

## **CAJ's submission no. S373**

### **CAJ's Submission to Access to Justice Review Northern Ireland**

**January 2012**

### ***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.

## **Submission to the consultation on Access to Justice Review Northern Ireland Report, January, 2012**

### **Committee on the Administration of Justice ('CAJ')**

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 welcomes the opportunity to respond to the present consultation.

The Access to Justice Review ('the Review') was set up by the Minister for Justice, David Ford MLA, in September 2010. The terms of reference for the Review included the objective of reviewing the provision of both criminal and civil legal aid within Northern Ireland. The review published a Discussion Paper in November 2010 and CAJ made a submission on foot of this in February 2011.<sup>1</sup> The Final Report of the Review was published in September 2011 and its findings and recommendations were opened to public consultation. These are extensive and this submission intends to focus on those findings and recommendations that CAJ considers most relevant to the issues raised in our initial submission to the Review.

#### **Summary:**

- The Review draws attention to the continuing problem of delay within the criminal justice system;
- It raises the prospect of decision-making in relation to the assignment of legal aid in the Magistrates Court being divided between the Legal Services Commission (LSC) and the judiciary. It also suggests that the legal aid delivery arm of the LSC become an executive agency within the Department of Justice (DoJ);
- The Review recommends the retention of the option of trial by jury for defendants accused of offences carrying a maximum sentence of more than six months imprisonment;
- It recommends that the Law Society should assist the LSC in drawing up duty rotas of suitably experienced solicitors across Northern Ireland willing to provide police station advice;

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<sup>1</sup> S279 'CAJ's Submission to the Access to Justice Review, February 2011'

- The Review makes a number of recommendations in relation to diversionary methods and discusses the use of Alternative Dispute Resolution (ADR);
- It comments on the use of legal aid in administrative law matters. The Review recommends that in relation to inquests there should be explicit recognition of a presumption that where issues under Article 2 of the European Convention of Human Rights (ECHR) are at stake, the immediate family of the deceased receive legal aid to support legal representation at the Coroners Court;
- CAJ provides comments on the detail of the above recommendations as well as drawing attention to concerns in relation to consideration of the equality duty in this process.

### **Delay in the civil and criminal justice systems:**

The Review draws to the Minister's attention the continuing concerns about delay in the civil and criminal justice systems (p.20). The Review also states that those responsible for developing policy on access to justice and for delivering legal aid services should be committed to supporting the efficient workings of the justice system and in particular to minimising delay (p. 19). However, the Review is clear that it does not wish to give the issue of delay in depth treatment. CAJ welcomes the Review's acknowledgement of the seriousness of delay as an issue within the justice system and that concerns regarding delay are ongoing. The recent reports of the Youth Justice Review<sup>2</sup> and the Prison Review Team<sup>3</sup> have also highlighted the issue of delay within the criminal justice system. The Criminal Justice Inspection has previously noted the negative impact of avoidable delay on victims and witnesses, defendants (particularly those remanded in custody) and youths.<sup>4</sup> CAJ hopes that these repeated and continued references to the problems of delay help to keep the issue in focus for all bodies connected to the criminal justice system. However, we believe the Review could have gone beyond merely highlighting delay as a problem and instead could have made recommendations geared more towards reducing delay, as the both the recent reports of the Youth Justice Review and Prison Review Team have done.<sup>5</sup>

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<sup>2</sup> 'A Review of the Youth Justice System in Northern Ireland' September, 2011

<sup>3</sup> 'Review of the Northern Ireland Prison Service: Conditions, Management and Oversight of all Prisons' Prison Review Team, Final Report, October 2011

<sup>4</sup> 'Avoidable Delay' Criminal Justice Inspection, June 2010

<sup>5</sup> The Youth Justice Review recommends a statutory time limit of 120 days from arrest to sentence/disposal for all youth justice cases. The Prison Review Team has recommended legislation to impose statutory time limits between arrest and disposal, beginning with cases in the Youth Court, before moving to Magistrates Court and Crown Court cases.

### **Responsibility for determining criminal legal aid applications:**

CAJ previously advocated in our initial submission to the Review that there was merit in having decisions in relation to criminal legal aid being made by an independent body. It is disappointing that the Review Team do not feel that an adequate case has been made for change at this time in relation to the test of whether legal aid should be assigned in the interests of justice (p. 29-30). However, CAJ welcomes the recommendation for research to be carried out in relation to the assignment of criminal legal aid. We hope that this research will consider the issues of transparency and accountability that we identified as being key to the decision-making process relating to legal aid in our initial submission.

