

CAJ's submission no. S308

CAJ's submission to Department of Trade, Enterprise and Industry's Consultation on its draft Equality Scheme

April 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 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, Joseph Rowntree Charitable Trust and the Oak Foundation.

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

**Submission to the Department of
Trade, Enterprise and Industry's
Consultation on its draft Equality Scheme**

**Committee on the Administration of Justice
April 2011**

The Committee on the Administration of Justice ('CAJ') is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its obligations in international human rights law. CAJ is co-convenor of the Equality Coalition. We welcome the opportunity to comment on the Department of Trade Enterprise and Industry's ('DETI') consultation on its new equality scheme.

CAJ acknowledges DETI's efforts in producing a comprehensive equality scheme and in beginning the consultation period in good time to allow for Equality Commission ('ECNI') approval before the 1 May 2011 deadline. We have also had the advantage of speaking with DETI representatives at an Equality Coalition event, and discussing some issues arising in relation to the draft equality scheme. We are encouraged to see that DETI has, on the whole, adopted the ECNI model scheme¹ and also expanded upon it slightly. However, we would like to challenge a few instances where DETI diverged from the ECNI model scheme, and also suggest a few additions, which would strengthen the DETI equality scheme.

Complaints Procedure

We note, with concern, that DETI has added a major qualification to the ECNI recommendations with which it will comply post-investigation. In the ECNI model scheme, para 8.8 states that the relevant public authority will 'will make

¹ ECNI model equality scheme, found at http://www.equalityni.org/sections/default.asp?secid=8&cms=Publications_Statutory+duty&cm sid=7_43&id=43.

all efforts to implement promptly and in full any recommendations arising out of any Commission investigation.² By contrast, in the DETI draft equality scheme, this is limited to ‘giving ‘full consideration’ to any such recommendations (at para 8.10).

We strongly believe that this limitation is both inappropriate and unnecessary. Schedule 9 Northern Ireland Act 1998 charges the ECNI with making recommendations on the correct application of s75 Northern Ireland Act 1998 (‘s75’). It would be wholly inappropriate for a public authority to usurp the ECNI’s role, by adopting a veto to these recommendations. This incursion into the ECNI’s powers is also unnecessary, as the para 8.8 obligation to comply with ECNI recommendations is already qualified by the term ‘make all efforts’. We therefore request that the DETI draft equality scheme, at para 8.10, is amended to reflect the ECNI model scheme.

Publication of screening forms

CAJ is concerned that DETI has changed the time period for the publication of its screening reports to once every six months, instead of one every three months, as set out in the ECNI model scheme (see para 4.21). As civil society will no longer be formally consulted upon DETI’s screening exercises, it is essential that stakeholders are informed on a regular basis of screenings carried out. Given that, as it stands, consultees would only be informed once every six months, policies for which no or minor impact was found may proceed to implementation before civil society is aware of its existence.

It would be helpful for consultees to be informed when screening forms are posted on the DETI website. We are concerned that, if screening reports are sent to consultees on a six monthly, or even quarterly basis, it is possible that civil society may not be aware of a specific policy’s screening for a long period of time. By this time, the policy may be implemented or further developed, so that alternative measures would be more difficult to apply. It would therefore be important for civil society to be informed sooner of policies for which ‘no’ or ‘minor’ impact was found, but for which they may have specialist knowledge of otherwise unforeseen equality impacts.

² Ibid, at para 8.8.

We appreciate that DETI will make the screening forms available on its website and on request (para 4.25). However, given that there are over 200 designated public authorities in Northern Ireland, it is impossible to review each of those websites daily, or even weekly, to check if screening forms have been posted. We would therefore recommend that DETI include a statement, at para 4.25, that consultees will be informed of screening forms when they are completed or posted on its website.

Consultation arrangements

DETI's draft equality scheme diverges from the ECNI model scheme in relation to consultation in two seemingly small ways. However, these small changes could affect the application of s75 in practice.

First, DETI has changed the time period for consultation from 'a minimum of twelve weeks' (ECNI model scheme, para 3.2.6) to one that 'normally lasts for twelve weeks' (DETI draft equality scheme, para 3.2.7). It is not clear why this change was inserted, as both the ECNI model scheme, and the DETI draft equality scheme, allow for exceptions when the 12 month period is not possible. Also, the 12 month minimum consultation period is consistent with OFMDFM³ and BERR⁴ Guidance, as well as the ECNI Guide on s75.⁵ We therefore suggest that DETI change the language relating to consultation time periods to that used in the ECNI model guide.

Secondly, DETI has included the words 'such as' within the list of those whose views will be sought in consultation. It states '[a]ll consultations will seek the views of those directly affected by the matter/policy, *such as* the Equality Commission, representative groups of Section 75 categories, other public authorities, voluntary and community groups, our staff and their trades unions and such other groups who have a legitimate interest in the matter'⁶ (our emphasis). The addition of 'such as' limits the list above to being alternative, rather than cumulative. We therefore recommend that it is removed.

