

CAJ's submission no. S317

CAJ's submission to the Department for Social Development'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 for Social Development'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 standard 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. We welcome the opportunity to comment on the Department for Social Development's ('DSD') consultation on its new equality scheme.

CAJ acknowledges DSD's efforts in producing a comprehensive equality scheme. However, we believe that the consultation period was too short to allow for full consideration by civil society. Given that the draft equality scheme was published on 1 March 2011, stakeholders have had less than two months to respond. This is clearly well below the three month minimum recommended in the OFMDFM,¹ BERR² and ECNI³ Guidance. We are encouraged to see that DSD has, on the whole, adopted the ECNI model scheme⁴ and also expanded upon it slightly. However, we would like to challenge a few instances where DSD diverged from the ECNI model scheme, and also suggest a few additions, which would strengthen the DSD equality scheme.

Consultation arrangements

We note that DSD's draft equality scheme diverges from the ECNI model scheme in relation to consultation, which could affect the application of s75 in

¹ 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>.

² 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.'

³ 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'.

⁴ ECNI model equality scheme, found at http://www.equalityni.org/sections/default.asp?secid=8&cms=Publications_Statutory+duty&msid=7_43&id=43.

practice. We consider these changes below, and also make one suggested addition, beyond the ECNI model scheme.

First, DSD 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 DSD 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 DSD include the relevant passage from para 3.2.1 ECNI model scheme in its own equality scheme.

Secondly, DSD has qualified the time-period of consultations from one which ‘lasts for a minimum of twelve weeks’ (para 3.2.6 ECNI model scheme) to one which ‘should last for a minimum of twelve weeks’ (para 3.10 DSD draft equality scheme). It is not clear why this amendment has been introduced, particularly as allowance is made for shorter time periods in exceptional circumstances. We therefore recommend that DSD make a stronger commitment to the 12 week consultation period, in order to promote certainty and align with the ECNI model scheme.

Thirdly, DSD has included the words ‘such as’ within the list of those whose views will be sought in consultation and removed the reference to seeking the views of ‘other public authorities, voluntary and community groups, our staff and their trades unions and such other groups who have a legitimate interest in the matter, whether or not they have a direct economic or personal interest’ (para 3.2.1 ECNI model scheme). The DSD draft equality scheme states that ‘[a]ll consultations will seek the views of those directly affected by the matter/policy, *such as* the Equality Commission and representative groups of Section 75 categories⁵ (our emphasis). The addition of ‘such as’ limits the list above to being alternative, rather than cumulative. We therefore recommend that it is removed.

Also, it is not clear why DSD has removed ‘other public authorities, voluntary and community groups, our staff and their trades unions and such other

⁵ Ibid, at para 3.2.1.

groups who have a legitimate interest in the matter, whether or not they have a direct economic or personal interest' from para 3.2.1. These are important categories of persons who should be consulted on equality impacts. DSD has also removed the ECNI model scheme references to suggested consultation methods (at para 3.2.2). We recommend that the ECNI model scheme be used as a minimum threshold for the DSD draft equality scheme, and that content not be removed without good reason. We therefore suggest that these passages are included in the DSD equality scheme.

Finally, we note that DSD 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 DSD of 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 DSD publish and/or consult on its draft audit of inequalities.

Further, we recommend that DSD commits to publish and consult on its audit of inequalities and action plan in the future, by explicitly adding them as documents for which DSD will seek input from its stakeholders and consult upon (currently only the draft action plan is referred, and as a completed event at para 2.14 DSD draft equality scheme).

Publication of Information

CAJ is concerned that DSD has changed the content and time period for the publication of its screening reports.

DSD has limited the publication of screening reports to 'regularly', instead of 'quarterly' (once every three months), as set out in the ECNI model scheme (see paras 4.15, 4.20 and 4.25). In order to promote confidence in DSD's transparency and accountability, we recommend a more time-specific period for publication. Also, as civil society will no longer be formally consulted upon DSD's screening exercises, it is essential that stakeholders are informed on a specified basis of screenings carried out. Given that, as it stands, consultees would only be informed 'regularly', this could be interpreted to allow for less frequent publication of screening reports. If so, policies for which no or minor

impact was found may proceed to implementation before civil society is aware of their existence.

Further, it would be helpful for consultees to be informed when screening forms are posted on the DSD website. We are concerned that, if screening reports are sent to consultees on for example a quarterly basis, it is possible that civil society may not be aware of a specific policy's screening for a long period of time. 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 DSD will make the screening forms available on its website and on request (para 4.24). 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. Also, DSD has generalised the assessments that will be published on the website to 'equality assessments' (para 4.24), compared to the more specific 'assessments (screening reports and completed templates, the results of equality impact assessments)' at para 4.24 ECNI model scheme. It is therefore unclear exactly which documents will be published.

As such, we recommend that DSD specify which assessment documents will be published on its website, and also include a statement, at para 4.24, that consultees will be informed of screening forms when they are completed or posted on its website.

