

CAJ's submission no. S311

CAJ's submission to the Department of Finance and Personnel'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 Finance and Personnel's Consultation on its draft Equality Scheme

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 Finance and Personnel's ('DFP') consultation on its new equality scheme.

CAJ acknowledges DFP's efforts in producing a comprehensive equality scheme. We have also had the advantage of speaking with a DFP representative at an Equality Coalition event, and discussing some issues arising in relation to the draft equality scheme. We are encouraged to see that DFP 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 DFP diverged from the ECNI model scheme, and also suggest a few additions, which would strengthen the DFP equality scheme.

Consultation arrangements

We would like to point out some concerns relating to consultation, both on the draft equality scheme itself and, separately, arrangements for future consultations within the draft equality scheme.

In relation to the consultation for the draft equality scheme itself, the consultation period was too short to allow for full consideration by civil society. Given that the draft equality scheme was published on 17 February 2011, stakeholders have had less than two months to respond. This is clearly well below the three month minimum recommended in the OFMDFM,² BERR³ and ECNI⁴ Guidance.

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

² 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>.

It is also difficult to find the consultation on DFP's website, as it is not included within the consultation zone.⁵ Furthermore, the closing date of the consultation period is not listed on the DFP website, and is listed as 'Monday 10 April 2011' on letters to consultees. We have understood the actual closing date to be Monday 11 April 2011, as 10 April 2011 is a Sunday.

In relation to the arrangements for future consultations, we note that DFP's draft equality scheme diverges from the ECNI model scheme in relation to consultation, which could affect the application of s75 in practice. We consider these changes below, and also make one suggested addition, beyond the ECNI model scheme.

First, DFP 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' (DFP draft equality scheme, para 3.2.7). It is not clear why this change was inserted, as both the ECNI model scheme, and the DFP draft equality scheme, allow for exceptions when the 12 week period is not possible. Also, the 12 week minimum consultation period is consistent with OFMDFM⁶ and BERR⁷ Guidance, as well as the ECNI Guide on s75.⁸ We therefore suggest that DFP change the language relating to consultation time periods to that used in the ECNI model guide.

Secondly, DFP 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

³ 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.'

⁴ 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'.

⁵ See <http://www.dfpni.gov.uk/index/about-dfp/consultation-zone.htm>.

⁶ 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>.

⁷ 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.'

⁸ 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'.

authorities, voluntary and community groups, our staff and their trades unions and such other groups who have a legitimate interest in the matter⁹ (our emphasis). The addition of 'such as' limits the list above to being alternative, rather than cumulative. We therefore recommend that it is removed. Please also add CAJ to the list of consultees at Appendix 3.

Thirdly, it is not clear why DFP has removed the detailed suggestions for methods of consultation and awareness raising, as listed in the ECNI model scheme (at paras 3.2.2 and 3.2.5 respectively). We recommend that the ECNI model scheme be used as a minimum threshold for the DFP draft equality scheme, and that content not be removed without good reason. Otherwise, the DFP equality scheme will be less robust in practice and questions may arise as to whether DFP is taking its equality duties seriously.

Fourthly, we note that DFP has failed to include certain aspects of the ECNI model scheme in relation to accessibility (see ECNI model scheme paras 6.1, 6.8 and 6.9). We believe that this could limit public access to DFP information and services. This is particularly important in relation to people with disabilities and younger and older people. These categories are all listed within s75 Northern Ireland Act 1998 ('s75'), and DFP must consider their equality of opportunity in relation to access. In this regard, the DFP equality scheme should be an example of best practice, and so we recommend that DFP reinstate the relevant paragraphs from the ECNI model scheme, as a minimum.

Finally, we welcome DFP's publication and consultation on its draft audit of inequalities. This will help civil society inform DFP of any irregularities or omissions, and also provide a useful frame of reference for the draft action plan. We recommend that DFP commits to publish and consult on its audit of inequalities in the future, by explicitly adding the audit as a document for which DFP will seek input from its stakeholders and consult upon (at para 2.17 DFP draft equality scheme). Please note that, due to a lack of time and expertise, we have not reviewed the DFP audit of inequalities or draft action plan.

We would like to remind DFP that, in addition to the s75 action-based plan, s75 continues to apply to all DFP policies in relation to all nine equality

⁹ ECNI model scheme, at para 3.2.1.

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.

Publication of screening forms

CAJ is concerned that DFP has not included in its draft equality scheme any provisions allowing for consultees to be informed of the publication of screening forms, or the collation and publication of screening reports.

The ECNI model scheme allows for ‘screening reports’ to be published quarterly (see para 4.15). The DFP draft equality scheme, by contrast, does not include any reference to a ‘screening report’. Further, the ECNI model scheme allows for ‘screening reports (electronic link or hard copy on request if more suitable for recipients) which include all policies screened over a 3 month period [to be] also sent directly to all consultees on a quarterly basis’ (at para 4.25). The DFP draft equality scheme does not allow for consultees to be directly informed at any time of any screening exercises that have taken place.

We appreciate that DFP will make the screening forms available on its website and on request (para 4.13). 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. It is possible that civil society may not be aware of a specific policy’s screening until the policy is implemented or further developed, so that alternative measures would be more difficult to apply.

It will 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. We therefore recommend that DFP include a statement, at para 4.13, that consultees will be informed of screening forms when they are completed or posted on its

website. In addition, we recommend that reference to 'screening reports' is included within the DFP equality scheme, for ease of reference.

Complaints Procedure

We note, with concern, that DFP 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 all efforts to implement promptly and in full any recommendations arising out of any Commission investigation.' By contrast, in the DFP draft equality scheme, this is limited to giving 'full consideration' to any such recommendations (at para 8.8).

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. 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 DFP draft equality scheme, at para 8.8, is amended to reflect the ECNI model scheme.

Furthermore, we are concerned that DFP has removed the commitment to keep a complainant fully informed of progress and any outcome of investigations (see ECNI model scheme, para 8.6). The transparency and accountability of DFP's complaints investigation could be seriously undermined by this omission. Public confidence in DFP's action, in relation to the equality duties and its complaints procedures, would be increased by including the text of para 8.6 ECNI model scheme in its draft equality scheme and implementing it fully. We recommend that DFP make this amendment.

Staff understanding of s75

CAJ also recommends that DFP include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the DFP 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 Authorities¹⁰ (‘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’.¹¹ 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.’¹²

As the DFP 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 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.’¹³

¹⁰ 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>.

¹¹ Ibid at page 26.

¹² Ibid, at page 27.

¹³ 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

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

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Section 75 categories. Thus Section 75 enables multiple identity issues to be considered as well as issues regarding particular categories of people.’