Brian Porter
Human Rights and Equality Unit
Northern Ireland Office
11 Millbank
LONDON
SW1P 4PN

30 September 2005

Dear Brian Porter,

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 works on a broad range of human rights issues and its membership is drawn from across the community in Northern Ireland. CAJ's activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize. Together with UNISON, we co-convene the Equality Coalition.

As you will be aware, the Equality Coalition was one of the organisations represented on the advisory group for the independent aspect of the Section 75 review carried out by Neil Faris and Eithne McLaughlin. However, along with NIC-ICTU (see letter attached 14 June 2004) the Coalition withdrew from the advisory group due to the fact that we were concerned that the review was straying beyond its agreed terms of reference.

As we have made clear on previous occasions, CAJ's position in relation to the Section 75 Review is that we would largely endorse the recommendations outlined by Professor Christopher McCrudden in the paper he produced for the independent element of the review, 'Mainstreaming Equality in Northern Ireland 1998-2004: A Review of Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998', in "The Section 75 Equality Duty – An Operational Review", Volume 2. We note that Professor McCrudden, the

leading expert in the field, developed a number of themes which we believe outline not only the main problems with regard to the operation of Section 75, but also provide a model for the way forward.

It is worth in our view repeating the main points identified by Professor McCrudden, which we wholly endorse. We would of course refer the NIO to the original text for a full explanation of each point.

1. Strategic Focus

Given the lack of strategic focus in relation to the current operation of Section 75 Professor McCrudden recommended a more co-ordinated approach to the carrying out of impact assessments and the adoption of a broad range of equality indicators to monitor progress. Such high-level focus would also in our view address the current problems that exist with respect to certain strategies emanating from government being perceived as "too high-level" to be subject to an Equality Impact Assessment (EQIA).

2. Co-ordination within Government

The revised strategy should be co-ordinated through a high level (preferably permanent secretary level) inter-departmental and inter-sectoral committee, with independent members, plus an equality forum comprising representatives of key public authorities and other stakeholders.

3. Resourcing Section 75

There should be more effective linking of Section 75 with New TSN, in particular with the provision of more targeted resources to tackle the disadvantages that are revealed by way of impact assessments.

4. Reporting and Researching the effect of Section 75

There should be better reporting of best practice in general, with particular focus on more accurate reporting by public bodies, with the Equality Commission examining how best the public bodies' annual progress reports can communicate the most important developments.

5. Impact Assessments

The adoption of a more streamlined and strategic approach to screening and priorities for impact assessment is necessary. One example Professor McCrudden identified was the potential benefits of NDPBs and Departments examining the same issues at roughly the same time.

6. Consultation and Participation

Crucially, Professor McCrudden draws a distinction between the various options that are frequently discussed in relation to this issue. He identifies five different options, namely cutting consultation, centralizing consultation, delegating consultation, more targeted consultation, and direct funding of those in the community and voluntary sector who wish to participate. Of these, he recommends the fourth and fifth options, which CAJ would also endorse. It is imperative however that the NIO in their paper recognize the distinction drawn by Professor McCrudden, and follow his model accordingly. It is clear that the first three options are about restricting participation to a "chosen few" who speak on behalf of those directly affected. The fourth and fifth options are more difficult, but essential for better-informed decision-making. It is imperative that the NIO in their paper acknowledge that Section 75 is about participation by those directly affected in decisions that affect their lives. It is not about creating elites outside government that speak "on behalf" of those affected.

7. Compliance

Professor McCrudden recommended a "much stronger approach" by the Equality Commission than has so far been forthcoming, with the need for an effective enforcement strategy on the part of the Commission. It is fair to say that this was one aspect of the Review that CAJ felt was not addressed adequately by the independent element. We note however that the paper produced by the NIO identifies this as a matter for the Equality Commission Review, which is in our view the appropriate forum for such matters to be taken forward. We would endorse the need for a fully independent audit of compliance as part of the Equality Commission's five-year review, however we recognise that such matters will be decided ultimately by the Commission.

8. Litigation

This is perhaps the most contentious aspect of the Section 75 Review, but one that in the view of CAJ, provides a template for the current difficulties regarding the operation of Section 75. It is noteworthy that Professor McCrudden very much endorsed the need for an effective litigation strategy, stating that

"Judicial review, in my view, should be seen as part of the armoury of weapons available to both the Equality Commission and non-governmental organizations in seeking compliance with section 75 in the future."
Professor McCrudden was of the view that such a litigation strategy would provide an incentive to public bodies to refocus attention and resources to implementing section 75 more vigorously. He was also of the view, however, that litigation could provide judicial clarification around a number of issues in relation to Section 75 such as the concept of "adverse impact" and the meaning of "due regard".

