



**Response to the Department of Justice on its
Draft Equality Scheme and Action Plan**

June 2011

1 Introduction

NICEM is an independent non-governmental organisation working to promote a society free from all forms of racism and discrimination, where differences are recognised, respected and valued, and where human rights are guaranteed. As an umbrella organisation¹ we represent the interests of black and minority ethnic² (BME) communities in Northern Ireland.

NICEM welcomes the opportunity to make a response to this important consultation. Section 75 of the Northern Ireland Act 1998 was, at that time, a genuinely unique experiment in mainstreaming equality across nine grounds, including ‘racial group’ and ‘religious belief’.

NICEM has concerns that the ‘due regard’ duty in section 75 has become a mechanical exercise and that public authorities generally produce ‘defensive’ screening exercises and self-justifying EQIAs. We are also concerned that key elements in original schemes, such as the collection of quantitative and qualitative data, collaborative research across sectors and the effective monitoring of policies across all section 75 grounds, have been largely disregarded.

In short, NICEM considers that the bureaucratic application of equality schemes by many public authorities has turned section 75 from an equality ‘mainstreaming’ duty into an equality ‘sidelining’

¹ Currently we have 29 affiliated BME groups as full members. This composition is representative of the majority of BME communities in Northern Ireland.

² In this document “Black and Minority Ethnic Communities” or “Minority Ethnic Groups” or “Ethnic Minority” has an inclusive meaning to unite all minority communities. It refers to settled ethnic minorities (including Travellers, Roma and Gypsy), settled religious minorities, migrants (EU and non-EU), asylum seekers and refugees and people of other immigration status.

duty.

NICEM considers that section 75 itself and Schedule 9 of the Act have many deficiencies. Nonetheless, the Effectiveness Review conducted by the Equality Commission (ECNI), the third edition of its Guide on Statutory Duties and the introduction of audits of inequality and action plans all provide a stimulus for the reinvigoration of the mainstreaming duty in section 75.

NICEM expects the Department to submit a mature equality scheme to the ECNI. It should build on the experience of 10 years of operating under predecessor schemes and reflect the particular functions of the Department and challenges that it faces. NICEM worked as part of the Equality Coalition to discuss with the ECNI its draft Model Scheme, to which we will refer below, and we consider this to have been a valuable exercise in setting down the minimum standards expected in an approved equality scheme.

NICEM also accepts that drafting an audit of inequalities and an action plan is 'new territory' for everyone involved in this process. We welcome the production of the Department's draft action plan. However we are concerned that a complete audit of inequalities has not been published.

NICEM expects both audits and action plans to be 'living documents' within the work of the Department. We expect them to be regularly reviewed and made more comprehensive and effective. We consider that the development of audits and action plans is not some form of alternative to the effective compliance of the Department with its equality scheme, but rather a means of helping the Department adopt best practice in the

proactive promotion of equality of opportunity in its work.

In this sense, this revision of equality schemes, and introduction of audits and action plans, is an opportunity to learn from the mistakes and inadequacies of the past 10 years and to move forward, even at a time of scarce resources, into a period of genuine mainstreaming of equality.

3 Draft Equality Schemes

3.1 Consistency with ECNI Model Scheme

In NICEM's view, **there should be a non-regression principle in relation to the consistency of draft equality schemes with the ECNI Model Scheme.** We would have preferred if the Department had been required by the Commission to indicate any deviation from the minimum requirements of the Model Scheme with an explanation of the deviation. **We feel that public authorities should be required to explain deviations from the Model Scheme in the schemes which they submit to the Commission for approval and that the submitted schemes should be circulated to consultees so that they can comment upon the deviations and explanations.**

We have seen the response of the CAJ and endorse their remarks. This is particularly the case in relation to the failure to adopt a commitment, in §8.8 of your scheme, to “make all efforts to implement promptly and in full any recommendations arising out of any Commission investigation”. In our view, the provisions in paragraph 11(3) of Schedule 9, to refer investigation reports to the Secretary of State where ECNI recommendations have not been followed, is the ultimate ‘fall-back’ position. It should only be pursued

against a recalcitrant public authority not prepared to take its section 75 responsibilities seriously.