CAJ note that the Review suggests (p. 6) that upon implementation of the provision providing for a fixed means test within the Justice Act 2011 that responsibility for the financial assessment of applicants pass to the Legal Services Commission (LSC). CAJ would welcome further clarification on this suggestion. It appears to raise the prospect of the application for legal aid being divided between the judiciary and the LSC, with the LSC making decisions in relation to financial eligibility and the judiciary deciding whether legal aid is required in the interests of justice. The Review suggests that procedures will need to be developed to ensure the efficient dispatch of court business in such circumstances. CAJ would agree, as there is the potential that by dividing responsibility for making decisions in relation to legal aid (if this is what is intended), delay within the criminal justice system could be increased.

In relation to the LSC, we note that the Review affirms that individual decisions on legal aid must be made independently of government or of any sectional interest (p. 124). CAJ also notes that it is proposed that the legal aid delivery arm of the LSC become part of an executive agency within the Department of Justice (p. 126 – 127). Whilst we acknowledge that consideration has been given to maintaining the independence of the decision-making process (through recommendations that the Minister for Justice, political institutions, or staff at the core of the DoJ have no involvement in the decision-making process, and that a small advisory board be established to provide assurances on the independence of the process), CAJ is concerned that such arrangements have the potential to create the perception of departmental, political or ministerial involvement. We would urge that this recommendation be given serious consideration from this perspective. Whilst the goals of fostering closer working relationships and maximising efficiencies that are identified in the Review are to be encouraged, CAJ would question whether bringing the legal aid decision making process closer to the DoJ is the most appropriate way to achieve this.

### **Retention of the option to elect for trial by jury in the Crown Court:**

CAJ welcomes the support shown by the Review to retain the option of trial by jury for those defendants accused of offences carrying a maximum sentence of more than six months imprisonment (p. 39). We agree that using a small number of highly publicized cases to justify a more restrictive approach in this area is not appropriate. The Review identifies that accusations in relation to such offences can be extremely important to defendants and that a conviction may effect reputation, employability and the trust of friends and neighbours. That confidence and trust in the justice system on the part of defendants is likely to be enhanced by having the right to elect for trial by jury is also noted by the Review.

However, CAJ is concerned that the Review undermines its position on this issue by going on to identify several possible courses of action (without making recommendations) in the event that concerns remain. The first course of action would be to reduce the level of remuneration (perhaps to the level of a magistrate's court contested case fee) available in cases where the defendant elects for trial by jury, on the grounds that if the District Judge and prosecution would be content for a trial at the Magistrates Court, it is likely that the case is less complex than the generality of matters tried at the Crown Court. Firstly, as the Review acknowledges, the potentially low value of money or goods does not necessarily reflect the complexity of the case. Secondly, the possibility of allowing the prosecution and the court the opportunity to lower the remuneration offered to the defendant's legal representatives if the defence do not agree with their assessment of the seriousness of the case, could effect the quality and availability of legal representation for the Crown Court proceedings. Crown Court trials can be longer than summary trials in the Magistrates Court and legal representatives may not accept instructions in cases where they will not be paid at the normal Crown Court rate, but may have to attend the trial for longer than they would have to in the Magistrates Court.

The second course of action suggested is to curtail the right to trial by jury depending upon the value of the goods or money in a theft case, or the value of damage in a criminal damage case. This option does not seem to consider what the Review previously acknowledges, which is that the value of goods or money does not necessarily reflect the complexity of the case. The final course of action suggested is that the availability of alternatives to prosecution for first time minor offenders could reduce the instances of election for trial. However, this course of action seems to overlook the fact acknowledged later in the Review that alternatives to prosecution require an admission of guilt on the part of the defendant before they are made available. A defendant electing for trial in the Crown Court would presumably be doing so as they are pleading not guilty to the charges against them.

