

**COMPLAINT TO THE DEPARTMENT OF FINANCE AND PERSONNEL IN RESPECT OF
ITS FAILURE TO COMPLY WITH ITS EQUALITY SCHEME IN RELATION TO THE
“BRIEFING ON NORTHERN IRELAND BUDGETARY OUTLOOK 2018-2020”**

This complaint relates to the “Briefing on Northern Ireland Budgetary Outlook 2018-2020” (the Briefing) which was issued by the Department for Finance and Personnel (DoF) on 18 December 2017. The Committee on the Administration of Justice (CAJ) attended a presentation on this briefing delivered by DoF at the offices of NICVA on 15 January 2018 and information provided at that presentation also informs this complaint.

We are raising a complaint about DoF’s failure to screen the policy proposals set out in the Briefing. We also note that whilst the department has provided a briefing no formal consultation has taken place under the terms of the Equality Scheme nor is proposed in respect of the policy proposals set out in the Briefing. We are also concerned that there is no evidence that the Department has complied with its statutory duties under the Rural Needs NI Act 2016, and raise this in the context of close intersectionality with the Section 75 duties.

We are raising this complaint under paragraph 8.2 of the DoF Equality Scheme on the basis that CAJ is “*A person ... directly affected by an alleged failure of the authority to comply with its approved Equality Scheme...*” on the following basis:

- CAJ is a legal person and public watchdog¹ which scrutinises the implementation of the Section 75 duty and seeks to promote the equality agenda within Northern Ireland;
- Along with UNISON, CAJ is co-convenor of the Equality Coalition which is an umbrella network for the Section 75 sector many of whose members (and their stakeholders) will be impacted by the budget proposals;
- CAJ is a consultee in the DoF’s Equality Scheme and regularly engages in relation to the equality impacts of proposed or adopted policies; and
- CAJ is organisation with a body of work on the combating of poverty and inequality and has successfully challenged the Northern Ireland Executive’s failure to adopt an anti-poverty strategy.

¹ For definition in ECHR jurisprudence see *Magyar Helsinki Bizottság v. Hungary*, (application no. 18030/11) ECtHR, 8 November 2016 [166-168].

CAJ has not been able to engage with DoF regarding Section 75 compliance and the budget proposals: we have not been consulted on the proposed policy, nor have we – as a consultee - had the opportunity to trigger a review of a screening decision. The budget, and policy proposals set out in the paper clearly will have significant impacts on equality of opportunity for specific Section 75 groups and this is one of the circumstances whereby DoF is obliged under the terms of its Equality Scheme to proceed to an EQIA. This has not happened and we have therefore not been able to engage in it, nor facilitate engagement with the broader Equality Coalition network. CAJ is directly affected by the DoF’s approach in failing to engage in any Section 75 scrutiny at all on the Briefing.

Failure to equality screen

We understand from the DoF presentation that the Briefing is a not a budget or draft budget but, rather, is intended to inform the Minister’s (or if no Minister in place, the Northern Ireland Office’s) final decision on the budget. However, we also note that the Briefing is lengthy (143 pages) and that it sets out specific “Departmental Scenarios” and “Departmental Overviews and Impacts” in respect of three possible choices available to an incoming Executive (or the NIO). These ‘scenarios’ are very clearly policy proposals that have been worked on in considerable detail. There is authority from previous Equality Commission investigations that a public authority’s proposed or adopted policies do not fall outside the definition of policies subject to the application of Section 75 by virtue of being called something else. In this regard, the Equality Commission’s decision in the case of *ECNI v DSD* (in relation to strategic housing policy) is particularly helpful. In response to the DSD’s argument that “*the high-level strategic approach could not be meaningfully screened...*”² the Equality Commission stated:

“The Commission notes the view of the Department that a high level strategic document could not, at that stage, be meaningfully screened. However, legislation intended that the equality duties be part of the policy development process. The

² DSD stated that “During drafting of the strategy for consultation, and before the proposals were finalised, a decision was taken that the high-level strategic approach could not be meaningfully screened singly and in its entirety on a ‘one-off’ basis, containing as it did a wide range of actions which aimed to deliver benefits for people across every housing tenure type (owner-occupiers and renters in the social and private sectors)”.