The Department clearly does not come into that category and would wish to set a positive example for public bodies in the criminal justice system. We consider that the Department should respect the ECNI's expertise in carrying out section 75 investigations and therefore should make this commitment to carry out ECNI recommendations.

3.2 Customised Equality Schemes

Having made that point, **NICEM nevertheless believes that public authorities should make more efforts to customise their schemes to their own functions.** We have seen some schemes that repeat exactly the wording of the Model Scheme with minimal attempt to make the scheme a reflection of what the authority actually does. We do not accept that, because the scheme is a 'legal document', it should merely reiterate the terms of the Model Scheme. No doubt, the Commission wishes to approve a scheme within which the obligations of the Department are clearly set out, so that the Commission can, if necessary, conduct its investigations into alleged failures to comply with it. But this genuine concern is met by the 'non-regression' principle outlined above.

In our view, the scheme should be both inward and outward looking. It should be relevant to those who work for the public authority, so that they can see its role in mainstreaming equality in its organisation.

It should also explain fully to recipients of services, and the public more generally, what the authority actually does so that they can also see how the mainstreaming of equality is relevant to them. Given that most public

authorities have been operating under their original schemes, it should be easy to include practical examples of how the authority has already complied with its original scheme, not just on screening and EQIAs but also on other commitments such as the collection of evidence and the monitoring of policies.

The Department's draft scheme contains a page of headings on the Department's work, which is varied and deserves greater description and explanation. In our view, **more could be done to make the scheme relevant both to those who work for the Department and the citizens who receive its services**, and also those who work with them on consultative and other participative forums and respond to the Department's consultations.

We have met with a range of responses to this idea of the equality scheme as a 'living document'. One idea which now occurs to us is that the Department could take this opportunity to produce **a straightforward 'Practical Guide' to its equality scheme** (and its audit and action plan) for the benefit of those who work at the Department and those who work in the criminal justice system as well as those who become involved in the criminal justice system and otherwise interact with it. We think this particularly beneficial in relation to a new Government Department and a now devolved criminal justice system. In fact we find significantly more detail on the Department's work in the introductory sections of the draft action plan.

Such a Guide could be customised to the Department's own particular circumstances and give examples of what it has done under its original

scheme taking examples from its Annual Reports to the Commission. The Guide could even be updated annually to incorporate key aspects of each subsequent Annual Report.

3.3 Collection of data

§ 4.30 of the Department's draft revised scheme states:-

“The systems in place to monitor the impact of policies and identify opportunities to better promote equality of opportunity and good relations are:

- the collection, collation and analysis of existing relevant primary and secondary quantitative and qualitative data across all nine equality categories on an ongoing basis;
- an audit of existing information systems within one year of approval of this Equality Scheme, to identify the extent of current monitoring and consider action to address any gaps in order to have the necessary information on which to base decisions; and
- undertaking or commissioning new data if necessary.”

We welcome these commitments as it is not clear to us the Department (or its predecessor) has been undertaking these forms of data collection under its original scheme. In our view, the initial responsibility for the comprehensive collection of evidence lies with the relevant Government Department but with the full involvement of other bodies in the criminal justice system.

We refer more generally at §4.1 below to the CJI Report on section 75 and the criminal justice system.³ However many of the recommendations in the Report are directed at the issue of monitoring.

“For the criminal justice system

- We recommend that the Criminal Justice Board take immediate steps to ensure that the new monitoring process being commenced by the PSNI will, in conjunction with the Causeway IT system, provide the criminal justice agencies with a functioning equity monitoring system of defendants (paragraph 2.4).
- We recommend the Criminal Justice Board should produce an annual publication which contains as much equality data as is available in relation to the criminal justice system as a whole (paragraph 2.8).

...

Agency specific recommendations

- We recommend the Northern Ireland Prison Service publish the findings of its internal review into its internal monitoring figures and prioritise the implementation of its recommendations (paragraph 2.41).
- We recommend that the Probation Board for Northern Ireland should take steps to extend appropriate section 75 monitoring across its various functions, in particular its work with adjudicated offenders and its community development funding (paragraph 2.44).
- We recommend the Youth Justice Agency takes steps to begin to monitor across its three core areas (paragraph 2.51).”

