

CAJ's submission no. S313

CAJ's submission to the Department of the Environment's Consultation on its draft Equality Scheme

April 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 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, Joseph Rowntree Charitable Trust and the Oak Foundation.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Submission to the Department of the Environment's Consultation on its draft Equality Scheme

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-convenor of the Equality Coalition. We welcome the opportunity to comment on the Department of the Environment's ('DOE') consultation on its new equality scheme.

CAJ acknowledges DOE's efforts in producing a comprehensive equality scheme. We have also had the advantage of speaking with DOE representatives at an Equality Coalition event, and discussing some issues arising in relation to the draft equality scheme. We are encouraged to see that DOE has, on the whole, adopted the ECNI model scheme¹ and also expanded upon it slightly. However, we would like to challenge a few instances where DOE diverged from the ECNI model scheme, and also suggest a few additions, which would strengthen the DOE equality scheme.

Consultation arrangements

We would like to point out some concerns relating to consultation, both on the draft equality scheme itself and, separately, arrangements for future consultations within the draft equality scheme.

In relation to the consultation for the draft equality scheme itself, the consultation period was too short to allow for full consideration by civil society. Given that the draft equality scheme was published on 22 February 2011, stakeholders have had less than two months to respond. This is clearly well below the three month minimum recommended in the OFMDFM,² BERR³ and

¹ ECNI model equality scheme, found at http://www.equalityni.org/sections/default.asp?secid=8&cms=Publications_Statutory+duty&cmid=7_43&id=43.

² 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>.

ECNI⁴ Guidance. It is also difficult to find the consultation on DOE's website, as it is not included within the consultation zone.⁵

In relation to the arrangements for future consultations, we note that DOE's draft equality scheme diverges from the ECNI model scheme in relation to consultation, which could affect the application of s75 in practice. We consider these changes below, and also make one suggested addition, beyond the ECNI model scheme.

First, DOE has removed the commitment, at para 3.2.1 ECNI model scheme, to notify all consultees, as a matter of course, of the matter/policy being consulted upon to ensure they are aware of all consultations. While we understand the rationale behind targeted consultation, we believe that all consultees should be made aware of consultations, as the wider civil society may have valuable input for a matter that DOE perceives as being outside of their remit. Further, the full list of consultees at Appendix 3 would be redundant if not used in practice. We would therefore recommend that DOE include the relevant passage from para 3.2.1 ECNI model scheme in its own equality scheme.

Secondly, it is not clear why DOE has removed the reference to seeking the views of those with a legitimate interest 'whether or not they have a direct economic or personal interest' (at para 2.15 ECNI model scheme) and also the detailed suggestions for methods of consultation (at para 3.2.2 ECNI model scheme). We recommend that the ECNI model scheme be used as a minimum threshold for the DOE draft equality scheme, and that content not be removed without good reason. We therefore suggest that these passages are included in the DOE equality scheme.

Thirdly, we note that DOE has not consulted upon its audit of inequalities. The ECNI has made clear that the consultation on the audit of inequalities is implicit in the request for consultation on the draft action plan. The publication or consultation of audit of inequalities would help civil society inform DOE of

³ Department for Business, Enterprise and Regulatory Reform, July 2008, *supra*. Criterion 2 states that '[c]onsultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.'

⁴ 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'.

⁵ See <http://www.DOE.ni.gov.uk/index/about-DOE/consultation-zone.htm>.

any irregularities or omissions arising, which are more difficult to identify within the action plan. Commentary would also be more constructive, given that the audit is not constrained by resources and strategic plans, as is likely the case for the draft action plan. We therefore recommend that DOE publish and/or consult on its draft audit of inequalities.

Further, we recommend that DOE commits to publish and consult on its audit of inequalities and action plan in the future, by explicitly adding them as documents for which DOE will seek input from its stakeholders and consult upon (currently only the draft action plan is referred, and as a completed event at para 2.20 DOE draft equality scheme). Please note that, due to a lack of time and expertise, we have not reviewed the DOE draft action plan. However, we have noted the removal of the commitment to incorporate action measures into the business planning process (see para 2.14 ECNI model scheme), which we recommend is included.

S75 beyond the action plan

We would also like to remind DOE that, in addition to the s75 action-based plan, s75 continues to apply to all DOE policies in relation to all nine equality groups. We recommend that DOE also commits to including progress on its delivery in its organisational annual report, as suggested at para 2.7 ECNI model scheme.

Although we recognise the positive impacts that the action-based plan could have on addressing inequalities, we are also aware that it could have a limiting influence on the operation of s75 outside the specific priorities identified within it. Also, newly emerging inequalities may not be captured in the original audit of inequalities. We therefore hope that any data gaps identified in the audit of inequalities will be addressed, and that the audit will provide a useful tool for policy-makers when applying s75 beyond the scope of the action-based plan.

