CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

CAJ's submission no. S. 270

CAJ's Submission to the Department of Justice's Equality Impact Assessment On the Proposals for a Justice (Northern Ireland) Bill 2010

November 2010

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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.

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1. Introduction

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-convener of the Equality Coalition. For some time CAJ has been involved in the process of furthering the mainstreaming of equality in Northern Ireland and we welcome the opportunity to forward our views on equality related documents.

We welcome the opportunity to comment on the Department of Justice's ('DOJ') equality impact assessment ('EQIA') on its proposals for the Justice Bill (NI) 2010 ("the Bill"). We recognise that this would be the first major piece of devolved legislation on justice matters in Northern Ireland for almost 40 years. We also acknowledge the work invested in the Bill and the attempts to comply with equality legislation.

However, we also note significant problems in the way in which this EQIA has been carried out. Particularly as this the DOJ's first EQIA, we intend to use this submission to underline these procedural concerns. As such, this submission will concentrate on procedural concerns relating to the EQIA of the Bill, which in turn impact on substantive equality concerns.

Although we welcome the fact that DOJ has undertaken an EQIA of all the proposals included in the Bill, we are concerned that its effectiveness may be undermined by the timing of the EQIA's consultation period. In particular, the

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closing date of the consultation falls after the Bill has already been published, thus calling into question the meaningfulness of the consultation. In addition, there are currently ongoing consultations on issues related to component parts of the Bill.

Furthermore, CAJ is concerned about DOJ's approach to impact assessment in relation to screening when an equality impact is identified, and the need to consider mitigating measures and alternative policies. Each of these issues will be considered in turn.

2. Meaningful Consultation

The EQIA on the proposed Justice (NI) Bill 2010 was issued for consultation on 12th August 2010 with a closing date for submissions of 4th November 2010. However, the draft Bill was published by the NI Assembly on 18th October 2010 before responses to the consultation had been received. This approach is legally problematic.

Firstly, schedule 9(9)(2) of the Northern Ireland Act 1998 requires the following:

"in making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account any such assessment and consultation ...carried out in relation to the policy."

Publishing the Bill before the end of the consultation period and before all responses have been submitted and considered means that DOJ has not taken all necessary consultation into account, thus not complying with its statutory obligations in this regard.

Secondly, as well as statutory obligations, in common law a number of cases have outlined what is required in any consultation process, including for example what are referred to as the "Sedley Requirements"[1], namely:

i. it must be undertaken when proposals are still at a formative stage;
ii. it must give sufficient reasons to permit the consultee to make a meaningful response;

[1] R v London Borough of Barnet, ex parte B [1994] ELR 357, 372G

iii. it must allow adequate time for consideration; and
iv. the results of the consultation must be conscientiously taken into account in finalising any proposals.

Given the publication of the Bill before submissions have been received, the extent to which this consultation meets requirements (i) and (iv) in particular is extremely questionable.

These requirements are also reflected in the Cabinet Office Code of Practice on Consultation, which makes it clear that "*Formal consultation should take place at a stage when there is scope to influence the policy outcome."*[2]

CAJ notes that some of the component parts of the Bill have already been consulted upon individually and that equality issues were raised in these consultations. However, we think that the manner in which equality issues were addressed was insufficient. For example, in relation to the consultation on Court Boundaries in Northern Ireland, the responses showed concerns relating to equality, such as, impact on "the equality of opportunity of young and older people, people with disabilities and those with dependants if they were required to travel further." (p. 60) Nevertheless, it was screened out for the purposes of EQIA. Many equality concerns have been rejected without considering them any further. Indeed, none of the consultations already undertaken have resulted in a proper equality analysis by means of an EQIA, despite evidence of differential and adverse impact in a number of them (see on).

CAJ is also concerned that DOJ has not coordinated various consultations on issues related to component proposals in the Bill in such a way that allows proper consideration of the issues. For example, there are currently consultations underway on:

- Remuneration of Defence Representation in the Crown Court (closing date 19 November 2010);
- EQIA of the Proposals on Reform of legal representation provided by way of criminal legal aid at the Crown Court (closing date 19 November 2010);

[2] http://www.berr.gov.uk/files/file47158.pdf

- EQIA of the Proposals on new Rules on Remuneration of Defence Representation in the Crown Court (closing date 19 November 2010); and
- Sentencing Guidelines Mechanism (closing date 18 January 2011).

