

CAJ's submission no. S.284

CAJ's response to the  
Department of Enterprise,  
Trade and Investment's  
consultation on  
its Draft Budget 2011-15

February 2011

### *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.

Minister Arlene Foster MLA

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cc Bob Collins and Evelyn Collins, Equality Commission NI

16 February 2011

Dear Minister

**Budget 2011-15: Inadequate Assessment of Equality Impacts**

Thank you for the letter of 26 January 2011, sent by your Private Secretary, and for further explaining the Department of Enterprise, Trade and Investment's ('DETI') approach to its equality duties in relation to the budget. Thank you also for sending us a copy of your high level impact assessment ('HLIA') forms for each of DETI's spending proposals.

We recognise the efforts that have been made by DETI to comply with the equality duties, but we believe that inadequate assessment has been carried out to comply with s75 Northern Ireland Act 1998 ('s75'). Also, given certain irregularities found in the HLIA forms, it is difficult to be confident as to their conclusions. Finally, without access to the HLIA forms, the DETI draft budget 2011-15 consultation document contains very little information on the equality assessments undertaken.

Inadequate s75 equality assessment

We believe that DETI has not complied with its duties under s75 and its own equality scheme. We acknowledge that DETI has carried out HLIAs of its proposals, but an HLIA does not discharge the s75 duties, as set out in our previous correspondence and confirmed by the Chief Executive of the Equality Commission of Northern Ireland ('ECNI').

Further, the HLIA summary annexed to the DETI draft budget 2011-15 consultation document claims in its title to be an '*Equality Impact Assessment and High Level Impact Assessment*'. However, it does not contain all of the seven elements required in an equality impact assessment ('EQIA'), further to the ECNI Procedure for Conduct of Equality Impact Assessments,<sup>1</sup> including the consideration of available data and research. This also runs contrary to the clear statement in DETI's equality scheme that '[t]he Department will carry out EQIAs in accordance with Annex 1 of the Equality Commission's Guide to the statutory duties'<sup>2</sup> (at para 4.6).

DETI's equality scheme states that, '[b]efore the introduction of any **new policies** the Department will carry out the **screening exercise** as set out in paragraph 4.1 at the early development stage to identify whether there would be any impact on the promotion of equality of opportunity or good relations, and whether greater equality of opportunity could be promoted and therefore be subject to a full impact assessment'<sup>3</sup> (emphasis in original). This commitment has clearly not been carried out in respect of the budget proposals.

We note your private secretary's reference to DETI's contribution to the Office of the First Minister and Deputy First Minister's EQIA on the NI Executive's budget.<sup>4</sup> However, this exercise does not cover the specific spending proposals included in DETI's departmental budget. Further, the Executive EQIA and DETI's current '*equality screening exercise of budget allocations*'<sup>5</sup> are released too late to allow full consideration of the equality impacts of the DETI budget in the consultation process.

In this regard, the various proposals included in the budget inter-relate, given the need to balance the books. As such, each proposal cannot be considered in isolation, particularly after the draft budget has been approved. At that stage, changes to existing proposals would have an impact on those spending and/or savings plans that have already been implemented, and so cannot be

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<sup>1</sup> ECNI Procedure for Conduct of Equality Impact Assessments, Annex 1 to Guidelines on s75, found at <http://www.equalityni.org/archive/pdf/GuidetoStatutoryDuties0205.pdf>.

<sup>2</sup> DETI Equality Scheme, found at [http://www.detini.gov.uk/revised\\_equality\\_scheme.pdf](http://www.detini.gov.uk/revised_equality_scheme.pdf).

<sup>3</sup> Ibid, at para 4.7.

<sup>4</sup> Letter of 26 January 2011.

<sup>5</sup> Also in your private secretary, Glynis Aiken's letter of 26 January 2011.

changed. We understand that this would inhibit DETI's ability to amend its proposals later in the budget process.

As such, we believe it is essential for DETI to assess equality impacts, as required by s75, before the draft budget is approved. As we have stated in our previous correspondence, caselaw in GB<sup>6</sup> has underlined the need for advance consideration of the promotion of equality of opportunity<sup>7</sup>, as opposed to 'rearguard action'.<sup>8</sup> The courts have warned that '*it is unlawful to adopt a policy contingent on an assessment*,'<sup>9</sup> and that such an equality impact assessment would amount to '*policy-based evidence rather than evidence-based policy*.'<sup>10</sup>

We remind you that the purpose of the s75 duty is to consider the impact of proposals on vulnerable people. In a time of recession, people who are already disadvantaged should be given every consideration and there is a duty on officials to mitigate any adverse impact. This correspondence is not merely for the purpose of administrative argument. It is to focus on the process of making crucial decisions over spending for the next four years; decisions which will impact on people who already live in difficult circumstances.

