

CAJ's submission no. S.282

CAJ's response to the  
Department of Education's  
consultation on  
its Draft Budget 2011-15

February 2011

### *What is the CAJ?*

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Minister Catriona Ruane MLA

Department of Education  
Rathgael House  
Balloo Road  
Rathgill  
Bangor  
BT19 7PR

Cc Bob Collins and Evelyn Collins, Equality Commission NI

16 February 2011

Dear Minister

**Budget 2011-15: Inadequate Assessment of Equality Impacts**

Thank you for the letter of 26 January 2011, sent by the head of Financial Planning, and for further explaining the Department of Education's ('DE') approach to its equality duties in relation to the budget. Thank you also for sending us a copy of your screening forms for each DE's spending proposals.

We recognise the efforts that have been made by DE to comply with the equality duties of by s75 Northern Ireland Act 1998 ('s75'). However, we do not believe that these duties have been wholly discharged. First, given certain irregularities found in DE's screening forms, it is difficult to be confident as to their conclusions. Secondly, any equality impact assessments carried out will be too late to inform the consultation process. Finally, without public access to the screening forms, the DE draft budget 2011-15 consultation document contains very little information on equality impacts.

Issues arising from equality screening forms

Despite DE's efforts in carrying out screening exercises for most of the proposals used in its draft budget 2011-15, certain irregularities and inconsistencies force us to question the soundness of some of their conclusions.

We acknowledge that the equality screening forms used derive from ECNI's 2010 Guidance on s75, and thus were perhaps used by DE for the first time. We recommend that DE carry out training for its staff on s75, as required by Schedule 9 para 4(2)(e). We suggest that such training include the objectives and operation of s75, and the correct approach to completing screening forms.

The difficulties we encountered in the screening forms for DE's draft budget 2011-15 spending proposals are set out below.

➤ *Relevance of 'universal impact'*

Several equality screening forms claim that the policy involved has no equality impacts due to its 'universal application'. This shows a fundamental misunderstanding in relation to the objectives and operation of s75.

First, due to underlying inequalities in our society, some groups may have less access to or benefit from a policy, despite its universal application. S75 is in place to help understand these barriers and adapt policies to help facilitate access and benefit for all. For example, screening document resource no. 12 recognises the lower uptake of free school meals by protestant communities and ethnic or religious minorities, and thus considers the specific needs of these groups. In this case, universal application would not suffice for equality of opportunity to be promoted.

Secondly, different levels of participation in specific policies results in impacts being felt more strongly by certain groups. Thus, it is a *non sequitur* to state, at screening document resource no. 1 (regarding teacher's pay) that '[w]hilst 75% of the teaching workforce is female this policy will have a universal application and therefore will not have adverse impacts on equality of opportunity or outcome'. To the contrary, the policy will, in fact, impact on women three times more than on men. This data is particularly striking in relation to redundancy costs (screening document resource no. 4).<sup>1</sup>

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<sup>1</sup> Although this policy relates to teaching and non-teaching workforce, it is not clear what the makeup is and so how 'it is not anticipated that it will result in a negative impact to an s75 group'.

➤ *Use of evidence and monitoring*

The DE equality screening form asks for '*evidence / information (both qualitative and quantitative)*' gathered to inform each policy (section 2.1). However, very few screening forms include reference to any evidence. Instead, they merely make bald statements about the (lack of) equality impact, which are then repeated in the section on '*needs, experiences and priorities of each of the categories*' (section 2.2).

Without reference to the evidence or data used, it is impossible to know how conclusions in relation to equality impact were reached. Some screening forms refer explicitly to the evidence or research used, which is helpful, but these are the exception rather than the rule.

Similarly, the monitoring section of each screening form (section 6) asks for details of '*the data you will collect in the future in order to monitor the effect of the policy on any of Section 75 equality categories.*' However, nearly all of the 37 screening forms leave this section blank or merely repeat statements about, for example, universal impact and ignore the request for future monitoring.

We welcome the commitment in a couple of screening forms, such as capital No. 6 (a & b) school transport, to monitor s75 groups upon which the policy has an impact. We would recommend that such an approach is taken for all policies that could have any impact on s75 groups.

