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FROM: STEPHEN LEACH
DIRECTOR, CRIMINAL JUSTICE
19TH MAY 2004.

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Cc: Copy List Below

John Spellar (B&L)

ASBOs - EQUALITY COMMISSION INVOLVEMENT

Issue:

Equality Commission is receiving several complaints from children's organisations about introduction of ASBOs, focussing on four week consultation period for draft Order (which Commission believes is too short, notwithstanding the earlier 13 week consultation on the underlying policy).

Background

1. Following the conclusion in April of the consultation period on our

Timing:

Pressing. Consultation period on draft Order closes 4th June.

Presentational Issues:

Possible embarrassment if Equality Commission decide on a formal investigation and produce adverse report. Children's groups and Human Rights Commission may also be publicly critical - but given their wider concerns about ASBOs that may occur in any event.

2. Children's groups, Children's Commissioner (CC) and the Equality Commission has now received complaints from a number of these groups focussing on the consultation period and other process issues.

Detail

3. There is nothing new in the issues which children's organisations and the HRC continue to raise (ASBOs predominantly used against young males

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ASBOs - EQUALITY COMMISSION INVOLVEMENT1

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Recommendation: That you:

- (i) note the current position;
- (ii) consider whether to agree to an extension of the consultation period;
- (iii) agree that, following the passage of the legislation, we should seek to involve the children's groups and others in consultation workshops on the implementation arrangements; and
- (iv) give a steer on whether the consultation period of the draft Order should be extended to twelve weeks.

Background

1. Following the conclusion in April of the consultation period on our policy proposals for Anti-Social Behaviour Orders (ASBOs), the proposal for a draft Order in Council reflecting the policy was published for consultation on 10th May. Given that the first part of the consultation was open for a full twelve weeks (in the event extended by one further week) you decided to limit the second consultation to four weeks - closing on 4th June and aiming to complete the Parliamentary stages and secure Privy Council approval by 27th July.

2. Children's groups, the Human Rights Commission (HRC) and the Children's Commissioner (CC) continue to express concerns about ASBOs, and the Equality Commission has now received complaints from a number of these groups focussing on the consultation period and other process issues.

Detail

3. There is nothing new in the issues which children's organisations and the HRC continue to raise (ASBOs predominantly used against young males

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under 21; full EQIA was needed; children should have been directly consulted; not a meaningful consultation since Government's mind is made up). What is new is the role of the Equality Commission (EC) as the means of focussing those complaints on the process issue of the length of the consultation period.

4. The Children's Law Centre has written to the NIO with a formal complaint under the provisions of our Equality Scheme, and has made a concurrent formal complaint to the EC on behalf of themselves and seven other organisations (listed at Annex A). Joan Harbinson (the EC Chief Commissioner) spoke to me in connection with a meeting she had last week with representatives of these organisations. On the substantive matter of whether the proposals could be said to discriminate against young males, I pointed out that the provisions would apply universally and the issue is about sanctioning the behaviour. There was no discrimination against young males *per se*, and any adverse impact was fully justified within the wider social purpose intended by Parliament. She did not seriously dispute this.

5. However, she believed that on **process** we were vulnerable, arguing that even accepting that this was a second consultation, a four week period for the draft Order was too short. Eight weeks should be the minimum and the Commission preferred twelve. She claimed it would be difficult for statutes like the Commission itself to reply within four weeks and almost impossible for smaller voluntary organisations. She had told the children's groups who met her that in the Commission's view four weeks was insufficient, and formally asked us to extend it. Joan also indicated that she is liaising closely with the HRC and the CC.

Discussion and Options for the Way Ahead

6. I attach at Annex B extracts from the Cabinet Office, NIO and Equality Commission guidance on consultation. (The Commission's guidance focuses

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mainly on equality schemes, not policy proposals.) In allowing an initial 13 week consultation, we appear to have fully met the letter of the guidance, and Central Management Unit colleagues confirm that nothing obliges us to have a second period of consultation longer than the four weeks planned. It is also worth recalling that the initial consultation was not simply passive: we actually funded an event to bring children's groups together and help them discuss the proposals on an informed basis.

7. There are **two options**. **First, extend** the period of the consultation, as requested by the EC. This would prevent some turbulence and help to allay concerns that the outcome is a foregone conclusion and the Government's mind already made up. It might appease the Commission on the basis that it could assure complainants that by its intervention it had achieved the extension of the consultation period and therefore need not pursue a formal investigation.

8. The downside would be that we could not secure the making of the Order before the Recess, to which we are publicly committed. Moreover, the children's groups, while exploiting the process issue, are actually more concerned with the substance. They do not want ASBOs, and any extension could give them more opportunity to lobby the Commission on issues such as the EQIA, particularly if they can line up the HRC and CC to support this. If they succeed in creating enough momentum, the EC might pursue an investigation in any event and look for further extensions of timescales. And if in the end we conceded a full EQIA on this policy purely to appease the EC rather than on the basis of a real belief that it was needed, that could create an important and awkward precedent.