As the Executive Summary of the Report states, at p vi,:-

“Monitoring is central to these efforts and to date, we identified a weakness in relation to this within each criminal justice agency, but most acutely across the system as a whole. This will require a concerted system-wide effort to effect change. “

³ CJINI, ‘Section 75 The impact of Section 75 of the Northern Ireland Act 1998 on the criminal justice system in Northern Ireland’, May 2009.

Hopefully approval of the Department's scheme, and rigorous monitoring of the Department's policies under the scheme will provide the impetus to see these recommendations brought into effect across the criminal justice system.

It is therefore essential that the comprehensive collection of evidence, and monitoring of policies, is undertaken under the Department's revised scheme.

3.4 Screening and EQIAs

NICEM welcomes the Department's commitment to screening and EQIAs in §§4.4-4.20. NICEM has expressed concern in the past about the manner in which screening is conducted by the Department. In our response to the consultation on the EQIA of the Justice Bill 2010, we stated:-

"We take issue with the thinking behind para 6.36 ('Conclusions'). We do not accept that, because offenders are 'self-selecting', any adverse impacts on them should be discounted."

The Department, in its 'Report on Responses', stated:-

"4.24 In terms of the Department's comment that offenders were "self-selecting" the Department recognises that there are many reasons for offending. Reasons can indeed be linked to a myriad of social, environmental and family factors and the term "self selecting" may not fully accord the depth of causality. It would be insufficient to justify a law purely on the grounds of a choice to break it or not and that was not our intention. Equally, any suggestion which might imply that offenders are not entitled to equality and human rights protections would be of major concern. The Bill itself has been fully competence assessed and approved and the justice system as a whole operates to the highest compliance standards.

4.25 Where the Bill does have an impact on offenders, any impacts are either low in terms of the numbers affected; are for the broader policy aim of public protection (and therefore have positive impacts on all Section 75 groups); and do indeed have mitigating measures built in, as illustrated above."

NICEM also took issue with the ‘screening out’ by the NI Law Commission of all its proposals on reform of the bail system in criminal proceedings. At pages 6-7 of our response, we stated:-

“Finally, we must once again raise the issue of bodies involved in the criminal justice system attempting to rely on the proposition that, if there ‘happens to be’ a higher proportion of members of a section 75 group affected by the proposals, this “does not, in the Commission’s view, raise a difficulty with reference to section 75”.⁴

As the CLC states, the Equality Commission’s Investigation Report in the CLC’s own complaint against the Northern Ireland Office refutes this line of reasoning. It appeared again in the Department of Justice’s EQIA on the Draft Justice Bill and it is being given further currency here.

For the avoidance of doubt, if there is a higher representation of young men in the criminal justice system, that is, in itself, ‘significant evidence’ that the proposals may well have an adverse impact on them.

We can briefly mention an important case in England and Wales on the equivalent public sector race duty. In R (on the application of) v Secretary of State for Justice,⁵ the Secure Training Centre (Amendment) Rules 2007 were challenged partly on the basis that they had an adverse impact on young black men. No attempt had been made to address the public sector duty and the Administrative Court found that the introduction of Regulations contravened the race duty. By the time the case reached the Court of Appeal,⁶ the Department for Justice had produced a Race Equality Impact Assessment which the Court of Appeal dismissed as being too late.⁷

If the reasoning of the Commission applies to issues of youth restraint, it would seem to follow that the fact there is a higher proportion of young black men in youth custody is in some way a ‘fact of life’ and not a pivotal

⁴ We made the same point to the Department of Justice on its EQIA on the draft Justice Bill.

⁵ [2008] EWHC 171 (Admin).

⁶ C. R (on the application of) v Secretary of State for Justice [2008] EWCA Civ 882.

⁷ Incidentally, the English Court of Appeal quashed the Regulations on the basis of a serious breach of the GB public sector race duty.

factor in determining whether there was evidence of adverse impact upon them. In our view, the opposite is the case.”

We note that the Law Commission, in response to submissions made to it, has now conducted an extensive screening exercise on its bail reform proposals and has decided to undertake a full EQIA on them.

