

CAJ's submission no. S335

CAJ's submission to St. Mary's University College's consultation on its draft Equality Scheme

May 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 St Mary's University College's Consultation on its draft Equality Scheme

Committee on the Administration of Justice
May 2011

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 St Mary's University College's ('St Mary's') consultation on its new equality scheme.

CAJ acknowledges St Mary's beginning the consultation period in good time to allow for Equality Commission ('ECNI') approval before the 1 August 2011 deadline. We are encouraged to see that St Mary's has in the main followed the ECNI model scheme¹, but we are also concerned by many amendments that have been made. In particular, St Mary's has removed many passages from the ECNI model scheme, when adapting it for the St Mary's draft equality scheme.

Although we understand the advantages of limiting the information included in an equality scheme, to make it user-friendly for staff, we believe that St Mary's has removed too many important passages from the ECNI model scheme. Some of these passages ensure compliance with the s75 framework, encourage the effective mainstreaming of equality or provide essential information for staff on the operation and objectives of s75. In this respect, although some of the deleted passages are not constitutive of St Mary's duties, their inclusion would send a clear signal to staff and civil society that St Mary's takes its s75 responsibilities seriously.

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

It is clear that St Mary's equality scheme must conform to ECNI's Guidance on s75² (para 4(3)(a) Schedule 9 Northern Ireland Act 1998). As the ECNI model scheme is based on its Guidance, we strongly recommend that it is used as a minimum standard on which to build St Mary's equality scheme. Also, St Mary's has not included most of the references to Schedule 9 Northern Ireland Act 1998 in its equality scheme. Although their removal from the text of the scheme does not remove their application in practice, we believe that the references to statute underline the seriousness of the obligations. Their inclusion reminds staff that the s75 obligations are statutory and not merely bureaucratic.

In this submission we will challenge several instances where St Mary's diverged from the ECNI model scheme and also suggest a few additions, which would strengthen the St Mary's equality scheme.

Consultation arrangements

We note that St Mary's draft equality scheme diverges from the ECNI model scheme in relation to consultation, which we believe could affect the application of s75 in practice.

First, St Mary's has removed the list, in para 3.2.1 of the ECNI model scheme, of the types of persons to be included in a consultation. These are important categories of persons who should be consulted on equality impacts, and all of whom may not be included at Appendix 3 (list of consultees). We recommend that the ECNI model scheme be used as a minimum threshold for the St Mary's draft equality scheme, and that content not be removed without good reason. Similarly, St Mary's has not included the example consultation methods (para 3.2.2 ECNI model scheme), which could be helpful to staff. It is not clear why this change has been made and we suggest that these passages are included in the St Mary's equality scheme.

Secondly, St Mary's has removed all references to situations where a consultation period will last longer than 12 weeks, and the examples of when this would occur (para 3.2.7). It would be helpful if examples, such as the summer or Christmas break or the complexity of the policy, were included.

² 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>.

This would help promote clarity and certainty as to the likely time period for consultations.

Finally, St Mary's has removed several references to making consultation more accessible, particularly in relation to children and young people, people with disabilities and ethnic minorities (at para 3.2.3 ECNI model guide). St Mary's has also removed paras 3.2.8 and 3.2.9 ECNI model scheme, which acknowledge 'the fact that affected individuals and representative groups may have different needs'. Given that these categories of persons are included in s75 itself, it is essential that St Mary's commits to promoting their equality of opportunity in taking part in consultations. Also, their input to the impact of policies on other people in their equality groups could be invaluable.

Had St Mary's included these paragraphs, it would have committed to taking 'appropriate measures to ensure full participation in any meetings that are held' including the time of day, the venue, language and other accessibility requirements and childcare (para 3.2.8) and providing all information, including data, in appropriate formats to ensure meaningful consultation (para 3.2.9). Also, the reference to providing feedback reports in 'formats suitable to consultees' (para 3.2.11 ECNI model scheme) has been removed from the St Mary's draft scheme's equivalent para 33. We request that St Mary's insert these passages in its own equality scheme to help ensure accessibility when St Mary's carries out its consultations.