This is particularly important given that DSD has not committed, in its draft equality scheme, to include the specific contents of each screening report, as listed at para 4.20 ECNI model scheme. We remind you that DSD is under a statutory obligation to publish the aim of each policy and any mitigation or alternative policies considered, further to para 9(1) Schedule 9 Northern Ireland Act 1998. We therefore also recommend that these specific screening report contents are included in the DSD equality scheme (at para 4.21).

DSD has also limited the publication of its feedback report, which includes summary information on the policy consulted upon, a summary of consultees' comments and DSD's response to consultees' input. At para 3.16 of its draft

equality scheme, DSD has only committed to ‘provide feedback to consultees *who request it* in a timely manner’ (our emphasis). CAJ is concerned by this qualification, which is not included in the ECNI model scheme (para 3.2.11). As above, consultees may not be aware when a feedback report has been produced. As a result, transparency would be limited. Also, given the wording of para 3.16, it is not clear if a feedback report will only be produced if requested by a consultee, or if the ‘timely manner’ applies to the consultee’s request or the provision of the feedback report. We therefore recommend that DSD removed the words ‘who request it’ from para 3.16 of its equality scheme.

Consideration of data

We note, with disappointment, that DSD made two small changes to the ECNI model scheme in relation to monitoring and addressing gaps in data. We believe that this limits DSD action in relation to s75.

First, DSD has reduced the action that it will take in response to gaps in data, which would limit the effectiveness of s75. At para 4.28, DSD only intends to ‘consider taking action to address any gaps’, compared to the ECNI model scheme, which sets out that a public authority shall ‘take action to address any gaps’ (at para 4.29). The use of data is critical to the effective operation of s75, as it allows staff to become aware of policy impacts on s75 groups, which may not otherwise be expected or known about. We therefore recommend that DSD strengthen its approach to addressing gaps in data.

Secondly, where monitoring has found that a policy results in greater adverse impact than expected, DSD 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 DSD draft equality scheme only commits to ‘reviewing’ the policy (see para 4.29). 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 DSD 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 DSD change the language at para 4.29 of its draft equality scheme from ‘review’ to ‘revise’.

In this regard, would like to remind DSD that, in addition to the s75 action-based plan, s75 continues to apply to all DSD policies in relation to all nine equality groups. 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. In this regard, we recommend that DSD include the statement from para 7.2 ECNI model scheme that the timetable on s75 actions 'is different from and in addition to our commitment to developing action plans/action measures.'

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. We refer you to the need to review and consult upon the audit of inequalities, as noted above, and include such a commitment at para 2.14 DSD equality scheme.

Finally, we note that DSD has failed to include certain aspects of the ECNI model scheme in relation to accessibility (see ECNI model scheme paras 3.2.8, 3.3, 6.6, 6.7, 6.8 and 9.3). We believe that this could limit public access to DSD information and services. This is particularly important in relation to people with disabilities and younger and older people. These categories are all listed within s75 Northern Ireland Act 1998 ('s75'), and DSD must consider their equality of opportunity in relation to access. In this regard, the DSD equality scheme should be an example of best practice, and so we recommend that DSD reinstate the relevant paragraphs from the ECNI model scheme, as a minimum.

Complaints Procedure

We note, with concern, that DSD 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.'⁶ By contrast, in the DSD draft equality

⁶ Ibid, at para 8.8.

scheme, this is limited to giving ‘full consideration’ to any such recommendations (at para 8.8).

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 Northern Ireland Act 1998 (‘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 DSD draft equality scheme, at para 8.10, is amended to reflect the ECNI model scheme.

Staff understanding of s75

DSD has removed several references to staff training in the equality scheme, in the foreword and throughout section five.⁷ Although we welcome the alignment of DSD’s training programme with CAL, we are concerned that the change of language from ‘training’ to ‘awareness’ (see para 5.2), and the removal of references to a detailed training plan (para 5.3) and focused training for key staff (para 5.4) may diminish the extent to which training is provided.

Training is a key requirement for s75, under para 2(e) Schedule 9 Northern Ireland Act 1998. It is also essential to ensuring a full understanding of the objectives and operation of s75, which would make the statutory duty more effective and also, in the long run, more efficient in terms of resources. We would therefore recommend that DSD review section five of its draft equality scheme and restore the ECNI model scheme content.

CAJ also recommends that DSD include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the DSD equality scheme DSDs not explain the relationship between the equality duty (s75(1)) and the good relations duty (s75(2)). The ECNI Guide for Public Authorities⁸ (‘the ECNI Guide’) clearly states that ‘good relations cannot be

⁷ See para 5.2, 5.3, 5.5 and 5.6 of ECNI Model Scheme, *supra*.

⁸ 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>.

based on inequality’ and confirms that ‘the term due regard was intended to be, and is, stronger than regard’.⁹ 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.’¹⁰

As the DSD 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.’¹¹

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

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⁹ Ibid at page 26.

¹⁰ Ibid, at page 27.

¹¹ 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.’