³ 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>.

⁴ Department for Business, Enterprise and Regulatory Reform, July 2008, *supra*. Criterion 2 states that '[c]onsultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.'

⁵ 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'.

⁶ *Ibid*, at para 3.2.1.

Consideration of data

We note, with disappointment, that DETI made two small changes to the ECNI model scheme in relation to monitoring and addressing gaps in data. We believe that this limits DETI action in relation to s75.

First, DETI has reduced the action that it will take in response to gaps in data, which would limit the effectiveness of s75. At para 4.31, DETI only intends to ‘consider action to address any gaps’, compared to the ECNI model scheme, which sets out that a public authority shall ‘take action to address any gaps’ (at para 4.29). The use of data is critical to the effective operation of s75, as it allows staff to become aware of policy impacts on s75 groups, which may not otherwise be expected or known about. We therefore recommend that DETI strengthen its approach to addressing gaps in data.

Further, we would like to remind DETI that, in addition to the s75 action-based plan, s75 continues to apply to all DETI policies in relation to all nine equality groups. Although we recognise the positive impacts that the action-based plan could have on addressing inequalities, we are also aware that it could have a limiting influence on the operation of s75 outside the specific priorities identified within it. Also, newly emerging inequalities may not be captured in the original audit of inequalities. We therefore hope that any data gaps identified in the audit of inequalities will be addressed, and that the audit will provide a useful tool for policy-makers when applying s75 beyond the scope of the action-based plan.

Secondly, where monitoring has found that a policy results in greater adverse impact than expected, DETI has qualified the action that it would be prepared to take. In the ECNI model scheme, public authorities should ‘revise’ the policy to achieve better outcomes for relevant equality groups (para 4.30). By contrast, the DETI draft equality scheme only commits to ‘revisiting’ the policy (see para 4.32). We appreciate that the language may have been tempered to allow for those situations where it is not easy to change the policy, but we believe that the excellent procedures to identify and monitor equality impacts would be almost redundant if DETI were not to put the information found into practice. It would seem counter-intuitive to discover adverse impacts and yet not alter policy to lessen this effect. We therefore recommend that DETI

change the language at para 4.31 of its draft equality scheme from 'revisit' to 'revise'.

Staff understanding of s75

DETI has removed several references to staff training in the equality scheme, in the foreword and throughout section five.⁷ Although we welcome the alignment of DETI's training programme with CAL, we are concerned that the change of language from 'training' to 'awareness' (see para 5.2), and the removal of references to a detailed training plan (para 5.3) and focused training for key staff (para 5.4) may diminish the extent to which training is provided.

Training is a key requirement for s75, under para 2(e) Schedule 9 Northern Ireland Act 1998. It is also essential to ensuring a full understanding of the objectives and operation of s75, which would make the statutory duty more effective and also, in the long run, more efficient in terms of resources. We would therefore recommend that DETI review section five of its draft equality scheme and restore the ECNI model scheme content.

CAJ also recommends that DETI include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the DETI equality scheme does not explain the relationship between the equality duty (s75(1)) and the good relations duty (s75(2)). The ECNI Guide for Public Authorities⁸ ('the ECNI Guide') clearly states that 'good relations cannot be based on inequality' and confirms that 'the term due regard was intended to be, and is, stronger than regard'.⁹ It also clarifies that 'the discharge of the good relations duty cannot be an alternative to or cannot set aside the equality of opportunity duty'.¹⁰

As the DETI equality scheme will be used as a point of reference for its staff's application of s75 and any training provided, it is crucial that the equality scheme itself contains clear statements on the relationship and difference between the two s75 duties. Similarly, the ECNI Guide provides useful

⁷ See para 5.2, 5.3, 5.5 and 5.6 of ECNI Model Scheme, *supra*.

⁸ Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities, ECNI, April 2010, found at

<http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>.

⁹ *Ibid* at page 26.

¹⁰ *Ibid*, at page 27.

statements on positive action and multiple identities. We believe that the inclusion of these statements, or similar, would help staff to understand s75. For example, it is a common misunderstanding that ‘universal application’ implies a neutral impact on equality groups, when it can, of course, exacerbate inequalities.

The useful passages in the ECNI Guide are as follows: ‘The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities. There is no conflict between the Section 75 statutory duties and other affirmative action measures or positive action measures which a public authority may undertake under anti-discrimination laws.’¹¹

If you would like any further information, please do not hesitate to contact CAJ at the details listed below.

¹¹ Ibid, at page 25. At the same page, the ECNI Guide also states: ‘Individuals do not neatly fit into one Section 75 category or another, individuals will invariably be members of a number of Section 75 categories. Thus Section 75 enables multiple identity issues to be considered as well as issues regarding particular categories of people.’