### **Police Station advice:**

CAJ welcomes the acknowledgement within the Review that access to independent legal advice before being questioned by the police is a necessary component of the right to a fair trial under Article 6 of the ECHR and that legal aid should remain available to allow persons detained in police custody to be advised by a solicitor of their choice (p. 40). We note the recommendation that the Law Society should assist the LSC in drawing up duty rotas of suitably experienced solicitors across Northern Ireland willing to provide police station advice and that arrangements should be made to ensure availability at all times. As CAJ noted in its initial submission to the Review, the reason why the LSC only provided such information previously for those who required advice or assistance in Belfast is not clear. We would therefore emphasise the importance of ensuring that such rotas are made available across Northern Ireland.

### **Diversionsary measures:**

CAJ welcomed the examination of alternative approaches and structures as part of the terms of reference of the Review in our initial submission. CAJ has consistently advocated the use of non-custodial disposals where appropriate. We agree with the Review that consistency in approach and in ensuring that offenders are properly advised about the implications of what they are being offered in relation to diversionsary measures is vital (p. 43).

The Review discusses the possible use of fixed penalty notices and conditional cautions, introduced as part of the Justice Act 2011. It recommends that legal aid should enable the provision of advice to financially eligible people who may have been offered fixed penalty notices, conditional cautions or other diversionsary interventions, but should only be available to support legal representation at court if it would have been available in the event of the matter being prosecuted in the first place (p. 45). CAJ welcomes the recommendation that advice be available if these diversionsary measures are offered.

The Review also refers to the recommendation of the Criminal Justice Review that consideration be given to the introduction of prosecutorial fines in Northern Ireland along the lines of the Scottish model. If consideration is to be given to increasing the use of fines in Northern Ireland, CAJ would draw attention to our recent submission to the DoJ consultation on fine default<sup>6</sup> where we highlighted the potentially serious impact that imprisonment for fine default can have on individuals, some of who may be unable pay fines. It was noted by the DoJ in those proposals that increasing

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<sup>6</sup> CAJ's submission no. S368 CAJ's submission to the Department of Justice (Northern Ireland) on Fine Default in Northern Ireland: A consultation.

numbers of persons were being imprisoned as a result of fine default. CAJ would also draw attention to the comments made recently by the Prison Review Team on the issue of fine default, which highlighted the problems associated with the imprisonment of fine defaulters:

...the prison population in Northern Ireland is inflated because of the number of fine defaulters and remand prisoners it holds. Half the women committed to Hydebank Wood in the last year were sent there for fine default. This is simply unacceptable. It does nothing to address the needs of offenders or society, and makes prisons much more difficult to run, with significant resources needing to be devoted to the crucial early processes of committal and assessment. Nor does it do anything to deal with the actual problem of people who are either too poor to pay a fine, or who can avoid payment at the further public expense of a couple of days in prison.<sup>7</sup>

In our initial submission to the Review, CAJ stated that due to the cross-cutting nature of many of the issues involved, the Review Team should link with the Prison Review Team, in order that a holistic view of the justice system be taken. CAJ believes that a holistic view must also be taken going forward and so any proposals for measures such as prosecutorial fines must consider the wider impact they can have throughout the criminal justice system and on the person they are applied to.

In relation to children and young people, CAJ welcomes the acknowledgement within the Review of the importance of independent advice being available so that children are fully aware of and understand the implications of the diversionary or restorative process that they are being invited to embark upon and of the consequences if they fail to follow these successfully (p.45). In our initial submission, CAJ stressed that it is particularly important for young people to have access to such advice and information. We note the recommendation that the DoJ reviews the procedures for offering diversionary measures, including restorative youth conferencing, to children and young people to ensure that they have access to appropriate advice and are in a position to give informed consent to such measures, and the recommendation that legal advice to children and young people offered diversionary interventions should be available on the same basis as for adults.

#### **Free advice by recipients of funding for legal advice services:**

The Review suggests that all providers of legal advice, registered for legal aid purposes, should commit to provide a limited period of free and unfunded assistance to clients on a pro bono basis, for example by directing them to the right

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<sup>7</sup> 'Review of the Northern Ireland Prison Service: Conditions, Management and Oversight of all Prisons' Prison Review Team, Final Report, October, 2011, p. 29

place to secure more detailed assistance. The Review also concludes that instead of setting up advice lines or more community based law centres, the best course of action is to build on the network of solicitors and voluntary sector providers already present throughout Northern Ireland. In our initial submission to the Review, CAJ expressed concerns at the unfair burden that could be placed on the voluntary sector, without the provision of adequate funding. CAJ believe that this concern is still relevant to these proposals. We believe that the voluntary sector can only be built upon, particularly if they are being asked to provide unfunded advice on a pro bono basis, through the provision of adequate funding initially.

