

CAJ's submission no. S. 272

CAJ's response to
Section 75 Equality Impact Assessment
of the Proposals on new Rules on
Remuneration of Defence Representation in
the Crown Court

November 2010

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.

Consultation on Section 75 Equality Impact Assessment of the Proposals on new Rules on Remuneration of

Defence Representation in the Crown Court

Response of the Committee on the Administration of Justice

November 2010

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. 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.

CAJ welcomes Northern Ireland Courts and Tribunals Service's ('NICTS') decision to conduct a full equality impact assessment ('EQIA') on its proposals on new rules on remuneration of defence representation in the Crown Court. ('the Proposals'). We also understand the impact of cuts on all aspects of public spending, and the need to review the remuneration levels for defence representation in the Crown Court.

However, we have concerns that insufficient data has been presented within the EQIA to consider fully the impact of the Proposals on the equality of opportunity for s75 groups. Also, where data has been provided, and found an impact on young male defendants and Catholic legal professionals, NICTS has not taken action to assess how this may impact on the promotion of equality of opportunity. We recommend that NICTS address the need for more data and analysis of the impacts on s75 groups, particularly where they could affect access to justice and have adverse effects on the equality of opportunity.

2. Data collection

We commend NICS for carrying out an EQIA on the Proposals, but we are concerned that the EQIA will not wholly achieve its purpose, due to the lack of data on the various groups listed in s75 Northern Ireland Act 1998 ('s75').

In relation to Crown Court defendants, the only data that we have been provided with is age and gender of defendants. While we understand the sensitivities in relation to collecting certain data, we recommend that NICTS address gaps in the data and deal with sensitivities to ensure that all information has been taken into account when assessing the impacts on s75 groups.

In the Equality Commission for Northern Ireland's ('ECNI') Practical Guidance on EQIAs¹, it is clear that public authorities, including NICTS, have a responsibility to '*[i]dentify gaps in available information for equality categories and where more detailed data are needed take steps in order to have the optimum information on which to consult and base subsequent decisions; [and] if necessary, commission new data (qualitative or quantitative)*' (at page 11). Please could you confirm what steps are being taken to satisfy these requirements.

In relation to the legal profession, NICTS states that, as the Bar and Law Society are not public bodies, there is no requirement on them to maintain Section 75 data (paras 5.1 and 5.2). We remind you that it is incumbent on NICTS, not the Bar or Law Society, to collect such data for the application of s75. We would therefore recommend that NICTS continue to collect data, such as its 2009 survey on Crown Court users, for all s75 groups.

The use of data allows for the assessment of impacts to be embedded in a solid evidence base, as opposed to conjecture. For example, we are concerned by NICTS' statement that, in the absence of other data, there is '*nothing to suggest*' that there would be an impact upon any other s75 category (at para 5.4) and '*young males who are defendants may be affected more than any other s75 group*' (at para 5.3). Without recourse to data, it is impossible to know what impact the Proposals may have on other s75 groups.

¹ Found at <http://www.equalityni.org/archive/pdf/PracticalGuidanceEQIA0205.pdf>.

3. Impacts found with s75 categories

The evidence provided by the NICTS demonstrates that categories within certain s75 groups are impacted upon by the Proposals more than others. This was found to be the case in relation to ethnicity, religion, gender and age. In this regard, the greater impact on white people and Christians is to be expected, given their proportionate representation in Northern Ireland's population. However, the proportionately greater impact on young males and Roman Catholics (in relation to defendants and the legal profession respectively) is not reflected in the wider demography.

Where such impacts have been found, NICTS has a statutory obligation to consider how these impacts may be mitigated, or any alternative measures that could be employed (see paras 9(1)(a) and (b) of Schedule 9 Northern Ireland Act 1998). However this has not been carried out by NICTS in relation to either of the groups identified above.

The Equality Commission's Practical Guidance on Equality Impact Assessment states that *'[t]he 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... Ways of delivering policy aims which have a less adverse effect on the relevant equality category, or which better promote equality of opportunity for the relevant equality category, must in particular be considered'* (at page 29).

a. Impact on Young Male Defendants

In relation to the greater impact on young male defendants, NICTS states that *'the impact will only be on defendants – not on young males as a group'* (para 6.3). However, this reasoning is not consistent with the aims or operation of s75.