Each of these will not be completed until after the closing date of the consultation on the EQIA of the Bill. As a result, DOJ and consultees will not be able to co-ordinate and use the results of these consultations to inform the development of the Bill. In relation to legal aid in particular, this is subject to a wider review on access to justice, and we would suggest that these provisions are best considered as part of that overall review.

The above difficulties, arising from a lack of coordination between consultations, are further underlined by the inconsistent approach to the proposals on case initiation reform. A Court Service consultation on proposals to allow the Public Prosecution Service to issues summonses without recourse to a lay magistrate closed on 28 May 2010. The same proposals feature in DOJ's EQIA consultation on the Bill, launched on 12 August 2010. However, those proposals are not included in the text of the Bill, as published on 18 October 2010, presumably due to a report on the conclusions of the earlier Courts Service NI consultation, released on 1st October 2010, which made clear that the proposals would not be progressed, as a result of consultation responses received.

The above scenario shows the importance of early consultation in policy development. It underlines the need to await a full report on consultation responses before acting further on the proposals involved. Further, the willingness of DOJ to act before a consultation is concluded suggests that DOJ does not expect the consultation responses to impact greatly on its policy approaches. If this is the case, it defeats the very object of consultation, which would only be carried out in form and not in substance.

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3. Approach to Impact Assessment

Identifying possible equality impact and approach to screening exercises

The 'Overarching assessment of Impacts' section of the EQIA (p. 16-25), reviews the impacts across each of the three groups that the Bill will affect: the general public; victims and witnesses; and offenders, and on examination of the first two groups asserts that the proposals will be "to the benefit of all Section 75 groups." (p. 19 and 22). The phrases "benefit of/to all" or positively impacting on all, are used no less than 9 times in the EQIA.

The EQIA states that: "each individual proposal has by and large been individually screened out as being in need of a full equality impact assessment. The reason for this outcome is in the spread and nature of the proposals." It is claimed that the proposals will "improve procedures for all" and provide "a better service for all." (p. 12, 13). These are vague statements which do not provide sufficient justification for not conducting further equality analysis. They are presenting benefits that the Bill will bring to the general public in large, rather than considering actual impact on equality grounds.

CAJ therefore believes the approach that the proposals will have equal benefit to everyone in Northern Ireland across all Section 75 categories is problematic. Section 75 of the Northern Ireland Act 1998 requires a public authority to have due regard to the need to promote equality of opportunity between the nine equality categories, rather than providing equal benefit to all. The phrase "equal benefit to all" does not exist in Section 75. Therefore, merely stating that the proposals will "benefit all" is not a proper approach to be taken while exercising EQIA. There is a need to consider how to better promote equality of opportunity.

In relation to offenders, it is stated that:

" the conclusions from this analysis are that young males who offend may indeed be affected more than any other Section 75 group by some aspects of the Bill's proposals. The key aspect of impacts on offenders is however that the impact will only be on those "who offend". The Bill will not impact on young males as a whole. Offenders are a self-selecting group who choose to break laws that apply equally to all. It is their offending behaviours that attract the

impact, not as a result of any particular policy proposals to target young males as a group." (p.25)

This assertion is repeated on numerous occasions throughout the document and is deeply problematic. To draw a comparison, consider the application of this approach to another set of circumstances:

" the conclusions from this analysis are that women who have babies may indeed be affected more than any other Section 75 group by some aspects of the Bill's proposals. The key aspect of impacts on women is however that the impact will only be on those "who have babies". The Bill will not impact on women as a whole. Women who have babies are a self-selecting group who choose to have babies. It is their behaviour that attracts the impact, not as a result of any particular policy proposals to target women as a group."

CAJ has had occasion to raise concerns about this approach in a number of other consultations by the DOJ's predecessor, the Northern Ireland Office.

Furthermore, this argument – that an equality impact assessment would add nothing of value in circumstances where the adverse impact would flow from freedom of choice – was used by the NIO in the case *In the matter of an Application by Peter Neill for Judicial Review* [2005] NIQB 66 and was challenged by the Equality Commission who asserted that the focus should have been on the impact of the policy in question. This was confirmed in the judgment by Mr Justice Girvan who said that:

"[47] …A proposal to introduce a new criminal or quasi-criminal provision designed to regulate individuals' social lives has clearly the potential of impacting on the social life of individuals and may have a greater effect or impact on particular sections of the community such as, for example, children, juveniles, young people, homosexuals or otherwise. <u>It would not be an answer to say that once the law is enacted and the action is criminalised an individual from one of the affected groups can have no grievance because he is simply bound to obey the new law. What must be considered is the policy stage of the evolution of the criminal or quasi-criminal legislation</u>" (emphasis added).

