject to the obligation to ensure the protection of the child and the promotion of the child’s best interests. Equally, they must ensure that others do not restrict that right. The decision by a child whether or not to exercise these rights is a choice and, as such, should be recognized, respected and protected.”⁴

The General Comment also provides insight into the obligations on Government with regard to the right of the child, ‘to participate fully in cultural and artistic life’: It states that the right to participate fully has three inter-related and mutually reinforcing dimensions; access which necessitates that children have the opportunity to experience cultural and artistic life, participation which requires that concrete opportunities are guaranteed for children to engage in creative activities with a view to the full development of their personalities and contribution to cultural life. It is clear that States parties must ensure the preconditions for participation, facilitation and promotion of opportunities for the implementation of all Article 31 rights. Children can only realise their rights if the necessary legislative, policy, budgetary, environmental and service framework is in place. In addition, every child must be afforded equal opportunities to enjoy his or her Article 31 rights.⁵

³United Nations Committee on the Rights of the Child, The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (Article 31), (2013), General Comment No. 17, CRC/C/GC/17

⁴ Para 14, *Ibid.*

⁵ Para 15, *Ibid*

With regard to the provision of resources for the realisation of children’s rights under the Convention, Article 4 of the UNCRC states that,

“States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”

The Committee’s General Comment No 5. on General measures of implementation of the UNCRC,⁶ is clear that children should be visible in budgets and that analysis of resources for children should take place to ensure that States are fulfilling their obligation to allocate resources to the maximum extent in order to ensure the realization of children’s rights. In addition, it outlines the obligation on States to ensure that budget decisions which will impact on children are made with the best interests of the child as a primary consideration. It states that,

“The Committee needs to know what steps are taken at all levels of Government to ensure that economic and social planning and decision-making and budgetary decisions are made with the best interests of children as a primary consideration and that children, including in particular marginalized and disadvantaged groups of children, are protected from the adverse effects of economic policies or financial downturns.”⁷

The UN Committee also recommended that,

“...the State party, in accordance with article 4 of the Convention, allocate the maximum extent of available resources for the implementation of children’s rights...”⁸

It highlighted the need to invest in children by Governments, stating that investment in children is a,

⁶ General Comment No.5: General Measures of Implementation of the Convention on the Rights of the Child, UN Doc CRC/GC/2003/5.

⁷ *Ibid*, para 51.

⁸ *Ibid*, para 19.

“...widely accepted best guarantee for achieving equitable and sustainable human development and a fundamental requirement for social and economic priorities of any government”⁹

Also of relevance to the current consultation is the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), which was ratified by the UK Government on 8th June 2009. Article 5 provides that persons with disabilities shall have equal access to all the protections afforded by the law. Article 7 provides that all children with disabilities shall have full enjoyment of all human rights and fundamental freedoms; that their best interests shall be a primary consideration and that their voices shall be heard in all matters concerning them. Article 19 provides the right for people with disabilities to independent living and full and their full inclusion and participation in the community. Article 24 provides the right for persons with disabilities to access an inclusive education system at all levels.

General Comments

Access to transport to enable children and young people to fully participate in many aspects of their lives is a vital element to the realisation of some of their fundamental rights as outlined above. It is clear from the consultation document that the Department believes that the current legal framework relating to the use of minibuses has been wrongly interpreted and is currently operating in contravention to Regulations introduced in 1994 and 1996. The consultation document states that the Department’s previous interpretation of the legislative framework, whereby car licence holders could be paid to drive a minibus if they had passed their driving test prior to 1997 and the organisation held a s10B permit and where people whose driving was not stipulated in their contract of employment were able to drive a minibus on their car licence, was unsustainable. The Department has now concluded that under existing legislation those driving a minibus for hire or reward do require a full minibus driving licence and Drivers Certificate of Professional Competence. While this primarily will impact on paid drivers, the Department’s interpretation of the legal framework means that anyone who drives in the course of their employment, such as teachers, health workers and caretakers are deemed to be paid drivers who will require a full D1 licence and driver qualification card to drive a minibus in future. This is estimated to be at considerable expense to the organisations affected, including schools, and may be prohibitive, impacting significantly on the ability of children and young people to take part in a range of activities. Drivers who volunteer for voluntary organisations and receive no

⁹ CRC (2007) Day of General Discussion “Resources for the rights of the child – Responsibility of States”, Para 27.

payment except for out of pocket expenses will not be affected by the revised guidance.

