

CAJ's submission no. S363

CAJ's submission to the Public Prosecution Service on its 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 Public Prosecution Service on its 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-convenor of the Equality Coalition. We welcome the opportunity to comment on the Public Prosecution Service's ('PPS') consultation on its draft equality scheme. We have also met with representatives of the PPS at an Equality Coalition event on 28 September 2011.

CAJ acknowledges PPS's efforts in producing a comprehensive draft equality scheme. We are encouraged to see that PPS has adopted the ECNI model scheme as a basis for its draft equality scheme, and expanded on it in parts. However, we are concerned by some divergences from the ECNI model scheme, which could affect the application of the PPS equality scheme in practice. In this submission, we will query the divergences from the ECNI model scheme and also suggest a few additions, which we believe would strengthen the PPS equality scheme.

Exemption for Prosecution of Offences

We acknowledge that, further to s38 Justice (Northern Ireland) Act 2002 and s75(4A) Northern Ireland Act 1998, PPS's functions related to the prosecution of offences is exempt from s75(1) and (2) Northern Ireland Act 1998 ('s75').¹ However, we believe that PPS has extended this exemption by applying it 'to prosecution decisions and also prosecutorial policies relating to such decisions' (see para 1.1 PPS draft equality scheme). Although s75 clearly cannot apply to each individual prosecution decision, we believe that the prosecutorial policies under which PPS operates must be within the remit of

¹ S38 Justice (Northern Ireland) Act 2002 inserts at s75 '(4A)The references in subsections (1) and (2) and Schedule 9 to the functions of the Director of Public Prosecutions for Northern Ireland do not include any of his functions relating to the prosecution of offences'.

s75. Indeed, at the Equality Coalition event on 28 September 2011, we understood that PPS representatives agreed with this reasoning.

We would like to underline the importance of restricting the s75 exemption to only the prosecution decisions and running of each individual case. First, the wider exemption prevents the mainstreaming of equality in prosecutorial policy development. As a result, several disadvantaged groups, who might be the victims of hate crimes, might not be prioritised or even addressed in general prosecutorial policy.

Secondly, an extension of the wider exemption is that PPS has wholly excluded the monitoring of equality impacts which are ‘directly linked to prosecution decisions’ (see para 4.28 PPS draft scheme). As a result, the PPS cannot know if it is inadvertently prosecuting a larger proportion of individuals from a particular section of the community. It is only by undertaking such monitoring that the PPS can truly understand the effects of its prosecutorial policy, and its application or otherwise, on the equality groups listed in s75. Where an adverse impact is identified, the PPS could then revise its prosecutorial policy, or take steps to ensure its effective application.

We therefore recommend that the PPS limit the exemption of s75 to its functions relating to the selection and running of individual cases. We recommend that s75 should be applied to prosecutorial policies and that prosecutorial decisions should be monitored *ex post facto* in order to ensure the prosecutorial policy is appropriate and/or effectively applied in practice. We therefore request amendments to both para 1.1 and para 4.28 PPS draft equality scheme in order to reflect this change.

Consultation Methods

We note that PPS’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, PPS 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 PPS

draft equality scheme, and that content not be removed without good reason. We therefore recommend that PPS include, at para 3.3, 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, we note that PPS 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 PPS draft scheme states only that it 'will consider a range of consultation methods that are appropriate to the needs of stakeholders' (at para 3.2.2).

Although the above difference may seem minor, the effect could be to exclude disadvantaged groups from PPS consultations. Without engagement with the affected groups and their representatives, PPS might not know the most 'appropriate to the needs of stakeholders.' Furthermore, those methods which PPS perceives to be 'appropriate to the needs of stakeholders' might not include an effective method for consultees. As a result, methods which PPS 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 PPS 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.

Thirdly, we note that PPS 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 PPS draft scheme allows for such consultees to have 'sufficient time to respond' (at para 3.2.3). 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 PPS's equality scheme supports this basic principle. Also, a time period that PPS 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 PPS draft scheme's equivalent para 3.2.11. 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 PPS 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 PPS consultations

Finally, PPS has removed some references to making consultation more accessible. At para 3.2.8 of its draft equality scheme, PPS 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 PPS 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 PPS staff can reference these alternative consultation methods in the equality scheme and that, by including the text, PPS 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 PPS 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 PPS does commit to publish the screening templates on its website '[a]s soon as possible following the completion of the screening process' (see para 4.10 PPS 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 PPS include a statement that consultees will be informed of screening forms when they are completed or posted on its website.

Monitoring of Data

In relation to the monitoring of data, CAJ recommends five key changes to PPS's draft equality scheme. First, as noted above, we recommend that monitoring also be applied to the application of PPS's prosecutorial policy, in order to ensure that any adverse impacts on s75 groups be addressed. Secondly, we recommend that PPS commit to 'monitoring more broadly to identify opportunities to better promote equality of opportunity and good relations in line with Equality Commission guidance' (see para 4.28 ECNI model scheme).

Currently, PPS only commits to monitoring 'any adverse impact on the promotion of equality of opportunity' (para 4.28 PPS draft scheme). However, if it does not monitor more broadly, it cannot know when and if a policy might have an adverse impact (which would then be monitored, further to para 4.28 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 PPS explicitly commits to monitor more broadly than 'adverse impacts' (see paras 4.28 and 4.32 ECNI model scheme).

Thirdly, we note that PPS has not committed in its draft equality scheme to carry out '[t]he collection, collation and analysis of existing relevant secondary sources of quantitative and qualitative data across all nine equality categories' (see para 4.29 ECNI model scheme). Given that a similar commitment has been included in relation to primary data (at 4.29 PPS draft scheme), and given the importance of secondary data in understanding equality impacts [in a cost effective manner], we recommend that the PPS also commit to including secondary data in its monitoring activities by including the above phrase in its equality scheme (at para 4.29).

Fourthly, we welcome that PPS has published and is consulting upon its audit of inequalities and action plan. In addition, we recommend that PPS commits to publish and consult on its audit of inequalities in the future, by explicitly adding it as a document for which PPS will seek input from its stakeholders (currently only the draft action plan is referred, at para 2.16 PPS draft equality scheme). Please note that, due to a lack of resources, we have not reviewed the PPS draft audit of inequalities and action plan.

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

Finally, the way in which PPS uses its data and monitoring information is vital to promoting equality of opportunity. We are therefore concerned that in the PPS draft scheme, where monitoring has found that a policy results in greater adverse impact than expected, PPS 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 ECNI model scheme). By contrast, the PPS draft equality scheme only commits that a policy would be 'revisited, where appropriate' (see para 4.30 PPS draft scheme).

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 any procedures in place to identify and monitor equality impacts would be almost redundant if PPS 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 PPS change the language at para 4.30 of its draft equality scheme from 'revisit' to 'revise'.

Complaints Procedure

We note, with concern, that PPS has added a 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 PPS draft equality scheme, this is limited to a commitment that the PPS '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 PPS 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 PPS does not intend to implement any such recommendations 'in full', and 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 PPS draft equality scheme, at para 8.8, is amended to reflect the ECNI model scheme.

Staff Understanding of s75

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