### **Alternative Dispute Resolution (ADR):**

The Review concludes that the availability of a menu of ADR mechanisms for use in differing types of legal dispute enhances access to justice and should be promoted by the DoJ and stakeholders in the justice system (p. 62). However, the Review also notes that ADR is not a panacea, should not be seen as a substitute for routine negotiation and does not replace the court as the ultimate means of resolving justiciable disputes. CAJ welcomes the commitment to promoting increased use of ADR with the acknowledgment that it cannot replace access to the courts.

We also welcome the Review's acknowledgement that ADR is best suited to those cases where there is a reasonable prospect of the parties being able to seek an agreed way forward and where they both consent willingly to go through the process. However, as we stated in our initial submission to the Review, ADR should not be used primarily as a way of reducing cost in the legal system and should be available as an alternative to, rather than a replacement for access to the courts.

The Review makes particular reference to the proposed use of ADR in relation to civil cases under the Protection from Harassment (Northern Ireland) Order 1997. The Review recommends that on a partnership basis, as part of the community safety strategy in Northern Ireland, the coverage of community based dispute resolution schemes and their funding arrangements should be mapped, and a funded plan developed to fill gaps. The Review states that proportionate mechanisms to secure quality control, training and accreditation of those providing mediation at the local level should be secured and referral mechanisms developed so that appropriate cases of neighbourhood dispute, anti-social behaviour or harassment are routed through such schemes for resolution. The Review advises that any grants of legal aid to pursue injunctions in relation to neighbour disputes should be conditional on genuine attempts at mediation having been made and on the case having merit. It states that where legal aid goes to the complainant, the objective should be to secure an enforceable court order, as opposed to negotiated settlement thus avoiding repeated court appearances (p. 69).

CAJ is supportive of the concept of using advice and mediation services to resolve such disputes, as we indicated in our initial submission to the Review. The recommendations regarding a funded plan, securing quality control and developing referral mechanisms would appear to fit within this goal. CAJ would have concerns however at the recommendations regarding the grant of legal aid and the objective being to secure an enforceable court order. If the grant of legal aid is to be conditional on genuine attempts to mediate the dispute being made, this will require transparent and fair criteria to be developed as to what constitutes a genuine attempt to mediate the dispute. CAJ also does not believe that the Review should try and direct the outcome of legal proceedings if they are eventually initiated. The risk of cases being re-opened exists in relation to enforceable orders as well as negotiated settlements, as in both instances the complainant may allege that the respondent has either breached the terms of the order or the agreement. Given that the Review states that ADR should not be seen as a substitute for routine negotiation, CAJ does not believe that dismissing the prospect of a negotiated settlement once legal proceedings have been initiated is appropriate.

#### **Administrative law and legal aid:**

CAJ welcomes the sentiment displayed in the Review that the ability to challenge allegations of serious wrongdoing on the part of public authorities or human rights abuses should remain in scope as a priority funding objective (p. 8 – 9). However in relation to administrative law, the Review lays emphasis on considering other forms of dispute resolution, such as the Prisoner Ombudsman. The Review notes the time taken to investigate complaints as being a reason why judicial review might be favoured as a way forward. The Review states that leave for judicial review must be sought within three months, meaning that a complainant may not wish to go down a route which can take considerably longer than that to negotiate; and, in a prison context there are issues such as compassionate home leave that may need to be resolved over a very short time span. The Review therefore recommends that it would be worth exploring whether, if the Prisoner Ombudsman were resourced to deal with time bound issues on a fast track basis, that might reduce the number of prisoner cases going to judicial review. The Review further recommends that the decision on whether to grant legal aid in judicial review cases should take account of whether the opportunity has been taken to resolve the matter by other available means prior to seeking leave to make a full application (p. 93). The Review recognises that other routes to resolution, if they are to be applicable, will need to be capable of producing an outcome within the three months time limit for seeking judicial review or sooner if the decision at issue is time critical.

