



Promoting Justice / Protecting Rights

CAJ's Submission no. S432

Local Government NI Act 2014: The Draft Local Government (Standing Orders) Regulations (NI) 2014 response on the 'call in' mechanism and protection of minority rights, June 2014

Committee on the Administration of Justice ('CAJ')

1. 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.
2. The Department of Environment on the 3 June issued a Consultation Document on the Draft Local Government (Standing Order) Regulations (Northern Ireland) 2014 (the Regulations) and the associated draft Model Standing Orders. This consultation document contains draft secondary legislation designed to regulate proceedings and business at the new 15 councils established under the Local Government NI Act 2014 (the Act).
3. This submission relates to the 'call in' mechanism for decisions in new councils whereby, under section 41 of the Act a decision of the Council or its committees can be challenged by 15% of councillors on the grounds it was either not properly considered or that it would "would disproportionately affect adversely any section of the inhabitants of the district." If a decision is 'called in' the Council must obtain a legal opinion on it and then reconsider the decision. The consultation document outlines:

...the Act introduces a system of checks and balances to protect the interests of minority communities in a council's decision making. This includes provision that decisions specified in a council's standing orders must be taken by a qualified majority. This means that such a decision must be by agreement of 80% of the members of the council who are present and voting at the meeting of the council at which discussed. Provision is also made for

15% of the members of a council to request that a decision be reconsidered on either or both of the following grounds:

- that the decision was not arrived at after a proper consideration of all the relevant facts and issues;
- that the decision would disproportionately affect adversely any section of the inhabitants of the local government district.¹

4. The Regulations are then to make provision as to the call in mechanism and the meaning of section of a community.² Part 2 of the schedule (paragraphs 2-6) of the Draft Regulations set out the 'Call in Process'. Regulation 1 also makes decisions that are subject to 'call in' due to disproportionate adverse affect to then require a qualified majority of 80% of the council to then approve them. Paragraph 1 also provides that all decisions under the Council's general power of competence under the s79 of the Act must be taken by a qualified majority. The extent of this provision is not clear.
5. The 'call in' mechanism is however framed differently, does not require community designation, and does attempt to qualify the provision. However **CAJ is concerned that the draft regulations do not provide sufficient legal certainty to prevent both misuse and to provide clarity as to how 'disproportionately adversely affect' be interpreted.** As the regulations stand the 'call in' mechanism could be used to actually thwart minority rights initiatives and this submission therefore asks the Department to add additional safeguards. Furthermore the lack of legal certainty in particular over the interpretation of 'disproportionately adversely affect' could render the 'call in mechanism' difficult to operate in practice.
6. These concerns were raised at the Committee stage of the Bill with the Committee report concluding:

The Committee's concerns focussed very largely on the practical implications on the use of the call-in mechanism. The Bill does not specify the criteria to be used to determine the grounds for reconsideration under clause 45 (1)(b), that a decision would disproportionately affect adversely any section of the inhabitants of the district, and the Committee believed that any lack of clarity could lead to a specious use of call-in.

The Committee would therefore **recommend that careful consideration should be given to ensuring that the criteria for call-in should be so clearly defined in guidance and Regulations** that the role of the barrister or solicitor is not so crucial to this process; and that the procedures for obtaining an opinion from a barrister or solicitor will also be clearly outlined.³

Decisions subject or not subject to call in (paragraph 2):

¹ Paragraph 6.

² Section 41(1) and (4)b. The latter states that "section", in relation to the inhabitants of a district, means a section of a specified description; and that "specified" means specified in the regulations.

³ Committee of the Environment, Report on the Local Government Bill (NIA 28/11-15) Paragraphs 22 and 24.