NICCY is concerned that the proposed changes to section 10B permits and guidance on minibus driving are very unclear and their impact has already created a lack of clarity for many involved in driving and using minibuses. This is particularly the case for volunteer drivers, enforcement agencies and those who drive ancillary to their employment. We are particularly concerned at the impact that the proposed changes are having and will continue to have on the education sector and schools and youth settings in particular. Many children and young people take part in a range of education, sporting, music and youth activities which require them to avail of minibus transport. The Department's definition of what constitutes commercial and non-commercial effectively means that all teachers and youth workers who drive in an ancillary role to their employment will no longer be able to transport children and young people in minibuses owned by schools and youth clubs. NICCY is aware of a letter received by schools in June 2017 from the Education Authority which very clearly states that all driving of a minibus in connection with employment irrespective as to whether it is incidental or integral to the employment, i.e. whether driving duties are outlined on a job description or not, must be undertaken by a driver who holds a D1 licence by test and a driver's qualification card. NICCY has been contacted by a number of schools and youth providers who have stated that all transport is now being paid for in schools and youth settings and minibuses owned by these facilities are no longer being used. This is impacting on the ability of children to engage in a range of activities including access to formal education through Area Learning Committees and Shared Education projects. We have also been informed that the cost of compliance with the new proposed minibus regime will be approximately £1,000 per driver, a cost which in the current economic climate is prohibitive to many, significantly impacting on the ability of children and young people to take part in a range of activities which are vitally important to community inclusion and the development of all of their skills, talents and abilities.

NICCY is also aware that the acknowledgement by the DfI that they have been misinterpreting the current legislative framework regarding minibus transport effectively means that the proposed changes to section 10B permits and guidance on minibus driving have already been introduced. Given that schools and youth clubs are already paying for or not providing transport and that the changes are already in operation, we have serious concerns about how genuine and formative this consultation process is.

While NICCY understands that the responsibility for transport in schools is not solely the

responsibility of DfI, there is an obligation on Government Departments to work together to promote the wellbeing of children and young people. These proposals have the potential to have a serious detrimental impact on children's wellbeing and their development to their maximum potential in all aspects of their lives. The Children's Services Co-operation Act (Northern Ireland) 2015 requires Government Departments and agencies to co-operate with each other to contribute to the achievement of specified outcomes relating to the well-being of children and young people. In the Act "well-being" of children and young people includes the enjoyment of play and leisure, learning and achievement, the making by them of a positive contribution to society, living in a society which respects their rights and living in a society in which equality of opportunity and good relations are promoted between persons who share a relevant characteristic and persons who do not share that characteristic, among others. Government departments and agencies should ensure that they are co-operating with each other effectively in line with their statutory obligations to improve outcomes for all children and young people, including in providing for the needs of children with disabilities. NICCY wishes to respectfully remind DfI of their statutory obligations under the Children's Services Co-operation Act (Northern Ireland) 2015 in the context of the proposed changes to section 10B permits and guidance on minibus driving. It is our belief that the Act places clear statutory obligations on Government Departments to ensure that the well-being of children is promoted through co-operation. This would involve DfI working in partnership with other Government Departments, including the Department of Education and agencies, including the Education Authority to ensure that compliance with the proposed changes is funded by central Government and the cost not borne by schools, youth settings or children and young people themselves.

The law in relation to regulation 1071/2009 and its impact on domestic law is far from clear and NICCY suggests that progression with the current proposals is halted until cognisance can be taken of discussions, consultation and Committee findings in Westminster on the impact of these changes in England and Wales. It seems folly to progress with the proposed changes in isolation of a parallel process of scrutiny in Westminster which would be extremely useful in guiding decisions and formulating thinking on the necessary changes within a Northern Ireland context. This is particularly important in ensuring that the changes do not have the impact of undermining the social good relating to the inclusion of marginalised groups, including children and young people, in society and in activities which are important to their personal and social development.

There are a number of references in the current consultation to issues relating to safety,

however, there is absolutely no evidence presented with regard to safety concerns relating to the previous situation regarding minibus driving in Northern Ireland. NICCY would request clear evidence regarding the concerns expressed relating to safety as we are unaware that safety has been an issue with the operation of the regime to date.

The introduction of the Department's proposals will certainly have at least a short term impact on the ability of children and young people to take part in activities, using minibus transport due to the time delay in drivers becoming suitably qualified. NICCY would request information from DfI on how it intends to deal with the shortage of qualified drivers in a manner in the immediate term which does not prevent people who rely on minibus transport from being able to take part in activities and travel as required.

Section 75 of the Northern Ireland Act 1998 and the Common Law Duty to Consult

Section 75 of the Northern Ireland Act 1998 is intended to be used as a policy formulation tool however, NICCY does not believe that there is any potential to change the proposed scope of the current consultation, regardless of the views expressed by consultees through this consultation process. NICCY has serious concerns about how genuine this consultation exercise is and believes that there is significant evidence to indicate that the outcome of this consultation with regard to the current interpretation of the legislation and resultant Guidance has been pre-determined from the outset.