In relation to these recommendations, CAJ would firstly point out that under Order 53 Rule 4 of the Rules of the Court of Judicature (Northern Ireland) 1980, judicial

review must be sought promptly and in any event within three months. The use of the word promptly is significant, as any delay in seeking leave to apply for judicial review may have to be explained. Order 53 Rule 4 seems to encourage applicants to seek leave to apply for judicial review as quickly as possible. Therefore, if an Ombudsman or complaints mechanisms were to be effective in this area they would have to deal with cases very quickly. Fast tracking cases in such a way may adversely effect the quality of the decision making process. Alternatively, CAJ would be anxious that it is ensured that an individual who pursues their complaint through an Ombudsman or some other relevant complaints mechanism does not then become time barred in subsequently applying for judicial review as a result.

CAJ notes the Review's reference to Practice Note 1/2008 and the Pre Action Protocol included within it (p. 93). The Review states that the Pre Action Protocol requires an exchange of correspondence between the parties so that the opportunity is taken to resolve the matter before it goes to court, that litigation should be the last resort, and warns against the premature issue of an application for judicial review where a settlement is actively being explored, for example, through discussion or negotiation, the Ombudsman, early neutral evaluation or mediation. It should also be noted however that the Pre Action Protocol specifically states that it does not affect the time limit specified which requires that any application must be filed promptly and in any event not later than 3 months after the grounds to make the application first arose. The protocol also states that it is not appropriate in urgent cases and that in such cases an application should be made immediately. In any event, judicial review may be considered the favoured option of a prisoner or other person with a complaint against a public authority because more appropriate remedies may be available to them through the courts than would not be available through a complaints procedure.

#### **Legal aid for inquests:**

The Review outlines that at present the LSC is required to fund representation on behalf of the immediate family of the deceased at an inquest in relation to death in police or prison custody or during the course of police (or other security forces) arrest, search, pursuit or shooting. Funding is only to be granted, however, where legal representation is necessary to assist the Coroner to investigate the case and establish the facts. It is under this delegation that the LSC determines applications in respect of inquests under Article 2 ECHR, where there may be allegations about the possible role of state actors in the circumstances of the death.

The Review acknowledges several of the concerns CAJ expressed in our initial submission in relation to this issue. CAJ was concerned with the guidance offered in relation to applications in Northern Ireland, which only provide for funding for 'immediate family', as we believe that this guidance is overly restrictive. We

compared this with the guidance offered by the Lord Chancellor in England and Wales that states that family should be given a wide interpretation. Therefore we welcome the Review's recommendation that transparent guidelines should be drawn up defining what is meant by immediate family. CAJ would urge that in drawing up these guidelines, consideration is given to the point made in our initial submission to the Review, that in relation to historical cases (such as those related to the conflict in Northern Ireland) the next-of-kin may be deceased.

The Review also notes CAJ's concern that by contrast public authorities automatically have legal representation at Article 2 inquests. CAJ was concerned that this may endanger the principle of equality of arms, where the family is not represented and may not have their interests sufficiently safeguarded. The Review recommends that there should be explicit recognition of a presumption that where Article 2 issues are at stake, the immediate family of the deceased would receive legal aid to support legal representation at the Coroner's Court (p. 96 – 97). That the next-of-kin should be involved in such proceedings to the extent necessary to safeguard their interests is a key requirement of an Article 2 compliant investigation:

The Court considers that the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events.<sup>8</sup>

The Review also recommends that decisions on legal aid for inquests should be entirely for the legal aid authority without Ministerial involvement (p. 96 – 97). CAJ welcomes these recommendations.

We are concerned however at the stress given by the Review to the second limb of the guidance, which qualifies support to circumstances where representation is necessary to help the Coroner in the investigation and in establishing the facts. The Review states that not every death in police or prison custody would qualify the immediate family for representation at the inquest, especially given that other investigations might have taken place, such as under the auspices of the Prison Ombudsman or Police Ombudsman. CAJ hopes that these comments do not weaken the recommendation that there be an explicit presumption in favour of legal aid where Article 2 ECHR is engaged. For example it is the view of CAJ that investigations by the PSNI Historical Enquiries Team into deaths in which the state is implicated do not presently meet Article 2 requirements.<sup>9</sup> We also note the

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<sup>8</sup> *Jordan v. United Kingdom* [2001] ECHR 327, para. 134

<sup>9</sup> is also worth noting that following the recommendation of the Criminal Justice Inspection in its September 2011 report '*An inspection into the independence of the Office of the Police Ombudsman for Northern Ireland*' at present the investigative function of the Police Ombudsman's office into historic cases has been suspended temporarily in the context of a 'lowering of independence' within the office.