The very purpose of s75 is to consider the need for the promotion of equality of opportunity within the context of specific policies. If impacts were disregarded where they only apply to specific categories of persons affected by those specific policies, then the entire process would become obsolete. For example, For example, a policy relating to a maternity unit would have a greater impact on women. It would be contrary to common sense – and s75 - not to address those impacts only because they do not impact upon all women, but only women having babies.

NICTS has found that the Proposals affect defendants before the Crown Court and so any impact found on any s75 category defendants should be considered in full, as required by Schedule 9, ECNI Guidance and NICTS' equality scheme. As noted above, an impact was found on young males. Therefore, we request that NICTS consider how the disproportionate impact of the Proposals will affect young males and their equality of opportunity.

In particular, it is essential that NICTS consider how the Proposals may affect young male defendants' access to justice. We note that the Proposals involve a 20-30% decrease in legal remuneration, the removal of enhancements based on case difficulty and discontinuing the separate category for very high cost cases ('VHCC'). It is not clear, however, whether NICTS has conducted a full analysis of the ability of lawyers to represent defendants on that level of remuneration. If the reduced remuneration is not sufficient, it may not be cost-efficient for lawyers to act, which could reduce the availability and quality of defence representation. This in turn would lead to an inequality of arms and affect access to justice.

b. Impact on Roman Catholic solicitors and counsel

The evidence from the 2009 NICTS exit survey of Crown Court users showed that there are over twice as many Roman Catholics as Protestants working as defence lawyers in the Crown Court. Therefore the Proposals will clearly impact to a greater extent on Catholics than Protestants. However, NICTS does not analyse this impact any further, and seems to justify this by stating that *'the proposals do not target these groups and it is the NICTS's view that the greater impact arises from the fact there are more people from these groups within the survey'* (para 6.5). Such a justification is not a logical analysis of survey information – either the survey information is not reliable, and so should be rejected in full, or its results must be analysed as they fall.

Furthermore, it is important that a distinction be made between groups that are targeted and those who experience greater impact. S75 requires consideration of impacts, not targets. Also, when analysing survey data we should be prepared that it may show impacts that were not expected before starting the survey. Indeed, such results provide even greater, not less, reason to analyse the data, its causes and impacts in full.

The problematic approach of NICTS in this regard can be paralleled with the situation in England and Wales, where it was found that implementing price competitive tendering for legal aid had a greater impact on black and ethnic minority lawyers, as they are the biggest group undertaking legal aid cases. In that case, the Black Solicitors' Network and the Society and Asian Lawyers, backed by the Law Society and the Commission for Racial Equality, started legal action against the Ministry of Justice on the basis that the suggested legal aid reforms did not comply with anti-discrimination law. As a result of this action, the government agreed to carry out full and cumulative race assessment exercises on the outcome and possible impacts of the reforms.

Therefore, CAJ recommends that NICTS analyse in full its data showing a greater impact on Catholic lawyers, and consider what effects this may have on the promotion of the equality of opportunity. In particular, the reduction in legal aid remuneration could jeopardise the existence of small solicitors' firms dependent on legal aid work. Were this borne out, and given that the Proposals impact disproportionately on Catholics, they could have an adverse impact on the promotion of equality in Northern Ireland.

4. Conclusion

CAJ acknowledges NICTS' efforts in carrying out a full EQIA on its Proposals. However, we have concerns that insufficient data has been presented. While we appreciate the sensitivities arising when collecting data, we request confirmation that NICTS will take measures to address gaps in data. We also remind NICTS of its obligation under para 4(2)(b) Schedule 9 Northern Ireland Act 1998 to monitor any adverse impact of policies adopted.

CAJ notes that the Proposals will impact disproportionately on young male defendants and Catholic legal professionals. Although this was clear from NICTS evidence, the EQIA does not assess how this may impact on the promotion of equality of opportunity. We recommend that NICTS completes a full analysis of the impacts of the Proposals on s75 groups, including mitigating measures or alternative policies to promote better the equality of opportunity.

The remuneration for legal aid work in the Crown Court should be fair, to encourage sustainability and quality of representation. While we understand the budgetary pressures in the current economic climate, we recommend that

the legal aid budget should be amended only with careful consideration of its impact on inequalities, access to justice and the right to a fair trial.