The importance of these impacts is also reflected in international human rights treaties.<sup>11</sup> Indeed the UN Independent Expert on human rights and extreme poverty stated last month that *[h]uman rights are not dispensable and cannot be disregarded in times of economic uncertainty.. before designing and implementing any policy measures aimed at the recovery, policy makers must assess the impact of the measures on the most vulnerable groups of society, assess the appropriateness of the measures, and examine alternative policy options that would protect vulnerable sectors of society as a matter of priority*.<sup>12</sup>

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<sup>6</sup> In relation to s71 Race Relations Act 1976, which requires public authorities to have due regard for the need to promote the equality of opportunity in relation to race.

<sup>7</sup> R (Elias) v Secretary of State for Defence [2006] WLR 321, [2006] EWCA Civ 1293.

<sup>8</sup> R (BAPL and Another) v Sec of State for the Home Department and for Health, supra.

<sup>9</sup> R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062, at para 36.

<sup>10</sup> Ibid, at para 37.

<sup>11</sup> Such as the International Covenant on Economic, Social and Cultural Rights, ratified by the UK in 1976.

<sup>12</sup> Statement of Magdalena Sepúlveda, UN Independent Expert on human rights and extreme poverty, following a recent mission to Ireland. Full text can be found at <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10658&LangID=E>.

### Issues arising from the HLIA's

Despite DETI's efforts in carrying out screening exercises for most of the proposals used in its draft budget 2011-15, certain irregularities and inconsistencies force us to question the soundness of some conclusions. We would like to point out some of the difficulties encountered.

➤ *Relevance of universal impact*

Several equality screening forms claim that the policy involved has neutral or positive equality impacts due to universal application or economic benefits. For example, this was found where a policy was intended to '*benefit the entire community*' (see SFA capital bid pages 86-87), '*generate greater wealth creation*' (see Invest NI resource bid page 15) and '*stimulate economic activity generally, impacting on the whole community*' (see R&D resource bid at page 71). This shows a fundamental misunderstanding of the promotion of equality in relation to the objectives and operation of s75.

First, due to underlying inequalities in our society, some groups may have less access to or benefit from a policy, despite its universal application. S75 is in place to help understand these barriers and adapt policies to help facilitate access and benefit for all. Secondly, different levels of participation in specific policies results in impacts being felt more strongly by certain groups.

Therefore, many groups may find it difficult to benefit from financial assistance or entrepreneurship grants, despite the intention that they benefit all. In fact, it is most likely that the barriers to disadvantaged groups will prevent their access to greater wealth creation, which would further exacerbate the inequalities in our society.

We understand the need to stimulate our economy, for all the population, but it is imperative that, in doing so, DETI considers the way in which such initiatives will impact on vulnerable groups, so that equality can be promoted. Indeed, several studies have shown how greater income equality is the best way to benefit the whole community.<sup>13</sup>

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<sup>13</sup> See, for example, The Spirit Level, 2009, Wilkinson and Pickett.

In view of this, we contest DETI's statement in its draft budget 2011-15 consultation document that its '*allocation will have positive impacts for equality, good relations, anti-poverty and sustainable development*' (at page 10).

➤ *Tick-box approach*

We would like to underline that an equality assessment cannot be completed by merely ticking boxes. The courts have stated that '*the duty must be exercised in substance, with rigour and with an open mind.*'<sup>14</sup> It is questioned whether this approach has been taken, given that the over 70 assessments covering diverse policies and extensive spending cuts found almost identical results, none involving a negative impact.

We remind you that merely ticking boxes is not sufficient to discharge the s75 duty. The courts have found that an '*equality impact assessment should be an integral part of the formation of a proposed policy, not justification for its adoption... a record will not aid those authorities guilty of treating advance assessment as a mere exercise in the formulaic machinery. The process of assessment is not satisfied by ticking boxes.*'<sup>15</sup>

Furthermore, most HLIA forms provide no information at all on the '*evidence used*' to ascertain the equality impact of each policy. Without reference to the evidence or data used, it is impossible to know how conclusions in relation to equality impact were reached.

➤ *Inconsistencies between documents*

DETI's budget 2011-15 consultation document includes an HLIA at Annex C. However, the document at Annex C is very different to the HLIA forms sent to us in response to our Freedom of Information request. Annex C could be a summary of the HLIA forms, but it does not correspond with those documents.

In particular, the HLIA at Annex C refers to some negative impacts and mitigating actions in relation to both savings and spending plans. As these were not recorded in the HLIA forms, we can only surmise that these

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<sup>14</sup> Brown v SOS for Defence [2006] IRLR 934, at para 92.