7. Paragraph 2 of the schedule deals with decisions subject to call in. It sets out a list of types of decision which may be subject to call in (executive and committee decisions plus 'key decisions' by council officers) and also provides a list of decisions which cannot be subject to call in. This list includes regulatory/quasi judicial decisions otherwise subject to appeal, decisions which are urgent or which call in would mean unreasonable prejudicial delay, and minor decisions.
8. Notably the draft would still permit 'call ins' to be made against decisions which actually promote minority rights or implement matters which are in any case required by legislation or international obligations. CAJ would propose additional exemptions are added to the list in paragraph 3(2) to those matters which cannot be subject to call in including:
 - Decisions taken in implementation of primary legislation or in accordance with international obligations;
 - Decisions taken to promote the recognised rights of minorities;
9. An interpretation clause could clarify the 'recognised rights of minorities' as referring to Convention rights and the rights and minorities recognised within other international standards. 'International obligations' is already defined under section 107 of the Act. 'Convention rights' is defined in the Human Rights Act 1998.

Call-in admissibility (paragraph 3)

10. Paragraph 3 of the schedule deals with admissibility of 'Call-ins':
 - It sets out a time limit and specified form, including setting out reasons it is considered there will be a disproportionate adverse impact and against which section of the community;
 - Admissible *Call Ins* arguing disproportionate adverse impact are then sent to a practicing barrister or solicitor for a legal opinion on the merits;
 - If the legal opinion confirms the call in has merit (i.e. the decision would represent a disproportionate adverse impact) the decision must be placed on the agenda of the next available council meeting for a 'qualified majority' (80%) vote;
 - If the legal opinion states the call in does NOT have merit the original decision must then be implemented;
11. The key part of the mechanism is therefore whether a legal opinion determines that there has been a "disproportionate adverse impact" on a section of the community. There is however no further definition provided as to how this concept is to be interpreted. There is hence limited legal certainty as to how a determination on the merits of a call in will be made and it may be difficult for a legal opinion to make a reliable call to this end.
12. The concept of 'adverse impact' is referred to in the Belfast/Good Friday Agreement and consequently schedule 9 of the Northern Ireland Act 1998. This is in relation to

implementing the 'section 75' statutory equality duty, and relates to the assessment of whether policies will have an adverse impact on equality of opportunity across stated grounds. The Equality Commission accordingly defines 'adverse impact' in a similar manner to well developed concepts such as discriminatory detriment. The Commission sets out a definition which makes clear that groups must be both affected differently by a policy and that the effect is less favourable for an adverse impact to have occurred.⁴ CAJ believes there is merit in drawing on the Equality Commission definition of 'adverse impact' to assist interpretation of the same concept in the draft regulations.

13. Implicit in the primary legislation is that the effect of a policy must be 'adverse' i.e. objectively detrimental. Whilst the section 75 duty is tied to equality of opportunity and the Regulations may be intended not to be restricted to this. At present there no further qualification which leaves open potential broad interpretation as to what has to be adversely impacted on. CAJ would suggest that the concept is tied to the 'rights of others' referenced in the European Convention Human Rights which means recognised rights under the Convention as well as those in other international instruments when there is good reason to consider them. For example in the following formulation if added to the interpretation clause in paragraph 2 would meet the policy objective: "Disproportionate adverse impact" means significant affect on the rights of a section of the community, who are affected differently and less favourably than others."
14. The Act states that a section of the community means a section of a description specified in the Regulations. The draft regulations do not however appear to provide such a specification.⁵ Whilst in a local government context this may in part refer to a particular ward or area of the district, CAJ would also urge that the nine grounds set out in the statutory equality duty under section 75 of the Northern Ireland Act 1998 and the grounds set out under Article 14 of the Convention (as domesticated under schedule 1 of the Human Rights Act 1998) are also specified as relating to a section of the community.

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⁴ "Adverse Impact: Where a Section 75 category has been affected differently by a policy and the effect is less favourable, it is known as adverse impact. If a policy has an adverse impact on a Section 75 category, a public authority must consider whether or not the adverse impact is unlawfully discriminatory. In either case a public authority must take measures to redress the adverse impact, by considering mitigating measures and/or alternative ways of delivering the policy." Equality Commission Guides to Statutory Duties 2005, Appendix A, and Guide to Section 75, 2010 p82.

⁵ Paragraphs 5 and 6 deal with Committee and executive arrangements and the process for dealing with decisions 'called in' on grounds they were not arrived at by proper consideration. Paragraph 2 is the interpretation clause.