The Department considered that screening of the Strategy at the initial stage of development “would result in too generalised a piece of work to be of any significant value”, paragraph 2.1 of Equality Commission For Northern Ireland, Investigation Report under Schedule 9 of the Northern Ireland Act 1998 Department for Social Development : Housing Policy Proposals November 2015.

Commission advises that public authorities must take into account, at the earliest possible stage, available evidence and the different needs, experiences and priorities of each of the nine S75 categories in order to aid the consultation process and inform the policy. In the context of Section 75 a ‘policy’ is very broadly defined....”³

We refer you to Paragraph 4.1 of the DoF Equality Scheme which confirms the wide definition of “policy”:

*“4.1 In 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 this 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’.” [our emphasis]*

For the avoidance of any doubt we would highlight that the Briefing falls within the “functions” of DoF as defined in paragraph 1.3 of the Equality Scheme which includes:

“Managing the public expenditure of Northern Ireland (NI) Departments, including supporting the Minister and Executive in the allocation of funding available from HM Treasury.”

Thus, notwithstanding that the Briefing is not a final budget the options set out in the document clearly do constitute proposed “policies” for the purposes of the Equality Scheme and screening on the policy proposals should have been conducted in accordance with paragraph 4.5:

*“4.5 Screening is completed **at the earliest opportunity** in the policy development/review process. Policies which we propose to adopt will be subject to screening prior to implementation. For more detailed strategies or **policies that are to be put in place through a series of stages, screening will take place at appropriate stages during implementation.**”*

We recognise that the Briefing is intended to inform the Minister (or NIO) in respect of decisions on the final budget, but would emphasise that this Briefing clearly is a key stage of that decision making process and a stage at which screening is not only

³ Ibid paragraph 3.16

appropriate, but in our view, essential. In this regard we would refer to submissions made by several attendees at the DoF presentation of 15 January who highlighted that the proposals could have cumulative effects on specific Section 75 groups (e.g. children) and that it was essential that the cross-departmental impacts of proposals need to be considered so that the cumulative impact could then be assessed. In responding to queries on equality screening, the DoF representative appeared to suggest that screening was the responsibility of individual departments once decisions have been made. Individual departments unquestionably do have responsibility to equality screen any decisions proposed to be taken as a result of the budget, but this does not detract from the obligation for DoF to screen policy proposals on decisions on allocations to departments and related matters at an earlier stage. Once departmental budgets are allocated an individual department will have limited scope to mitigate or avoid (for example) cuts in services. In contrast, screening by DoF at the pre-decision stage, may result in particular adverse impacts on Section 75 group(s) being identified which potentially may only be mitigated or avoided by a decision at Ministerial level to allocate more resources or to avoid reduction in resources. In short, if screening is not conducted prior to a final decision on the budget being taken it may not be possible for some adverse impacts to be avoided or mitigated. Thus the failure to screen the proposals contained in the Briefing constitute not only a procedural breach of Section 75 (being in breach of the DoF's obligation to equality screen) but also a substantive breach of the duty to have "due regard" to the duty to promote equality of opportunity.⁴

It is notable that the Briefing document contains a significant amount of data in respect of the impact of the various "scenarios". It is evident that DoF therefore already has data upon which a screening exercise could have been based. We also note that Chapter Six of the Briefing contains summaries of "Key Challenges" with some conclusions that approximate findings of adverse impact.⁵ In the circumstances, the failure to conduct screening is puzzling.

⁴ Drawing on the Brown principles in case law the Equality Commission for Northern Ireland has interpreted the duty of "due regard" as being "...the decision maker must be aware of the duty; the statutory goals must be taken into consideration; "due" regard means the amount that is appropriate in the circumstances of the case; it is NOT a duty to achieve a particular outcome or result; the duty must be fulfilled at the time the decision is being considered; it must be exercised in substance, with rigour and an open mind; it is non delegable; it is a continuing duty; and it is good practice to keep records" See *McCreesh Final Investigation Report*, paragraph 4.9, 2014(emphasis in original).

