

CAJ's submission no. S361

CAJ's submission to the Northern Ireland Law Commission's consultation on the draft Equality Scheme

October 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 Northern Ireland Law Commission's Consultation on the draft Equality Scheme

**Committee on the Administration of Justice
October 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 Northern Ireland Law Commission's ('NILC') consultation on its draft equality scheme.

CAJ acknowledges NILC's efforts in producing a comprehensive draft equality scheme and we have had the opportunity to meet with NILC representatives at the Equality Coalition event on 28 October 2011. We were encouraged to see that NILC has adopted the ECNI model scheme as a basis for its draft equality scheme, and expanded on it in parts. In this brief submission, we will query a few divergences from the ECNI Model scheme and suggest a few additions which we believe would strengthen the NILC equality scheme.

Definition of Policies

We note that NILC has not included in its draft equality scheme the expansive interpretation afforded to the term 'policies', as used at para 4.1 ECNI model scheme. The latter states that '[i]n the context of Section 75, 'policy' is very broadly defined and it covers all the ways in which we carry out or propose to carry out our functions in relation to Northern Ireland. In respect of the NILC equality scheme, the term policy is used for any (proposed/amended/existing) strategy, policy initiative or practice and/or decision, whether written or unwritten and irrespective of the label given to it, eg, 'draft', 'pilot', 'high level' or 'sectoral'.'

We acknowledge that NILC has included, at para 4.2 NILC draft scheme, that '[t]he definition of a 'policy' under the Equality Commission's Guide to the Statutory Duties has a wide remit and includes policies relating to all functions and activities, including internal policies.' However, most of the remainder of the equality scheme largely refers to 'law reform proposals', rather than policies. In so doing, the NILC has limited the practical application of s75 Northern Ireland Act 1998 ('s75') to law reform policies.

As noted at para 1.1 NILC draft scheme, s75 applies to a designated public authority's functions in Northern Ireland, and "[f]unctions" include the "powers and duties" of a public authority. This includes our employment and procurement functions.' Therefore, it important to include, in the NILC equality scheme, policies and functions outside of law reform proposals, such as employment, procurement and research priorities, in relation to screening, equality impact assessments, monitoring and other methods of applying s75. We recommend that NILC include the full definition of policy, found at para 4.1 ECNI model scheme, and also change the references throughout its equality scheme from 'law reform proposals' to 'policies'.

Screening of Policies

In relation to the publication of screening, it is not clear how often NILC intends to publish its screening reports. At para 4.12 of its draft scheme, NILC states that its 'screening reports will be published quarterly [see below at 4.17-4.19 and 4.20 for details].' However, at para 4.17 NILC draft scheme, it states that '[s]creening reports will be published annually' and that '[s]creening reports detail: All policies screened by the Northern Ireland Law Commission over the 12 month period.' We recommend that the same time period be used throughout the document in order to avoid confusion.

Further, it would be helpful for consultees to be informed when screening forms are posted on the NILC website. We are concerned that, if screening reports are only sent to consultees quarterly, or especially annually, it is likely that civil society would not be aware of a specific policy's screening for a long period of time. The policy may be implemented or further developed by the time civil society is aware of its screening, by which time their input would be difficult to act upon and alternative measures may be more difficult to apply.

It is therefore important for civil society to be informed as soon as possible of policies for which ‘no’ or ‘minor’ impact was found, but for which they may have specialist knowledge of otherwise unforeseen equality impacts. We note that NILC does commit to publish the screening templates on its website ‘[a]s soon as possible following the completion of the screening process’ (see para 4.10 NILC draft scheme). 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 NILC include a statement that consultees will be informed of screening forms when they are completed or posted on its website.

In relation to the effects of screening, we note that the NILC draft equality scheme does not include the important commitment that subsequent policy decisions will take into account the outcomes of the assessment of equality impacts, and any associated consultation. NILC has not included in its draft scheme either para 3.2.10 ECNI model scheme (‘[i]n making any decision with respect to a policy adopted or proposed to be adopted, we take into account any assessment and consultation carried out in relation to the policy’) or para 4.2 ECNI model scheme (‘[i]n making any decision with respect to a policy adopted or proposed to be adopted, we take into account any assessment and consultation carried out in relation to the policy, as required by Schedule 9 para 9(2) of the Northern Ireland Act 1998’).

Although this action might seem implicit, the inclusion of the relevant passage confirms that any screening, equality impact or consultation exercise will affect the process of policy development. It is also a statutory requirement, further to para 9(2) Schedule 9 Northern Ireland Act 1998. We therefore request that NILC include the relevant passage in its equality scheme.

Furthermore, it is not clear why NILC has not included the references to the ECNI Guide for Public Authorities on s75¹ (‘the ECNI Guide’) and ECNI guidance on equality impact assessments (‘EQIA’).² Given the need for NILC’s equality scheme to comply with the ECNI Guide, as to form and content (para 4(3)(a) Schedule 9 Northern Ireland Act 1998), and given that

¹ 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>.

² *Practical guidance on equality impact assessment (February 2005)*

NILC has not included the detailed procedure on EQIAs in its equality scheme, we recommend that it includes the relevant passage from para 4.2 ECNI model scheme.

The relevant passage, at para 4.2 ECNI Model Scheme, states that [NILC] ‘uses the tools of screening and equality impact assessment to assess the likely impact of a policy on the promotion of equality of opportunity and good relations. In carrying out these assessments we will relate them to the intended outcomes of the policy in question and will also follow Equality Commission guidance:

- the guidance on screening, including the screening template, as detailed in the Commission’s guidance *Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities (April 2010)* and
- on undertaking an equality impact assessment as detailed in the Commission’s guidance *Practical guidance on equality impact assessment (February 2005)*.’

Monitoring of Data

We note that NILC has not included the detailed paragraphs from the ECNI model scheme in relation to monitoring the impact of its policies (see paras 4.28 – 4.31 inclusive ECNI model scheme). Although we recognise that NILC does not implement its law reform proposals, it does still implement other policies, be they internal services or research priorities. As a result, the procedures for the monitoring of impacts are still relevant to NILC, and we recommend that the relevant passages are included in its equality scheme. Such monitoring will also help to inform NILC’s audit of inequalities.

We welcome that NILC has published and is consulting upon its audit of inequalities and action plan. In addition, we recommend that NILC commits to publish and consult on its audit of inequalities in the future, by explicitly adding it as a document for which NILC will seek input from its stakeholders (currently only the draft action plan is referred, at para 2.14 NILC draft equality scheme). Please note that, due to a lack of resources, we have not reviewed the NILC draft audit of inequalities and action plan.

We would like to remind NILC that, in addition to the s75 action-based plan, s75 continues to apply to all NILC 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.

Staff understanding of s75

Finally, CAJ recommends that NILC include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the NILC equality scheme does not explain the relationship between the equality duty (s75(1)) and the good relations duty (s75(2)). 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’.³ 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’.⁴

As the NILC 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

³ Ibid at page 26.

⁴ Ibid, at page 27.

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.’⁵

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⁵ 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.’