

CAJ's submission no. S343

CAJ's submission to the Northern Ireland Audit Office's consultation on its draft Equality Scheme

June 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 Northern Ireland Audit Office'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-convener of the Equality Coalition. We welcome the opportunity to comment on the Northern Ireland Audit Office's ('NIAO') consultation on its new equality scheme.

CAJ acknowledges NIAO's efforts in producing a comprehensive equality scheme and in beginning the consultation period in good time to allow for Equality Commission ('ECNI') approval before the 1 August 2011 deadline. We have also had the advantage of discussing some of these concerns with NIAO representatives at an Equality Coalition event on 8 June 2011. We are encouraged to see that NIAO 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 NIAO diverged from the ECNI model scheme, and also suggest a few additions, which would strengthen the NIAO equality scheme.

Equality Commission Guidance

We note that NIAO's draft equality scheme diverges from the ECNI model scheme in relation to ECNI guidance. It appears that NIAO is watering down the extent to which it will follow ECNI advice, which is concerning to CAJ.

ECNI has been tasked with ensuring the effectiveness of s75 Northern Ireland Act 1998 ('s75') and advising on its application (see para 1 Schedule 9 Northern Ireland Act 1998). In order to ensure the correct and consistent application of s75, it is essential that each public authority follows the ECNI's

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.

advice and guidance. It is therefore unclear why NIAO has qualified the commitments in its draft equality scheme to follow ECNI guidance.

First, NIAO has not included in its draft equality scheme para 2.9 of the ECNI model scheme, which sets out a commitment to ‘liaise closely with the Equality Commission to ensure that progress on the implementation of our equality scheme is maintained.’ We do not understand why NIAO would want to delete this passage from its equality scheme and recommend that it be included in the final draft.

Secondly, NIAO has qualified the extent to which it will take into account ECNI documents, which provide official guidance on s75. Most critically, NIAO has removed the commitment found at para 3.2 ECNI model scheme, which states that ‘[w]e are committed to carrying out consultation in accordance with the following principles (as contained in the Equality Commission’s guidance ‘*Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities (April 2010)*’)’.

Where NIAO has included commitments to follow ECNI guidance, it has changed the language in a way that reduces the extent of those commitments. In each case, NIAO only commits to taking ECNI guidance ‘into consideration’, rather than following it or acting in accordance with it. This subtle change could make a big difference to the way in which s75 is applied in practice. It also makes NIAO’s procedures for applying s75 less transparent, and so more difficult for civil society to follow.

We strongly recommend that the commitments to follow ECNI guidance are strengthened in the following places:

- At para 2.3 NIAO draft scheme, those responsible for its effective implementation only commit to taking ‘full consideration of any good practice or guidance that has been or may be issued by the Equality Commission’. Instead, we suggest that they should commit to act in accordance with such good practice or guidance, as is set out at para 2.3 ECNI model scheme.
- In relation to screening and equality impact assessments (‘EQIA’), NIAO only commits to ‘take fully into consideration published Equality Commission guidance on the screening process and completion of the

screening template and undertaking an EQIA' (see para 4.3 NIAO draft scheme). Instead, we suggest that NIAO include the language at para 4.3 ECNI model scheme and thus commit fully to 'follow Equality Commission guidance:

- the guidance on screening, including the screening template, as detailed in the Commission's guidance '*Section 75 of the Northern Ireland Act 1998 – A Guide for Public Authorities (April 2010)*' and
 - on undertaking an equality impact assessment as detailed in the Commission's guidance '*Practical guidance on equality impact assessment (February 2005)*'.
- Similarly, at para 4.16 NIAO draft scheme, NIAO only commits to carrying out an EQIA 'taking fully into consideration Equality Commission guidance'. By contrast, the ECNI model guide contains a robust commitment to 'carry out the EQIA in accordance with Equality Commission guidance' (see para 4.17 ECNI model scheme). We recommend that NIAO include this stronger commitment, which would clarify the approach it intends to take to EQIA procedure.
 - Finally, in order to ensure monitoring is carried out in a confidential and effective manner, the ECNI model scheme includes a commitment to follow 'guidance from the Office of the Information Commissioner and the Equality Commission' (see para 4.27 ECNI model scheme). NIAO has chosen to qualify this commitment, again to take 'fully into consideration' such guidance. We request that this commitment is also strengthened, as per the ECNI model scheme.

We welcome NIAO's commitment to send an annual progress report to the ECNI on its implementation of s75. However, it is not clear why NIAO has declined to include the commitment to make this report available on its website (see para 2.8 ECNI model scheme). We are interested to learn why this passage has been removed, and suggest that it be included in the NIAO equality scheme, in order to boost transparency.

Approach to Screening

CAJ notes, with concern, that NIAO has removed the requirement to screen policies as early as possible and before implementation. 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, NIAO 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.²

We therefore strongly recommend that NIAO include the ECNI model scheme's para 4.5, which states that '[s]creening is completed at the earliest opportunity in the policy development/review process. Policies which we propose to adopt will be subject to screening prior to implementation. For more detailed strategies or policies that are to be put in place through a series of stages, we will screen at various stages during implementation.'

In relation to the publication of screening documents, it would be helpful for consultees to be informed when screening forms are posted on the NIAO website. We are concerned that, if screening reports are sent to consultees on 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 NIAO will make the screening forms available on its website and on request (para 4.12). 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

² See, for example, the Court of Appeal judgment in *R(C) v Secretary of State for Justice* [2008] EWCA Civ 882

been posted. We would therefore recommend that NIAO include a statement, at para 4.12, that consultees will be informed of screening forms when they are completed or posted on its website.

Consideration of Data

We note that NIAO 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 NIAO 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 NIAO publish and/or consult on its draft audit of inequalities.

Further, we recommend that NIAO commits to publish and consult on its audit of inequalities and action plan in the future, by explicitly adding them as documents for which NIAO will seek input from its stakeholders and consult upon (currently only the draft action plan is referred to at para 2.13 NIAO draft equality scheme). Please note that, due to a lack of time and expertise, we have not reviewed the NIAO draft action plan.

We would like to remind NIAO that, in addition to the s75 action-based plan, s75 continues to apply to all NIAO 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 NIAO has not committed to 'monitor more broadly to identify opportunities to better promote equality of opportunity' (as set out at paras 4.28 and 4.32 ECNI model scheme). We recommend that this commitment is included at paras 4.27 and 4.31 NIAO equality scheme.

Staff understanding of s75

CAJ recommends that NIAOs include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the NIAO equality scheme NIAOs not explain the relationship between the equality duty (s75(1)) and the good relations duty (s75(2)). 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’.³ 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.’⁴

As the NIAO 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.’⁵

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

June 2011

³ Ibid at page 26.

⁴ Ibid, at page 27.

⁵ 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.’