Similarly, a Court of Appeal case has found that changes in policy at secure training centres (STCs) might raise issues about racial equality 'in view of the

significant numbers of black and minority ethnic minority trainees (who include the claimant in this case) accommodated in STCs.'[3] There was no suggestion that, by committing crimes the black and ethnic minority individuals had self-selected themselves within the ambit of the policy. Fundamentally, the policy had a greater impact on black and ethnic minority individuals, and the Court found that the impact had to be assessed fully by the Secretary of State for Justice.

Therefore, the use of the phrase 'self-selecting' to limit the extent of Section 75 is unacceptable. The approach does not demonstrate a proper consideration of whether the policy is likely to have significant impact on equality of opportunity, with consideration of alternative policies and mitigating measures.

Alternative policies and mitigating measures

If any impact on any of the categories specified in Section 75 has been recognised, there is a need to consider alternative measures that better promote equality of opportunity. According to Schedule 9 (9)(1) of the Northern Ireland Act 1998 a public authority should:

"give details of any consideration given by the authority to - (a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and (b) alternative policies which might better achieve the promotion of equality of opportunity."

The Equality Commission's Practical Guidance on Equality Impact Assessment is clear on this:

"The consideration of mitigating measures and alternative policies is at the heart of the EQIA process. Different options must be developed which reflect different ways of delivering the policy aims. The consideration of mitigation of adverse impacts is intertwined with the consideration of alternative policies. Mitigation can take the form of lessening the severity of the adverse impact. Ways of delivering policy aims which have a less adverse effect on the relevant equality category, or which better promote equality of opportunity for

[3] R(C) v Secretary of State for Justice [2008] EWCA Civ 882, at para 39

the relevant equality category, must in particular be considered. Consideration must be given to whether separate implementation strategies are necessary for the policy to be effective for the relevant group" (p. 29) (emphasis added).

As has been stated, the impact of the Bill on young males has been recognised.[4] However, nowhere in the proposals are mitigating measures or alternative policies introduced which might better achieve the promotion of equality of opportunity than the existing proposals.

In relation to mitigating the impact of the Bill's proposals on mostly young, male offenders it is suggested that mitigating factors are already in place and which can be taken to address any perceived adverse impacts. In the section on 'Mitigation of Impacts' (p. 99), it is stated that these can be categorised into three areas: strategic actions and activities that exist at an overarching level to prevent offending, divert offenders, and provide for rehabilitation when the justice system is engaged; proposals within the Bill which in themselves enhance those activities and improve offender options; and delivery and monitoring arrangements which seek to ensure that the proposals are correctly delivered. Proposals within the first area involve: operation of a cautioning system, creation of the Youth Justice Agency, existence of rehabilitation legislation and crime prevention and education programmes.

CAJ acknowledges the consideration of mitigation factors. However, distinction needs to be made between consideration of general measures that are already in place and those that specifically apply to the impact of the particular proposals, the latter being what is actually required.

In relation to alternative policies, it is asserted that the Bill itself proposes alternative policies to previous legislation and that the whole Bill is an improvement on the old legislation.

CAJ does not consider this to be a proper approach. For example, the statement that a particular proposal (e.g. offender levy) is going to impact male offenders should be followed by clear evidence of the consideration of alternatives to the proposal. We did not find any consideration of the impacts of alternatives in relation to young offenders anywhere in the document.

[4] "Where the Bill does have an impact on a particular Section 75 category is where its proposals engage or create new powers to deal with offenders. Offenders are by and large male and as such will be impacted upon more than any other category." (p. 13)

Again, the argument that the proposals overall will also have positive impacts for offenders (p. 97) is not a proper consideration of the impacts of alternatives to those proposals that have an adverse impact. Furthermore, Schedule 9 (9)(1)(b) does not refer to previous policies but rather to current proposed policies.

CAJ is therefore of the view that the EQIA has failed to properly consider mitigation and alternatives as required by the legislation.

4. Conclusion

In summary, although CAJ acknowledges the significance of this first major Bill for the Department of Justice, and the publication of this EQIA, we have significant concerns that equality obligations have not been adequately discharged. As such, we recommend that the issues raised in this submission be addressed as a matter of urgency. In particular we question whether meaningful consultation is taking place when the Bill has already been submitted to the Assembly, and we underline the failure to assess and address impacts as required, including consideration of mitigating factors and alternatives.