It is noteworthy however that the final report by McLaughlin and Faris very much came down against the option of litigation, and in favour of a "regulatory rather than an adversarial approach".[1]

CAJ would have been interested in discussing further the options for a litigation strategy as a possibility for the future. However as a result of the challenge to Section 75 by the NIO, we found ourselves an interested party in a recent judicial review. It should be pointed out, however, that it was with some reluctance that we felt compelled to join the legal proceedings. CAJ, and a number of other consultees, had followed the agreed procedures and made a complaint to the Equality Commission about the failure of the NIO to comply with its Equality Scheme. The Equality Commission found that on two grounds, the NIO had indeed failed to comply with its Equality Scheme and put forward some recommendations. It was with some surprise, therefore, that CAJ discovered that the NIO challenged not only the findings of the Commission's investigation, but also the standing of consultees to take complaints to the Equality Commission in the first place.

Attached is a briefing note on the case that we have prepared along with our own submissions to the court. We would like to put on record our view that the approach adopted by the NIO in this case, if accepted, would fatally undermine both the Section 75 duty and the Equality Commission. The arguments put forward by the NIO in the course of proceedings run counter to both the letter and the spirit of what is contained in the Agreement and the Northern Ireland Act. For example, the argument presented by the NIO that the only persons "directly affected" by a policy - and therefore the only persons with standing to complain to the Equality Commission about that policy - are the other public bodies who

[1] McLaughlin and Faris, "The Section 75 Equality Duty – An Operational Review", Volume 1, page 36.

implement that policy, frankly beggars belief. Indeed, such an approach is not only contrary to the participative and collaborative nature of Section 75, but is contrary to the pronouncements from the Secretary of State in recent press release that "the Government's vision is to see an equal, inclusive society where everyone is treated with respect and where there is opportunity for all".[2]

Equally surprising is the claim put forward in the recent case that Section 75 is of limited application in relation to criminal or quasi-criminal matters, particularly since in all our dealings with the NIO over the past number of years, this argument has never been made previously. As we pointed out in the course of the legal proceedings, this argument runs counter to the NIO Equality Scheme which states that the Scheme will cover all the policies of the Department. This Scheme was of course signed by the Permanent Secretary and John Reid, the Secretary of State at the time of the Scheme's approval.

Moreover, it is clear that the approach adopted by the NIO in the recent case is one which fundamentally questions the role of the Equality Commission with regard to overseeing the enforcement of Section 75. Again, were the NIO arguments to be accepted by the court, it is clear that the power of the Commission to investigate any future complaints would be severely restricted. The preference for a judicialized as opposed to co-operative approach with regard to the operation of Section 75 is not in our view commensurate with what parliament, nor the signatories of the Agreement intended. Similarly, the attack on the Equality Commission's standing in relation to the enforcement of Section 75 does not fit with the recent pronouncements of the Secretary of State following his meeting with the new Chief Commissioner of the Equality Commission.[3]

Overall, the view of CAJ is very much that the approach adopted by the NIO in this case epitomises many of the concerns that we have identified over the past number of years with respect to resistance to the promotion of equality within government.

[2] See press release issued 9 September 2005, following meeting between Secretary of State Peter Hain, and the new Chief Commissioner of the Equality Commission Bob Collins.
[3] Ibid.

Summary and Conclusion

Over the past number or years, CAJ and other Coalition members have consistently pointed to what we consider to be the refusal by some public bodies, and in particular some government departments, to live up to their obligations under Section 75. Indeed, it is worth considering the speech delivered by Martin O'Brien (CAJ's former director) at the Equality Commission's Section 75 conference in 2003.

In that speech, Martin O'Brien stated that:

"There have in particular been problems around the issue of 'screening' of policies for example, with too many policies given a clean bill of health, when in our view they should have been subject to a full EQIA".

He went on to state that:

"experience has been that the closer one gets to central government the poorer the application of section 75 seems to be. While there are a few exceptions to this, at the highest levels, mainstreaming equality into decision making does not seem to be fully embraced. This is not meant to be a criticism of the Section 75 officers in Government Departments, far from it. It is however a comment on the attitudes within the senior civil service in general…..There seems to be an ideological problem with equality at the highest levels of decision-making in Northern Ireland, which will tolerate the promotion of equality further down the food-chain but will not implement at the top. When it comes to the big decisions, with resource implications, equality is being given insufficient regard. This is contrary to section 75 and if it continues it will inevitably result in resort to litigation."

At the time, Martin O'Brien's speech was severely criticised by those in government as presenting an unfair picture of the state of play with regard to the implementation of Section 75. Indeed, it is worth noting that a meeting was requested by senior officials at OFMDFM following the delivery of this speech in order to discuss what was considered to be unfair criticism of their work. It should also be noted that when Martin O'Brien referred to "resort to litigation," he was of course referring to the likelihood of Coalition members engaging in litigation to challenge the way in which some public bodies were misusing the screening process.

The surprising aspect of recent developments however is that in the face of such criticism it is the NIO itself that is resorting to litigation with the result that deliberately or inadvertently it is seeking to undermine Section 75. As the attached note shows in detail, if the court accepts the NIO position then Section 75 would in our view be fatally undermined.

In conclusion, it is clear that this institutional resistance to change within central government must be addressed at the highest level. Moreover, it is equally clear that the way forward outlined by Professor McCrudden is the only way in which the promotion of equality for all nine categories through the successful implementation of Section 75 can be secured. In this context, we would request that the NIO re-examine the paper they have issued so as to take these points on board.

Yours sincerely

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Research and Policy Officer