Accessibility

In addition to the above we note that St Mary's has failed to include several other passages of the ECNI model scheme, which are in place to ensure accessibility to St Mary's information and services. This leads us to question St Mary's commitment to accessibility, especially given that it has not included the statement, at para 6.6 ECNI model scheme, that St Mary's is 'committed to ensuring that all of our services are fully accessible to everyone in the community across the Section 75 categories.'

St Mary's has also qualified ECNI model scheme's para 6.1 which states that '[St Mary's] is committed to ensuring that the information we disseminate and the services we provide are fully accessible to all parts of the community in Northern Ireland. We keep our arrangements under review to ensure that this

remains the case.’ Instead, St Mary’s only ‘strives’ to ensure that its information and services are accessible (para 63 St Mary’s draft scheme).

In the same vein, St Mary’s has deleted all of para 6.2 ECNI model scheme, which states that ‘we are aware that some groups will not have the same access to information as others. In particular:

- People with sensory, learning, communication and mobility disabilities may require printed information in other formats.
- Members of ethnic minority groups, whose first language is not English, may have difficulties with information provided only in English.
- Children and young people may not be able to fully access or understand information.’

Again, these statements are incredibly important for ensuring accessibility to St Mary’s information. People with disabilities, ethnic minorities and younger people are all listed within s75, and St Mary’s must consider their equality of opportunity in relation to access. In this regard, the St Mary’s equality scheme should be an example of best practice, and we recommend that St Mary’s reinstate the relevant paragraphs from the ECNI model scheme, as a minimum.

In addition, St Mary’s has removed some of the examples of alternative formats for information, included at para 6.3 ECNI model scheme. For example, easy read, CD, mp3 and DAISY are not included. It is not clear why St Mary’s has deleted these examples, but it suggests that these formats will not be available. Given the importance of transparency, accessibility to public documents and s75 groups’ input to the s75 process, we request that these example alternative formats are included in the St Mary’s draft scheme.

Also, St Mary’s has deleted the commitment, at para 6.8 ECNI model scheme, to monitor, within a specific timeline, ‘across all our functions, in relation to access to information and services, to ensure equality of opportunity and good relations are promoted.’ Although St Mary’s states, at para 63 of its draft scheme, that it has already monitored the accessibility of its information and services, it is necessary to repeat this on a regular basis to ensure that its systems are working and access is achieved in practice.

Finally, we note that St Mary’s has not committed to provide, on request, its equality scheme in alternative formats ‘such as Easy Read, Braille, large print,

audio formats (CD, mp3, DAISY) and in minority languages to meet the needs of those not fluent in English' (para 9.3 ECNI model scheme) or for children and young people. If people with disabilities, younger people and ethnic minorities cannot access St Mary's equality scheme, then they cannot know if or when St Mary's has breached its scheme. It is therefore essential to have access to this document.

We note that St Mary's will include an action measure to address accessibility within its action plan, but we request that the commitments in the ECNI model scheme (paras 6.1, 6.2, 6.6 - 6.9 inclusive and 9.3) are also included in the St Mary's equality scheme.

Screening of Policies

In relation to the screening of policies, several aspects of the St Mary's draft equality scheme cause concern and could limit St Mary's fulfillment of the s75 duties.

First, St Mary's has removed the references to the expansive interpretation afforded to the term 'policies'. In particular, at para 2 of its draft scheme, St Mary's has removed the specific references to 'employment and procurement', as examples of 'powers and duties' included in the definition of 'functions' in s75 (see para 1.1 ECNI Guide). Given that the public sector is the biggest employer and contractor in Northern Ireland, the way in which it performs these functions is critical to promoting equality in our society. Clearly s75 does cover both employment and procurement (see, for example, the 2008 Procurement Guidance by ECNI and the Central Procurement Directorate). However, staff may not be aware of these important applications, if they are not explicitly included in the St Mary's equality scheme.