<sup>15</sup> R (Kaur and Shah) v London Borough of Ealing [2008] EWHC 2062, at paras 24 and 25.

negative impacts are those listed in the savings delivery plans in relation to Tourism Ireland Ltd and InterTradelreland. Annex C lists the negative impacts under spending plans (not savings, as in the savings delivery plans forms). It finds only neutral impacts for savings plans.

Furthermore, the negative impacts in the savings delivery plans relate to an impact on *'economic activity'* and not on equality and good relations, as stated in the titles of Annex C at sections 1 and 5. The conflicting results do not give us confidence in the results found.

➤ *Commitment to equality*

A statement in one of the HLIA forms causes us much concern in relation to DETI's commitment to equality in Northern Ireland. In the Foreign Direct Investment Resource HLIA, in the section on adjustments to increase the equality of opportunity between s75 groups, the official has stated that *'[i]t is not in Invest NI's remit to target projects that would create employment within specific Section 75 categories and this may be counterproductive to its efforts in attracting high quality investment'* (at page 164).

This statement runs contrary to the spirit and letter of s75. In fact, it is a statutory duty for designated public authorities, such as Invest NI and DETI, to have due regard to the need to promote equality of opportunity. It must also consider alternative policies that might better promote the equality of opportunity (para 9(1) Schedule 9 Northern Ireland Act 1998).

Further, the statement above shows a fundamental lack of understanding in relation to the benefits accruing to our community and workforce through having diversity represented in a proportionate manner. We strongly refute the suggestion that the involvement of s75 groups would discourage investment. If so, that investment would certainly not be *'high quality.'*

We recommend that DETI carry out training for its staff on s75, as required by Schedule 9 para 4(2)(e). We suggest that such training include the objectives and operation of s75, and the correct approach to completing screening forms.

### Insufficient information

Despite having filled out over 70 HLIA forms, DETI's main consultation document contained insufficient information to comment on its draft budget 2011-15, as the potential equality impacts are unclear. In order to engage in meaningful consultation, consultees must be provided with sufficient information to understand, scrutinise and comment on the policies proposed. In the BERR Code of Practice on Consultation,<sup>16</sup> *Criterion 3* (entitled *Clarity of scope and impact*) states that '[c]onsultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals'.<sup>17</sup>

The above is referred to in the Equality Commission for Northern Ireland's ('ECNI') Guidance on s75 which recommends '*that information is made available to ensure meaningful consultation, including detailed information on the policy proposal being consulted upon and any relevant quantitative and qualitative data.*'<sup>18</sup> Also, in common law, the need for sufficient information in any consultation process is set out in the "Sedley Requirements"<sup>19</sup>, which state that:

- 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;
- 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.

We believe that these minimum requirements for meaningful consultation were not fulfilled in DETI's public consultation document for its draft budget 2011-15. The consultation document only refers to '*largely neutral*' impacts for both savings and spending proposals. There is no indication of which proposals may not have had a neutral impact, what impacts may be involved, their extent, or which evidence was relied upon.

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<sup>16</sup> Department for Business, Enterprise and Regulatory Reform, July 2008, found at <http://www.berr.gov.uk/files/file47158.pdf>.

<sup>17</sup> Ibid at page 9.

<sup>18</sup> Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities, April 2010, at page 39, found at <http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>.

<sup>19</sup> R v London Borough of Barnet, ex parte B [1994] ELR 357, 372G.

We recommend that DETI includes in the main consultation document, either a summary of impacts found and evidence used, or reference to the underlying screening forms and the best way to access them. This would help ensure that the public has sufficient information to respond to DETI's budget consultation in a meaningful way.

Given the points above, we request that DETI review the way in which its s75 screening has been carried out and make the documents more easily available to the public. It is crucial to carry out and publicise thorough, evidence-based impact assessments in relation to the promotion of equality of opportunity, as required by s75. Furthermore, we cannot respond fully to the consultation process without access to this information and its underlying evidence.

We also request that any future consultation run for at least the 12 week period recommended in OFMDFM,<sup>20</sup> BERR<sup>21</sup> and ECNI<sup>22</sup> Guidance. We look forward to hearing from you.

Yours sincerely



Mike Ritchie

Director

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<sup>20</sup> OFMDFM (2003) „A practical guide to policy making in Northern Ireland“, at section 8.5, found at: <http://www.ofmdfmi.gov.uk/practical-guide-policy-making.pdf>.

<sup>21</sup> Department for Business, Enterprise and Regulatory Reform, July 2008, *supra*. Criterion 2 states that ‘*Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.*’

<sup>22</sup> Section 75 of the Northern Ireland Act 1998 A Guide for Public Authorities, April 2010, *supra*. At page 38, it states ‘*[w]e recommend that the consultation period lasts for a minimum of twelve weeks.*’