

CAJ's submission no. 362

CAJ's submission to the Office of the Police Ombudsman for Northern Ireland's consultation on its draft Equality Scheme

October 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 Office of the Police Ombudsman for Northern Ireland's Consultation on its Draft Equality Scheme

Committee on the Administration of Justice, October 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-convener of the Equality Coalition. We welcome the opportunity to comment on the Office of the Police Ombudsman for Northern Ireland's (OPONI) consultation on its draft equality scheme.

CAJ acknowledges OPONI's efforts in producing a comprehensive draft equality scheme. We were also encouraged to see that OPONI has adopted the ECNI model scheme as a basis for its draft equality scheme, and expanded on it in parts. In this brief submission, we will query a few divergences from the ECNI model scheme and suggest a few additions, which we believe would strengthen the OPONI equality scheme.

Consultation Methods

We note that OPONI'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, OPONI has removed the list, in para 3.2.1 of the ECNI model scheme, of several 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 OPONI draft equality scheme, and that content not be removed without good reason. We therefore recommend that OPONI include, at para 3.2.1, those phrases removed from the same para of the ECNI model scheme, namely: 'representative groups of Section 75 categories, 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.'

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

Thirdly, we note that OPONI has qualified the extent to which it will consider accessibility arrangements for consultation exercises. At para 3.2.2 ECNI model scheme, it states that '[w]e will engage with affected individuals and representative groups to identify how best to consult or engage with them. We will ask our consultees what their preferred consultation methods are and will give consideration to these.' By contrast, the OPONI draft scheme states only that it 'will consider a range of consultation methods that are appropriate to the needs of stakeholders' (at para 3.4).

Although the above difference may seem minor, the effect could be to exclude disadvantaged groups from OPONI consultations. Without engagement with the affected groups and their representatives, OPONI might not know the methods which are most 'appropriate to the needs of stakeholders.' Furthermore, those methods which OPONI perceives to be 'appropriate to the needs of stakeholders' might not include an effective method for consultees. As a result, methods which OPONI perceive to be the most effective might not, in effect, be successful in reaching the consultees on whom the relevant policy might impact the most. We therefore recommend that OPONI include the language used in the ECNI model scheme, as identified above, within its own equality scheme, in order to help ensure accessibility to its consultation exercises.

Fourthly, we note that OPONI has not fully replicated the commitment in the ECNI model scheme that consultees who have requested information in an alternative format will 'have equal time to respond' (at para 3.2.3). Instead, the OPONI draft scheme allows for such consultees to have 'sufficient time to respond' (at para 3.6). Again, this difference could seem minor, but its effect is that those consultees with disabilities or from ethnic minorities that require an

alternative format would not have an equal opportunity to input to the consultation process. Given that the very purpose of s75 is to promote equality of opportunity, it would seem important that OPONI's equality scheme supports this basic principle. Also, a time period that OPONI believes to be 'sufficient' might not be sufficient for the consultee concerned.

Similarly, we note that the reference to providing feedback reports in 'formats suitable to consultees' (para 3.2.11 ECNI model scheme) has been removed entirely from the OPONI draft scheme's equivalent para 3.13. Feedback reports are important, not only for consultees' ongoing advocacy work, but also to ensure the transparency and accountability of the entire consultation process. We recommend that OPONI commit in its equality scheme to making feedback reports available in alternative formats on request, as per para 3.2.11 ECNI model scheme, to help ensure accessibility for all to OPONI consultations

Finally, OPONI has removed some references to making consultation more accessible. At para 3.10 of its draft equality scheme, OPONI acknowledges 'the fact that affected individuals and representative groups may have different needs'. However, it has not included the explicit consideration of 'how the meeting is to be conducted, the use of appropriate language, whether a signer and/or interpreter is necessary, and whether the provision of childcare and support for other carers is required' (see para 3.2.8 ECNI model scheme). These considerations could have an impact on people with disabilities, older and young people, those with dependents (who are often women) and ethnic minorities.

Given that these categories of persons are included in s75 itself, it is essential that OPONI 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. It is therefore important that OPONI staff can reference these alternative consultation methods in the equality scheme and that, by including the text, OPONI shows its commitment to facilitating access to consultations for all s75 groups.

Screening of Policies

In relation to the publication of screening, it would be helpful for consultees to be informed when screening forms are posted on the OPONI website. We are concerned that, if screening reports are only sent to consultees quarterly, or

especially annually, it is likely that civil society would not be aware of a specific policy's screening for a long period of time. The policy may be implemented or further developed by the time civil society is aware of its screening, by which time their input would be difficult to act upon and alternative measures may be more difficult to apply.

It is therefore important for civil society to be informed as soon as possible of policies for which 'no' or 'minor' impact was found, but for which they may have specialist knowledge of otherwise unforeseen equality impacts. We note that OPONI does commit to publish the screening templates on its website '[a]s soon as possible following the completion of the screening process' (see para 4.15 OPONI draft scheme). 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 OPONI include a statement that consultees will be informed of screening forms when they are completed or posted on its website.

Audit of Inequalities

We note that OPONI 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 of or consultation on the audit of inequalities would help civil society inform OPONI of any irregularities or omissions arising within it, 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 OPONI publish and/or consult on its draft audit of inequalities.

Further, we recommend that OPONI commits to publish and consult on its audit of inequalities and action plan in the future, by explicitly adding them as documents for which OPONI will seek input from its stakeholders and consult upon (currently only the draft action plan is referred to, and as a completed event at para 2.17 OPONI draft equality scheme). CAJ has not commented on the OPONI Action Plan, currently at Appendix 6 of its Equality Strategy, as it has not been able to review the OPONI audit of inequalities.

We would like to remind OPONI that, in addition to the s75 action-based plan, s75 continues to apply to all OPONI 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.

Complaints Procedure

In relation to formal investigations by the ECNI¹, we note, that OPONI has added a qualification to the ECNI recommendations with which it will comply. 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 OPONI draft equality scheme, this is limited to a commitment that the OPONI ‘will make all efforts to give full consideration to, and prompt implementation of’ any such recommendations arising (at para 8.8).

Although it appears that OPONI is still committed to implementing the ECNI’s recommendations, it is not clear why the qualifications have been added first to include the terms ‘full consideration’ of recommendations and secondly to remove the words ‘in full’ in relation to their implementation. This suggests that OPONI does not intend to implement any such recommendations ‘in full’, and in any case only after its own ‘consideration’. We 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 OPONI draft equality scheme, at para 8.8, is amended to reflect the ECNI model scheme.

Staff Understanding of s75

¹ Under Paragraphs 10 and 11 of schedule 9, Northern Ireland Act 1998.

CAJ recommends that OPONI include statements in its equality scheme to explain the operation of s75, which is often misunderstood. In particular, the OPONI 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 Authorities² ('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 OPONI'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 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

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>.

³ As above, at page 26.

⁴ As above, at page 27.

⁵ As above, 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.'