In this regard, we note that DOE has made two small changes in relation to monitoring the application of policies for s75 groups, which could limit its effectiveness in practice. At para 4.31 of its draft equality scheme, DOE has committed to review its EQIA monitoring information on 'a regular basis'. By contrast, the ECNI model scheme allows for such review to take place on 'an annual basis' (at para 4.31). While we recognise that this change appears to

be minimal, its effect could be important, as it may lead to the lack of sufficient review of EQIA monitoring information. Unless a time period for review is fixed, it would be possible for that review not to take place, or for 'regular' to be interpreted as a much longer time span. We therefore recommend that DOE use the ECNI model scheme language of 'on an annual basis'.

Similarly, where monitoring has found that a policy results in greater adverse impact than expected, DOE has qualified the action that it would be prepared to take. In the ECNI model scheme, public authorities should 'revise' the policy to achieve better outcomes for relevant equality groups (para 4.30). By contrast, the DOE draft equality scheme only commits to 'reviewing' the policy (see para 4.30). We appreciate that the language may have been tempered to allow for those situations where it is not easy to change the policy, but we believe that the excellent procedures to identify and monitor equality impacts would be almost redundant if DOE were not to put the information found into practice. It would seem counter-intuitive to discover adverse impacts and yet not alter policy to lessen this effect. We therefore recommend that DOE change the language at para 4.30 of its draft equality scheme from 'review' to 'revise'.

Complaints Procedure

We note, with concern, that DOE has added a major qualification to the ECNI recommendations with which it will comply post-investigation. In the ECNI model scheme, para 8.8 states that the relevant public authority 'will make all efforts to implement promptly and in full any recommendations arising out of any Commission investigation.' By contrast, in the DOE draft equality scheme, this is limited to giving 'full consideration' to any such recommendations (at para 8.10).

We strongly believe that this limitation is both inappropriate and unnecessary. Schedule 9 Northern Ireland Act 1998 charges the ECNI with making recommendations on the correct application of s75. It would be wholly inappropriate for a public authority to usurp the ECNI's role, by adopting a veto to these recommendations. This incursion into the ECNI's powers is also unnecessary, as the para 8.8 obligation to comply with ECNI recommendations is already qualified by the term 'make all efforts'. We therefore request that the DOE draft equality scheme, at para 8.10, is amended to reflect the ECNI model scheme.

Publication of screening forms

In relation to screening templates, it would be helpful for consultees to be informed when screening forms are posted on the DOE website⁶. We are concerned that, as screening reports are sent to consultees on a quarterly basis (para 4.25), it is possible that civil society may not be aware of a specific policy's screening for a period of three months. By this time, the policy may be implemented or further developed, so that alternative measures would be more difficult to apply. It would therefore be important for civil society to be informed sooner of policies for which 'no' or 'minor' impact was found, but for which they may have specialist knowledge of otherwise unforeseen equality impacts.

We appreciate that DOE will make the screening forms available on its website and on request (para 4.14). However, given that there are over 200 designated public authorities in Northern Ireland, it is impossible to review each of those websites daily, or even weekly, to check if screening forms have been posted. We would therefore recommend that DOE include a statement, at para 4.14, that consultees will be informed of screening forms when they are completed or posted on its website.

Staff understanding of s75

CAJ also recommends that DOE include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the DOE equality scheme does not explain the relationship between the equality duty (s75(1)) and the good relations duty (s75(2)). The ECNI Guide for Public Authorities⁷ ('the ECNI Guide') clearly states that 'good relations cannot be based on inequality' and confirms that 'the term due regard was intended to be, and is, stronger than regard'.⁸ It also clarifies that 'the discharge of the good relations duty cannot be an alternative to or cannot set aside the equality of opportunity duty'.⁹

⁶ Or the relevant Represented HSC Body's website.

⁷ Section 75 of the Northern Ireland Act 1998: A Guide for Public Authorities, ECNI, April 2010, found at <http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>.

⁸ Ibid at page 26.

⁹ Ibid, at page 27.

As the DOE equality scheme will be used as a point of reference for its staff's application of s75 and any training provided, it is crucial that the equality scheme itself contains clear statements on the relationship and difference between the two s75 duties. Similarly, the ECNI Guide provides useful statements on positive action and multiple identities. We believe that the inclusion of these statements, or similar, would help staff to understand s75. For example, it is a common misunderstanding that 'universal application' implies a neutral impact on equality groups, when it can, of course, exacerbate inequalities.

The useful passages in the ECNI Guide are as follows: 'The promotion of equality of opportunity entails more than the elimination of discrimination. It requires proactive measures to be taken to facilitate the promotion of equality of opportunity between the categories identified in Section 75 (1). The equality duty should not deter a public authority from taking action to address disadvantage among particular sections of society – indeed such action may be an appropriate response to addressing inequalities. There is no conflict between the Section 75 statutory duties and other affirmative action measures or positive action measures which a public authority may undertake under anti-discrimination laws.'¹⁰

If you would like any further information, please do not hesitate to contact CAJ at the details listed below.

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¹⁰ Ibid, at page 25. At the same page, the ECNI Guide also states: 'Individuals do not neatly fit into one Section 75 category or another, individuals will invariably be members of a number of Section 75 categories. Thus Section 75 enables multiple identity issues to be considered as well as issues regarding particular categories of people.'