Similarly, St Mary's has removed the passage at para 4.1 ECNI model scheme, which states that '[i]n the context of Section 75, 'policy' is very broadly defined and it covers all the ways in which we carry out or propose to carry out our functions in relation to Northern Ireland. In respect of this equality scheme, the term policy is used for any (proposed/amended/existing) strategy, policy initiative or practice and/or decision, whether written or unwritten and irrespective of the label given to it, eg, 'draft', 'pilot', 'high level' or 'sectoral'.' We recommend that both of these passages are included in the St Mary's equality scheme.

Secondly, St Mary's has removed the requirement to screen policies *before* implementation. At para 38, St Mary's has deleted the passage '[p]olicies which we propose to adopt will be subject to screening prior to implementation' from the ECNI model scheme's equivalent para 4.5. The ECNI Guidance makes clear that screening should take place prior to implementation of policies. Indeed, the entire screening exercise would be academic if the policy would be implemented anyway.

By screening in advance, St Mary's would have an opportunity to consider mitigation or alternative measures to promote equality of opportunity, as required by para 9(1) Schedule 9 Northern Ireland Act 1998. Furthermore, established jurisprudence on the similar Great Britain duties to have due regard to the promotion of equality of opportunity has underlined the need to carry out the assessment in advance of implementation.³

Similarly, St Mary's has removed the commitment, at para 47 / 48, to carry out any equality impact assessment 'as part of the policy development process, before the policy is implemented' (see ECNI model scheme para 4.17). Although the St Mary's draft scheme refers to the ECNI Guidance, which requires equality impact assessments to be carried out in advance of implementation, staff may not be aware of this requirement, when referring to the St Mary's equality scheme. As a result, we strongly recommend that this clarification is included in the St Mary's equality scheme.

Thirdly, St Mary's appears to have minimised civil society input to the screening process. At para 37 of its draft scheme, St Mary's has not included the commitment to include, where possible, key stakeholders in the screening process (see para 4.6 ECNI model scheme). Similarly, St Mary's has removed the commitment to give details of the reasons for 'screening out' a policy (see para 4.12 ECNI model scheme). This information would be critical for civil society to understand the extent of St Mary's assessment of equality impacts, and thus input to the process. This is important not only for transparency and confidence in the process, but also to allow specialist groups to input their invaluable knowledge. We recommend therefore that St Mary's include the above references in its equality scheme.

³ See, for example, the Court of Appeal judgment in *R(C) v Secretary of State for Justice* [2008] EWCA Civ 882

The above limits to civil society input are exacerbated by the restricted publication of screening information. This is discussed in the following section.

Fourthly, St Mary's appears to have qualified the commitment to 'gather all relevant information and data, both qualitative and quantitative' (para 4.8 ECNI model scheme) when carrying out the screening exercises. The St Mary's draft scheme states that, in answering the screening questions, 'relevant information and data is gathered' (at para 39). We are concerned that the lack of reference to 'qualitative and quantitative' data could minimise the information sources. Also, the use of the impersonal language suggests that St Mary's could expect others to collect the data. As a result, we suggest that the ECNI model scheme language is used, to ensure St Mary's discharges its s75 duties in full.

Finally, it is not clear why St Mary's has removed the requirement for the policy lead to sign off each screening form (see paras 4.10 – 4.13 ECNI model scheme). This requirement, in both the model scheme and the ECNI Guidance, is not merely bureaucratic best practice. It ensures that the person working on the policy is fully aware of the equality impacts and takes responsibility on behalf of St Mary's for conclusions made. By doing this, equality of opportunity is mainstreamed into public policy, which is the fundamental objective of s75. We therefore request that St Mary's include the requirement for the policy lead to sign off each screening form.

Publication of screening

CAJ is concerned that St Mary's has not specified the time period within which its screening reports will be published (para 51 draft scheme). By contrast, the ECNI model scheme specifies that screening reports are to be published 'quarterly' or 'once every three months' (see paras 4.15, 4.20 and 4.25). In order to ensure transparency and accountability, we recommend a time-specific period for publication. Also, as civil society will no longer be formally consulted upon St Mary's screening exercises, it is essential that stakeholders are informed on a specified basis of screenings carried out.