Review's comment that there may, on rare occasions, be inquests that do not meet the criteria but where Article 2 issues might be at stake, in which case the exceptional grant procedure would apply. CAJ would hope that a sufficiently broad interpretation of what constitutes immediate family would go some way to minimizing the need for the exceptional grant procedure.

As highlighted in our initial submission, the Supreme Court has now ruled in the case of *McCaughey and another*<sup>10</sup> that coroner's holding inquests must comply with the procedural obligation under Article 2, which is to hold an effective investigation into the circumstances of the death, when the death occurred prior to the coming into force of the Human Rights Act 1998 on October 2<sup>nd</sup> 2000. This decision is potentially of great significance, given the numbers of inquests that are due to be heard into historic cases pre-dating the Human Rights Act, where there are allegations of state involvement in the deaths. In the context of the United Kingdom's human rights obligations for effective independent investigation into these very serious matters, CAJ believes that it is vitally important that families receive legal aid in order to have legal representation at such inquests.

### **Equality:**

CAJ noted in our initial submission to the Review that the equality duty under section 75 of the Northern Ireland Act 1998 ('s75') appeared to have been overlooked in the Discussion Paper and Agenda which we responded to. The Review report states that:

The commitment to equal access to justice includes adherence to the requirements of sections 75 and 76 of the Northern Ireland Act 1998 in relation to the promotion of equality of opportunity. While we have been mindful of these provisions in carrying out the review, we have not had the time or resources to carry out screening and equality impact assessments; we recognise that such assessments will be a necessary part of the procedure in implementing measures flowing from the review. (p. 18)

However, CAJ is mindful both of the mandatory requirements of Schedule 9 of the Northern Ireland Act 1998 and that DoJ has committed to screening policy changes at the earliest stage of the development process. DoJ has stated that 'the purpose of screening is to identify those policies that are likely to have an impact on equality of opportunity' and that such '**[s]creening is completed at the earliest opportunity in the policy development or review process'** (paras 4.4 and 4.5 DoJ draft equality scheme, emphasis added). Delaying screening until implementing the policy is not in

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<sup>10</sup> *In an application by Brigid McCaughey and another for Judicial Review (Northern Ireland)* [2011] UKSC 20

keeping with these commitments. It also makes little practical sense as the entire consultation process could become redundant where screening finds adverse impacts and requires the policies to be amended accordingly. The avoidance of early screening is a false economy, as the further consultation that would be required for any alternative policies or EQIA would use even more resources than had the process been applied holistically.

As stated in our previous correspondence with DoJ, there is well-established jurisprudence setting out the need to assess for equality impacts before policies are settled or consulted upon. Case law in Great Britain<sup>11</sup> has underlined the need for advance consideration of the promotion of equality of opportunity<sup>12</sup>, as opposed to ‘rearguard action’.<sup>13</sup> Public consultation can only be meaningful if all the necessary information is provided<sup>14</sup> and the courts have warned that ‘it is unlawful to adopt a policy contingent on an assessment,’<sup>15</sup> and that such an equality impact assessment would amount to ‘policy-based evidence rather than evidence-based policy.’<sup>16</sup>

Policies such as ‘access to justice’ deal with improving equal treatment of some of the most vulnerable and marginalised groups in society. CAJ would like to see the screening and Equality Impact Assessment processes harnessed and regarded as fundamental methodological tools in informing the development of such policies.

**Committee on the Administration of Justice**  
**January, 2012**

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<sup>11</sup> In relation to s. 71 of the 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 (now s. 149 Equality Act 2010).

<sup>12</sup> *R (Elias) v Secretary of State for Defence* [2006] WLR 321, [2006] EWCA Civ 1293.

<sup>13</sup> *R (BAPL and Another) v Sec of State for the Home Department and for Health*, supra.

<sup>14</sup> See *R v London Borough of Barnet, ex parte B* [1994] ELR 357, 372G.

<sup>15</sup> *R (Kaur and Shah) v London Borough of Ealing* [2008] EWHC 2062, at para 36.

<sup>16</sup> As above, at para 37.