➤ *When assessment is 'appropriate or necessary'*

As you will be aware, Schedule 9 Northern Ireland Act 1998 provides that, in order to comply with s75, each policy must be subject to an assessment of its likely impact on the promotion of equality of opportunity (para 4(2)(b)). However, some screening forms include statements that such assessment is not '*appropriate or necessary*', due to a policy being '*not forward facing*' (capital no.4.5 IT capital, in relation to screening) or non-sectorally applied in a '*very tight time frame*' (capital no. 8b, in relation to an EQIA).

We remind you that s75 applies to all policies, including those that are inward-facing. Indeed, the screening forms allow for 'no impact' to be

found, where appropriate, but screening should always be carried out. Also, while we appreciate the pressures of time, this cannot be used to avoid s75 duties, particularly where an adverse impact may be found.

➤ *Tick-box approach*

There is much inconsistency in the way in which the screening forms have been completed and the conclusions reached. As we have already pointed out above, the use of data and overall approach to s75 differs massively. In addition to this, some screening forms, particularly those listed under capital, contain so little information that they appear to have been completed with a 'tick-box approach'.

We remind you that merely ticking boxes is not sufficient to discharge the s75 duty. The courts have found that an *'equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption... a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes.'*<sup>2</sup>

➤ *Incomplete assessment*

In relation to the equality screening carried out, it is not clear that all of the proposals listed in DE's draft budget 2011-15 consultation document have been equality screened. For example, we were not able to find screening forms relating to procurement, teacher substitution and registration costs, primary principal transfer interviews and Access NI costs. Each of these could potentially have equality impacts, and we would recommend that screening exercises are undertaken.

Further, it is surprising that DE did not find any negative impacts on any equality groups within those screening forms completed. Given the extent of the spending cuts, one would expect that several equality groups may be affected. The issues listed above suggest that the screening forms have not in fact been completed correctly. As such, it is likely that some negative equality impacts may be caused by DE's draft budget 2011-15 spending and saving proposals. This being the case, we would expect a

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<sup>2</sup> R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062, at paras 24 and 25.

full equality impact assessment ('EQIA') to be carried out and consulted upon before the draft budget 2011-15 is finalised.

### Incorrect timing of s75 equality impact assessment

DE's budget 2011-15 consultation document states that '*[i]ndividual proposals will be subject to Equality Impact screening and, where necessary, full Impact Assessments will be undertaken as they are further developed and implemented*' (at page 27). This statement is misleading, as some equality screening exercises had already been carried out. When more thorough screening is carried out we expect that several policies will require an EQIA, given the extent of cuts suffered. At the very least, it is incumbent on DE to mitigate adverse impacts and consider any alternative policies that might better achieve the promotion of equality of opportunity (para 9(1) Schedule 9 Northern Ireland Act 1998).

Further, even if a more thorough impact assessment is carried out, this would be too late to inform the current consultation process. In this regard, the various proposals included in the budget inter-relate, given the need to balance the books. As such, each proposal cannot be considered in isolation, particularly after the draft budget has been approved. At that stage, changes to existing proposals would have an impact on those spending and/or savings plans that have already been implemented, and so cannot be changed. We understand that this would inhibit DE's ability to amend its proposals later in the budget process.

As we have stated in our previous correspondence, caselaw in GB<sup>3</sup> has underlined the need for advance consideration of the promotion of equality of opportunity<sup>4</sup>, as opposed to 'rearguard action'.<sup>5</sup> The courts have warned that '*it is unlawful to adopt a policy contingent on an assessment*,<sup>6</sup> and that such an equality impact assessment would amount to '*policy-based evidence rather than evidence-based policy*.'<sup>7</sup> As such, it is essential for DE to assess equality impacts, as required by s75, before the draft budget is approved.

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<sup>3</sup> In relation to s71 Race Relations Act 1976, which requires public authorities to have due regard for the need to promote the equality of opportunity in relation to race.

<sup>4</sup> R (Elias) v Secretary of State for Defence [2006] WLR 321, [2006] EWCA Civ 1293.

<sup>5</sup> R (BAPI and Another) v Sec of State for the Home Department and for Health, supra.

<sup>6</sup> R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062, at para 36.

<sup>7</sup> Ibid, at para 37.