Given that no time period has been specified for publishing screening reports, the St Mary's draft scheme could be interpreted to allow for publication to be less frequent than quarterly. This belief is reinforced by the specification, at para 46, that '[c]onsultees will be informed of screening decisions on an

annual basis.’ We expect that the same interpretation may be applied to the publication of screening reports, but this is not clear. As the draft scheme stands it is likely that St Mary’s policies for which no or minor impact is found would proceed to implementation before civil society is aware of their existence.

Also, it appears that St Mary’s will not publish its screening templates until the yearly screening report is released. St Mary’s draft scheme does not explicitly refer to the publication of screening templates, except by virtue of a link to them in the screening report (see para 49 St Mary’s draft scheme). By contrast, the ECNI model scheme provides for screening templates to be published ‘[a]s soon as possible following the completion of the screening process’ (see para 4.13 ECNI model scheme).

As it stands, therefore, civil society could only have access and input to screening decisions up to one year after they have been taken. This severely limits participation in screening decisions by those directly affected, and their representative groups, each of which would have expert knowledge of s75 impacts. This lack of inclusion could also lead to the need to change policies after one year, which could be disruptive and expensive. Further, we query whether the yearly publication of screening reports would, in itself, satisfy the publication requirements of para 4(2)(d) Schedule 9. We therefore request that St Mary’s publish its screening reports and/or templates more frequently than annually.

In addition, it would be helpful for consultees to be informed when screening forms are posted on the St Mary’s website. We are concerned that, if screening reports are sent to consultees on a quarterly or yearly basis, it is possible that civil society may not be aware of a specific policy’s screening for a long period of time. Even if St Mary’s allows for screening templates to be posted on the website on completion, this might not allow civil society’s timely input. Given that there are over 200 designated public authorities in Northern Ireland, it would be impossible to review each of those websites daily, or even weekly, to check if screening forms have been posted.

By the time that civil society is aware of a screening having taken place, the policy may be implemented or further developed, so that alternative measures would be more difficult to apply. It is therefore important for civil society to be

informed of policies for which ‘no’ or ‘minor’ impact was found, but for which they may have specialist knowledge of otherwise unforeseen equality impacts.

Monitoring and Data

We are concerned St Mary’s has not included in its draft equality scheme several passages on the importance and extent of monitoring data.

First, St Mary’s has not committed to monitor impacts more broadly than ‘adverse impacts’. Unless St Mary’s monitors impacts more broadly, it cannot know when and if a policy might have an adverse impact (which would then be monitored, further to para 52 of its draft equality scheme). Therefore, the lack of commitment to monitoring more broadly lessens the effectiveness of the commitment to monitor ‘adverse impacts.’ Also, the broader monitoring would help staff to identify potential impacts when undertaking screening and equality impact assessments. We recommend that St Mary’s explicitly commits to monitor more broadly than ‘adverse impacts’ (see paras 4.28 and 4.32 ECNI model scheme).

Secondly, St Mary’s has not committed to review its monitoring information on a yearly basis, as is suggested at para 4.31 ECNI model scheme. Unless St Mary’s reviews its monitoring information, it cannot know to what extent, if any, its policies are impacting upon equality of opportunity in Northern Ireland. Although we recognise that St Mary’s has committed that ‘monitoring systems are reviewed on an ongoing basis’ (para 53 St Mary’s draft scheme), this does not commit to reviewing the information and the lack of a precise time line could lead to less effective review. We also note that St Mary’s commits to report ‘on its equality profile on an annual basis’ (para 55 St Mary’s draft scheme). If this is intended to be a review of monitoring information, it would be helpful to specify this.