There is a statutory obligation, under Schedule 9 paragraph 9(2) of the Northern Ireland Act 1998, on all public authorities to take into account any assessment and consultation carried out in relation to the policy. A commitment to this is included within DfI's approved Equality Scheme.¹⁰ It is essential that DfI fully complies with this commitment and can clearly show how views expressed through consultation on the current proposals have been taken into account in progressing proposed changes to section 10B permits and guidance on minibus driving.

Case law in Britain is clear that consultation must be fair. In the recent Supreme Court case of *Moseley R (ota) v. London Borough of Haringey*¹¹ the court endorsed the long standing core principles of consultation as the embodiment of fairness, known as the

¹⁰ Para 3.2.10, Equality Scheme for the Department for Regional Development, Approved 9 August 2011 (Revised 20 August 2015)

¹¹ [2014] UK 56

Gunning principles.¹² These are that consultation must be at a time when proposals are still at a formative stage; the proposer must give sufficient reasons for its proposal to permit intelligent consideration and response; adequate time must be given for consideration and response and the product of consultation must be conscientiously taken into account in finalising any statutory proposals. It is NICCY's view that in the current consultation the proposals are not at a formative stage as the decision to with regard to the progression of the proposed changes to section 10B permits and guidance on minibus driving, despite the ongoing consultation process. If this is the case, DfI will be unable to show that the product of consultation was conscientiously taken into account in finalising its proposals.

NICCY strongly suggests that DfI takes sufficient cognisance of its statutory equality and common law obligations in taking forward its proposed changes to section 10B permits and guidance on minibus driving. In the *Moseley R (ota) v. London Borough of Haringey* case, it was held that it was unfair and unlawful not to invite and consider views about possible alternatives to the proposal contained in the consultation which was presented as if there was no alternative and consultees had no choice. NICCY believes there are notable parallels to be drawn with the current consultation and believes that the manner in which this consultation has been carried out raises serious questions about its fairness and consequently, lawfulness which could give rise to legal challenge.

NICCY is disappointed to note, from the Section 75 Equality of Opportunity Screening Analysis Form,¹³ that the policies have been screened out for equality impact assessment under section 75 of the Northern Ireland Act 1998. Given the nature of the proposed changes to section 10B permits and guidance on minibus driving, children and young people are clearly one of the groups most likely to be impacted upon by the proposals contained therein.

There is also a significant failure in the consideration of data in carrying out the screening exercise on the proposed changes to section 10B permits and guidance on minibus driving, resulting in a failure to fully consider the needs of children and young people. Fundamental to the proper execution of screening is the data relied upon by the public authority in carrying out the screening exercise, particularly with regard to the categories of political opinion, racial group, marital status and sexual orientation, for whom there is no

¹² [1985] 84 LGR 168

¹³ Department for Infrastructure, September 2017.

data presented. Proper screening of a policy based on all available disaggregated qualitative and quantitative data is a pre-requisite to determining if there is the potential for differential adverse impact or if there are actions which should be taken to better promote equality of opportunity and consequently the need to carry out a full EQIA. The Equality Commission's Guidance for public authorities in relation to screening is clear that where there is no data available, this should result in a public authority giving consideration to carrying out an EQIA. The Equality Commission's Guidance states that,

“As a first step in the screening exercise, public authorities should gather evidence to inform their screening... The public authority should ensure that any screening decision is informed by relevant data... The absence of evidence does not indicate that there is no likely impact. A public authority should make arrangements to obtain relevant information, whether quantitative or qualitative. If a public authority having taken reasonable steps to obtain relevant data, concludes that none is available, it may then wish to consider subjecting the policy to an equality impact assessment.”¹⁴

The consultation document states that there is limited evidence to suggest that the guidance has any significant adverse impact on any section 75 group as it applies equally to all drivers. NICCY believes that this interpretation of the potential impact of the proposed changes illustrates a clear misunderstanding of the Department's obligations under section 75 of the Northern Ireland Act 1998. It is clear from the statutory equality obligations under section 75 that equality of opportunity is not about treating everyone equally but rather about taking proactive measures to ensure that those children and young people with additional needs in accessing equality of opportunity have these needs met to ensure their full enjoyment of equality of opportunity. There will clearly be groups of children and young people and other protected section 75 groups who will be more likely to be adversely impacted upon by the proposed changes than others and the assertion that there will be no differential adverse impact on any member of the none section 75 groups due to equal application of the new policy assumes that the circumstances of all the groups are equal, which is clearly not the case.

In addition, the Department appears to have omitted is any consideration of the adverse impact on members of the protected section 75 groups who use minibuses. There is clear potential for differential adverse impact to be suffered by those who do not drive, for example, children and young people, children and young people with disabilities, older

¹⁴Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities' Equality Commission for Northern Ireland, April 2010, pg 52.

people and women. This adverse impact must be mitigated against as the impact is not simply to restrict the access of members of these groups from using minibus services, but also from accessing groups, leisure and cultural activities which are so important to ensuring inclusion in society and community participation.