9. The **second** option is to **maintain** the current position. Public opinion is in favour of ASBOs, and a popular piece of legislation would therefore be taken forward in the timescale about which you have been clear and open. We can demonstrate not only that the initial consultation was proactive, but

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also that as a result of the views received we did change the proposals in the draft Order in respect of reporting restrictions, which was one of the concerns of children's groups and others. And we are not proposing Parenting Orders, which children's groups oppose and seem to think we have a hidden agenda to introduce.

10. The downside is that we probably will face an EC investigation. While there would be an element of embarrassment in this, it need not hold up the legislative process. Moreover, if we are investigated, the most the Commission is likely to find is that we had (we would argue reasonably) abbreviated the timescale, and, if they take a view that we should have carried out a full EQIA, that we made a mistaken judgment on process. Again, this is not our view. If they so find, the Commission may lay before Parliament a report of the investigation under Schedule 9, paragraph 12(5). Unlike the position when it scrutinises non-Departmental public bodies, the EC cannot refer a designated Department to the Secretary of State and recommend him to give directions to it.

Handling of Implementation

11. I believe that it may be possible to draw some of the sting from the current campaign against ASBOs through our handling of the **implementation** of the provisions. As is normal practice, we will transparently monitor and evaluate the practical application of the policy. However, before that point there would be an opportunity for informal workshops on the implementation arrangements themselves. We have already set up an Implementation Group to work on drawing up principles and guidelines for our partner organisations. In developing these we could seek to involve a number of children's groups, and the Commissions, in the workshops - together with other voluntary groups, like Age Concern, which take a much more positive approach to ASBOs. This outreach would show that we are willing to engage in a meaningful way as the policy is

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implemented, and it would also enable us to demonstrate that ASBOs are not intended to be a negative restraining order imposed in isolation, but will form part of a spectrum of preventative, diversionary and restorative approaches, with a focus on positive outcomes.

Wider Issues

12. There are three wider issues you may wish to bear in mind. First, if the Commission insist on investigating and produce an adverse report, any resulting criticism of the Government might draw on the fact that you are also the Minister for Equality. However, such criticism should be manageable, since the EC findings would be unlikely to be considered particularly serious.

13. Second, the Commission could use any investigation to try to further its campaign for its powers under Section 75 to be strengthened. However, RIR advise that although the Commission may use the opportunity of the current external review of its Section 75 powers to draw attention to its lack of enforcement powers over Government Departments, this would seem a poor test case on which to rely.

14. Third, the children's groups are we believe lobbying political parties on this issue. Currently, the ASBO proposals are supported by UUP, DUP and Alliance, with no clear position from Sinn Fein and SDLP (although Mark Durkan has recently criticised the proposals privately to the Secretary of State. As against that, there has been positive coverage of ASBOs in the *Irish News*). Subject to continuing our public presentation of the benefits of ASBOs, and given the general welcome for the measures in the community, a strong political reaction against them does not seem likely.

Recommendation

15. This is primarily an issue for political judgement, balancing the equality and wider public interest considerations. While extending the

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timescale would deprive the groups who oppose ASBOs of this ground for complaint about process, it would mean that implementation slips by some months and would also provide the opportunity for further process issues to be raised. So in the end it might well not make for the smoother introduction of ASBOs. In practice, an open approach to finalising the implementation arrangements should enable any genuine process concerns to be taken into account.

16. You are recommended to:

- (i) note the current position
- (ii) consider whether to agree to an extension to the consultation period;
- (iii) agree that, following the passage of the legislation, we should seek to involve the children's groups and others in consultation workshops on the implementation arrangements; and
- (iv) give a steer on whether the consultation period on the draft Order should be extended to twelve weeks.

Stephen Leach

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EXT 27500

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ANNEX A

cc PS/Secretary of State (B&L)
Joe Pilling
Nigel Hamilton
Jonathan Phillips
David Watkins
David Cooke
Robert Hannigan
Adrian Arbuthnot
Maura Campbell
Conal Devitt
Brian Grzymek
Simon Marsh
Jim Alford
Kirsten McFarlane
Jim Strain
Rosemary Bailie

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ANNEX A

Barnardos

Committee for Administration of Justice

Children in Northern Ireland

Children's Law Centre

Derry Children's Commission

Include Youth

NSPCC

Parents Advice Centre

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Cabinet Office Code of Practice on Consultation

"... Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy."

NIO Equality Scheme

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

NOTE: New draft guidelines refer to twelve weeks for one part of the consultation.

Equality Commission's Guide to Statutory Duties

"... Adequate time should be allowed for groups to consult amongst themselves as part of the process of forming a view. The Commission recommends a period of at least two months for consultation exercises."

NOTE: This is in relation to Equality Schemes. No other guidance on consultation has been produced by Equality Commission.