⁵ For example, in considering proposals for the Department of Infrastructure at pages 81-82 it is noted that: "*A budget reduction of £1.7 million in 2018-19 would require a fundamental change to the delivery of demand responsive services...and would necessitate stopping grant funding to at least one*

Failure to consult

We note that Chapter Nine of the Briefing sets out a series of questions which “could help” with “feedback” on the Briefing. The Briefing was published on 18 December 2017 and feedback is requested by 26 January 2018 (a period of just over five weeks including the Christmas holidays).

Although not stated to be a “consultation” it is clear that this feedback process is intended to be a form of consultation. As such, the process is in breach of the DoF Equality Scheme in that it does not provide the requisite 12 or 8 week period for consultation.

Further, given that the final budget is required to be in place by “early February” insufficient time has been allocated to permit meaningful consideration of feedback received. We set out below the specific paragraphs of the Equality Scheme which have not been complied with:

Paragraph 3.2.5:

*“Any consultation period will normally last **for a minimum of twelve weeks** to allow adequate time for groups to consult amongst themselves as part of the process of forming a view. However, **in exceptional circumstances** when this timescale is not feasible (for example implementing EU Directives or UK wide legislation, meeting Health and Safety requirements, addressing urgent public health or strategic public expenditure matters or complying with Court judgements), **the timescale may be shortened to eight weeks or less before the policy is implemented.** We may continue consultation thereafter and will take account of comments as part of its monitoring commitments.*

Where, under these exceptional circumstances, we must implement a policy immediately, as it is beyond our authority’s control, we may consult after implementation of the policy, in order to ensure that any impacts of the policy are considered.” [our emphasis]

Paragraph 3.2.6:

*“If a consultation exercise is to take place over a period when consultees are less able to respond, for example, over the summer or **Christmas break**, or if the policy under consideration is particularly complex, **consideration will be given to the feasibility of allowing a longer period for the consultation.**” [our emphasis]*

of the service providers. The consequences of reductions of this level are reductions/cessation in services to the disabled and those in rural areas and redundancies in the service organisations...”

Paragraph 3.2.9:

“In making any decision with respect to a policy adopted or proposed to be adopted, we will take into account any assessment and consultation carried out in relation to the policy.”

Failure to conduct an equality impact assessment

It is clear that a significant number of the policy proposals in the Briefing could have potential major impact on particular Section 75 groups and these are alluded to in Chapter 6 of the Briefing (for example under “Key Challenges” section for the Department of Education at pages 65-66, for the Department of Health at page 75 and for the Department for Infrastructure at page 81.)

The failure to screen policies which have already been identified as likely to have a major impact on particular Section 75 groups is a breach of paragraphs 4.11 and 4.17 of the DoF Equality Scheme:

“4.11 If screening concludes that the likely impact of a policy is ‘major’ in respect of one, or more, of the equality of opportunity and/or good relations categories, we will normally subject the policy to an equality impact assessment...”

“4.17 Once a policy is screened and screening has identified that an equality impact assessment is necessary, we will carry out the EQIA in accordance with Equality Commission guidance. The equality impact assessment will be carried out as part of the policy development process, before the policy is implemented.

Had such screening taken place this is a circumstance under which an EQIA would be required.

Conclusion

DoF’s failure to equality screen, consult on and, where necessary, subject to EQIA the policy proposals contained in the Briefing constitute breaches of its Equality Scheme including a substantive breach of DoF’s duty to pay due regard to its obligation to promote equality of opportunity for Section 75 groups.

To afford partial remedy of these breaches we request that DoF undertake screening of any of the proposals which are likely to impact on Section 75 groups immediately so that any required mitigating measures and/or alternative policies can be put in place at the earliest opportunity. We also request confirmation that screening will take place on future budget briefings in good time before such briefing is finalised.