As the Department has failed to adequately consider the impact on users of minibuses in carrying out its screening exercise, it has also failed to identify the clear adverse impacts which will be suffered by this group. Where this had been carried out properly, the Department would have identified adverse impacts and would have had introduce measures to mitigate the adverse impact on the enjoyment of equality of opportunity or promotion of equality of opportunity on children and young people. The failure to do so in this case, is in NICCY's opinion, a breach of DfI's approved Equality Scheme. There is a statutory obligation on DfI to take action to mitigate against adverse impact as well as to proactively promote equality of opportunity in order to comply with section 75 and we would firmly recommend that that both the screening and equality impact assessment of the Department's proposals are carried out as a matter of priority in order to comply with the statutory equality obligations under section 75 of the Northern Ireland Act 1998. Mitigating measures should include DfI covering the costs of compliance with its proposals to ensure that children and young people, including those with disabilities and other affected section 75 groups are able to continue to avail of transport they require in order to access a range of activities at no cost of schools or to the affected groups themselves.

While DfI is still currently operating under its 2011 Equality Scheme, NICCY recently responded to its consultation on its revised Equality Scheme where it was proposed to include a commitment to consider at the screening stage whether a policy will disproportionately affect those on lower incomes as well as a commitment to consider whether as a result of the policy there will be a variable impact across geographical areas. In addition, we welcomed the proposed amendments to the screening questions in the Department's draft Equality Scheme to include consideration of opportunities through the development of policies to promote positive attitudes towards people with disabilities and to encourage the participation of people with disabilities in public life. There is likely to be a clear differential adverse impact suffered by children and young people who are living in poverty, children and young people in rural areas and those with disabilities as a result of the proposed changes to the operation of minibuses. There has been no consideration of these issues in the current consultation and NICCY firmly advises the Department to revisit its screening documentation and adequately consider the potential adverse impact on all

of the groups who are likely to be impacted upon as current and potential users of minibus services. Proper consideration of the potential for adverse impact on children and young people, including those with disabilities, as well as members of other protected section 75 groups should give rise to a comprehensive equality impact assessment being carried out which should include taking mitigating measures against the adverse impact suffered. We would respectfully remind the Department that compliance with these obligations is a statutory requirement under the Northern Ireland Act 1998 and we recommend that the Department desists from progressing its proposals until these statutory equality obligations have been fully complied with.

Given that the proposals contained within the consultation document have the potential to impact significantly on children and young people, direct consultation with children and young people would be extremely beneficial for the development of these proposals. This should include the provision of child accessible versions of the consultation document - a vital element to ensuring compliance with both section 75 of the Northern Ireland Act 1998 and Article 12 of the UNCRC.

The Department's Equality Scheme states that,

“We will consider the accessibility and format of every method of consultation we use in order to remove barriers to the consultation process. Specific consideration will be given as to how best to communicate with children and young people, people with disabilities (in particular people with learning disabilities) and minority ethnic communities. We take account of existing and developing good practice, including the Equality Commission's guidance Let's Talk Let's Listen – Guidance for public authorities on consulting and involving children and young people (2008).”¹⁵

We would therefore be grateful for details of how you have, or intend to, consult directly with children and young people as part of this process.

In light of our concerns as outlined above, we would urge the DfI to carry out a full and comprehensive equality impact assessment on the proposed changes to section 10B permits and guidance on minibus driving, including direct consultation with children and young people, using and relying on all relevant and necessary data in line with the Department's statutory equality obligations under section 75 of the Northern Ireland Act

¹⁵ Para 3.2.3, Equality Scheme for the Department for Regional Development, Approved 9 August 2011 (Revised 20 August 2015)

1998.

Conclusion

NICCY welcomes the opportunity to provide advice to the Department on the proposed changes to section 10B permits and guidance on minibus driving. We call on the Department to take into account the recommendations made in this submission, which we provide in the statutory advice capacity under Article 7(4) of 'The Commissioner for Children and Young People (Northern Ireland) Order' (2003)'.

These include the Department desisting from progressing its proposals until cognisance can be taken of discussions, consultation and Committee findings in Westminster on the impact of these changes in England and Wales and the Department has fully complied with its common law duty to consult and statutory equality obligations under section 75 of the Northern Ireland Act 1998. This will involve carrying out the screening process again, using comprehensive data which includes the impact on minibus users and a subsequent comprehensive equality impact assessment, including carrying out direct consultation with children and young people. When adverse impact has been identified, as it should have been, the Department should mitigate against this impact by working together with other Government Department's and agencies, as it is required to do under the Children's Services Co-operation Act (Northern Ireland) 2015 to ensure that compliance with the proposed changes is funded by central Government and the cost not borne by schools, youth settings or children and young people themselves.

We would be happy to discuss any element of this submission or provide further information / clarification if required.