Furthermore, St Mary’s has deleted the important commitment, in relation to reviewing information systems ‘to identify the extent of current monitoring and take action to address any gaps in order to have the necessary information on which to base decisions’ (para 4.29 ECNI model scheme). As stated above, monitoring data is essential to identify the inequalities existing in our society. Without this information, St Mary’s cannot know what or the extent of impact its policies are having on equality of opportunity. As a result, we request that

St Mary's include the relevant passages at paras 4.29 and 4.31 ECNI model scheme.

Finally, St Mary's has not included the statement at para 4.27 ECNI model scheme that sets out the benefits of monitoring. The inclusion of this passage would help staff to understand why monitoring is important. It states that: '[m]onitoring can assist us to deliver better public services and continuous improvements. Monitoring Section 75 information involves the processing of sensitive personal data (data relating to the racial or ethnic origin of individuals, sexual orientation, political opinion, religious belief, etc). In order to carry out monitoring in a confidential and effective manner, [St Mary's] follows guidance from the Office of the Information Commissioner and the Equality Commission.' We suggest that it is included in St Mary's equality scheme.

Audit of Inequalities and Action Plan

We note that St Mary's has not yet released its audit of inequalities or action plan for consultation. Once complete, we recommend that St Mary's consult on both these documents. At present, it only commits to consult on its action plan (para 18 St Mary's draft scheme). 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 St Mary's 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 St Mary's publish and/or consult on its draft audit of inequalities.

Further, we recommend that St Mary's commits to publish and consult on its audit of inequalities and action plan in the future, by explicitly adding them as documents for which St Mary's will seek input from its stakeholders and consult upon (currently only the draft action plan is referred to, at para 18 St Mary's draft equality scheme). We also recommend that all St Mary's action measures will be 'specific, measurable, linked to achievable outcomes, realistic and time bound and include performance indicators and timescales for their achievement' as set out in para 2.13 ECNI model scheme. It is not

clear why this commitment has not been included in the St Mary's draft scheme.

We would like to remind St Mary's that, in addition to the s75 action-based plan, s75 continues to apply to all St Mary's 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. 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. As a result, we were disappointed that St Mary's has not committed to monitor broadly or take action to address gaps in monitoring systems, as discussed in the above section.

Furthermore, we are deeply concerned that St Mary's has qualified the description of an audit of inequalities from information that identifies 'the inequalities that exist' (para 2.12 model equality scheme) to 'any inequalities that may exist' (para 16 St Mary's draft equality scheme). This amendment suggests that inequalities may not be experienced by St Mary's service users, staff and those who are affected by its policies. This sends out an inaccurate message, and suggests that St Mary's is not aware of the deep inequalities in our society, experienced by the s75 groups. We therefore recommend that this qualification is corrected.

Staff understanding of s75

Throughout this submission, we have identified many passages from the ECNI model scheme that have not been included in the St Mary's draft equality scheme. We believe that the extent of the 'missing' material limits the effectiveness of St Mary's s75 duties in practice. In particular, as the equality scheme will be St Mary's staff's first point of reference for the application of s75, it is critical that the scheme provides clear information on how s75 operates in practice. In addition to the above, we believe the following items should also be included in the St Mary's equality scheme.

First, St Mary's has not included the statement that it 'adheres to the relevant provisions of current anti-discrimination legislation' (para 6.6 ECNI model scheme). Again, this statement is not constitutive of St Mary's obligations, but helps staff to understand that anti-discrimination legislation is separate and in addition to s75. We therefore recommend that this statement is included.

Secondly, we recommend that staff training is monitored and evaluated, as recommended at para 5.6 ECNI model scheme. We note that St Mary's intends to maintain a database on which staff has been trained, which is a welcome initiative. In addition to this, we recommend that St Mary's commits to evaluate the effectiveness of its training.

Beyond the ECNI model scheme, CAJ recommends that St Mary's include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the St Mary's 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 Authorities⁴ ('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'.⁵ 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.'⁶

As the St Mary's 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

⁴ 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>.

⁵ Ibid at page 26.

⁶ Ibid, at page 27.

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.⁷

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

⁷ 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.’