Also, at 4.2.4 of DE's equality scheme, it states that '*[w]henver a Preliminary Section 75 Assessment indicates that an option for change is likely to impact on equality of opportunity or on good relations, then before any such option is adopted by the Minister or by the Department, the Department will estimate the likely impact on equality of opportunity or good relations using available relevant information and commissioning research if appropriate.*'

We remind you that the purpose of the s75 duty is to consider the impact of proposals on vulnerable people. In a time of recession, people who are already disadvantaged should be given every consideration and there is a duty on officials to mitigate any adverse impact. This correspondence is not merely for the purpose of administrative argument. It is to focus on the process of making crucial decisions over spending for the next four years; decisions which will impact on people who already live in difficult circumstances.

The importance of these impacts is also reflected in international human rights treaties.<sup>8</sup> Indeed the UN Independent Expert on human rights and extreme poverty stated last month that *[h]uman rights are not dispensable and cannot be disregarded in times of economic uncertainty.. before designing and implementing any policy measures aimed at the recovery, policy makers must assess the impact of the measures on the most vulnerable groups of society, assess the appropriateness of the measures, and examine alternative policy options that would protect vulnerable sectors of society as a matter of priority.*<sup>9</sup>

### Insufficient information

Despite having filled out over 700 pages of screening forms, DE's main consultation document contained insufficient information to comment on its draft budget 2011-15, as the potential equality impacts are unclear. In order to engage in meaningful consultation, consultees must be provided with sufficient information to understand, scrutinise and comment on the policies

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<sup>8</sup> Such as the International Covenant on Economic, Social and Cultural Rights, ratified by the UK in 1976.

<sup>9</sup> Statement of Magdalena Sepúlveda, UN Independent Expert on human rights and extreme poverty, following a recent mission to Ireland. Full text can be found at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10658&LangID=E>.

proposed. In the BERR Code of Practice on Consultation,<sup>10</sup> *Criterion 3* (entitled *Clarity of scope and impact*) states that '[c]onsultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals'.<sup>11</sup>

The above is referred to in the Equality Commission for Northern Ireland's ('ECNI') Guidance on s75 which recommends '*that information is made available to ensure meaningful consultation, including detailed information on the policy proposal being consulted upon and any relevant quantitative and qualitative data.*'<sup>12</sup> Also, in common law, the need for sufficient information in any consultation process is set out in the "Sedley Requirements"<sup>13</sup>, which state that:

- i. it must be undertaken when proposals are still at a formative stage;
- ii. it must give sufficient reasons to permit the consultee to make a meaningful response;
- iii. it must allow adequate time for consideration; and
- iv. the results of the consultation must be conscientiously taken into account in finalising any proposals.

We believe that these minimum requirements for meaningful consultation have not been filled in DE's public consultation document for its draft budget 2011-15. The consultation document only refers to '*largely neutral*' impacts for both savings and spending proposals. There is no indication of which proposals may not have had a neutral impact, what impacts may be involved, their extent, or which evidence was relied upon.

We recommend that DE includes in the main consultation document, either a summary of impacts found and evidence used, or reference to the underlying screening forms and the best way to access them. This would help ensure that the public has sufficient information to respond to DE's budget consultation in a meaningful way.

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<sup>10</sup> Department for Business, Enterprise and Regulatory Reform, July 2008, found at <http://www.berr.gov.uk/files/file47158.pdf>.

<sup>11</sup> *Ibid* at page 9.

<sup>12</sup> Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities, April 2010, at page 39, found at <http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>.

<sup>13</sup> *R v London Borough of Barnet, ex parte B* [1994] ELR 357, 372G

Given the points above, we request that DE review the way in which its s75 screening has been carried out and make the documents more easily available to the public. Where the screening suggests the need for a full EQIA, DE should consult upon this EQIA before the budget 2011-15 is finalised.

We also request than any future consultation run for at least the 12 week period recommended in OFMDFM,<sup>14</sup> BERR<sup>15</sup> and ECNI<sup>16</sup> Guidance.

We look forward to hearing from you.

Yours sincerely



Mike Ritchie

Director

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<sup>14</sup> OFMDFM (2003) "A practical guide to policy making in Northern Ireland", at section 8.5, found at: <http://www.ofmdfmi.gov.uk/practical-guide-policy-making.pdf>.

<sup>15</sup> Department for Business, Enterprise and Regulatory Reform, July 2008, *supra*. Criterion 2 states that '*Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.*'

<sup>16</sup> Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities, April 2010, *supra*. At page 38, it states '*[w]e recommend that the consultation period lasts for a minimum of twelve weeks.*'