In relation to ‘Age’, the Commission concludes:-

“Due to the over representation of young adults in the suspect, defendant and prison populations and the differing needs, experiences and priorities of children and young persons, it is reasonable to give further consideration to the question of whether any proposals for the reform of bail law and practice may potentially have a major impact on equality of opportunity for children and young adults.”

In relation to “Racial Group’, it concludes:-

“Due to the differing needs, experiences and priorities of persons from ethnic minorities which have been identified, it is reasonable to give further consideration to the question of whether any proposals for the reform of bail law and practice may potentially have a major impact on equality of opportunity for persons from ethnic minorities.”

We consider that the Commission has now adopted the correct approach to screening exercises. We hope that public bodies in the criminal justice system do likewise under their revised schemes.

4 Draft Audits of Inequality

4.1 The evidence base for the Draft Audit

We have concerns that the Department has not yet published a comprehensive audit of existing quantitative and qualitative evidence, alongside its draft action plan. It is possible to discern some sources of an audit of inequalities from the ‘Inequality Identified’ column in the draft action

plan (with accompanying notes). However we do not consider this to be adequate.

We have two particular concerns. First, in the draft Action Plan, under 'Performance Indicators', in relation to an 'Identified Inequality', 'Males/ Persons with a Disability/ Racial Group/ LGBT victims of Domestic Violence Under reporting by the above groups who are victims of domestic violence', there is the following:-

"Consideration also needs to be given to the recommendations in the recently published Criminal Justice Inspectorate NI report "The impact of Section 75 of the Northern Ireland Act 1998 on the criminal justice system in Northern Ireland."

This has surprised us for a number of reasons. First the CJI Report is not 'recently published'. It was published in May 2009. Secondly, 'domestic violence' is one of the few areas of the criminal justice system which it does not consider. Thirdly, it is a comprehensive audit of the criminal justice system, under section 75 categories, which ought to have formed the basis of the Department's audit of inequalities rather than being mentioned in the draft action plan.

Finally, we note an Assembly motion on the implementation of the recommendations on 22 June 2009. While we accept that there has been a process of devolving policing and justice, we still find it concerning that the recommendations in the CJI Report are still 'to be considered'.

Our second specific concern is that there is no reference to NICEM's paper, 'The Next Stephen Lawrence?' by Robbie McVeigh.⁸ The report contains 13 recommendations. The three key elements are set out as follows:-

"[S]ix years on from the Northern Ireland Criminal Justice Review and following specific attention in the review to issues of racism and criminal justice, we might expect first, equity monitoring in terms of 'racial group' and second, a statement of principle showing how the system as a whole will address racial discrimination and third a clear strategy as to how community safety for minority ethnic groups is to be delivered. None of these things has happened in any developed or meaningful way despite the huge increase in racist violence detailed above."

In a scoping paper for NICEM in preparation for further research,⁹ McVeigh states:-

"[7]. A further five years down the line, these issues remain central to race and criminal justice in Northern Ireland. None of these goals has been adequately delivered. Any new research needs to first ask why Northern Ireland remains in a 'pre-MacPherson' situation and then proceed to make a definitive intervention towards such delivery."

This scoping paper has one and half pages of bibliographic references. Without publication of a full audit of inequalities, and consultation on it, it is not possible to see whether any of these sources have been taken into

⁸ McVeigh R, 'The Next Stephen Lawrence?', NICEM, 2006.

⁹ McVeigh R, 'Race and the Criminal Justice System in Northern Ireland – a scoping study for NICEM', January 2011 (http://www.nicem.org.uk/publications_view/item/race-and-the-criminal-justice-system-in-northern-ireland-a-scoping-study-for-nicem-). The CJI Report plays a central role in the analysis in the scoping paper.

account.

4.2 The audit process

The ECNI defines the audit as a “systematic review and analysis of inequalities”. On the basis of the references to ‘Inequality Identified’ and ‘Evidence/Research’ in the first two columns of the draft Action Plan, we cannot say if this has taken place.

4.3 Gap analysis

What was missing in most draft audits is **a gap analysis of evidence on the inequalities suffered by ethnic and religious minority communities** in Northern Ireland in the areas for which the Department is responsible. Even in a period of reduced resources, we consider it essential that comprehensive research and consultation processes take place independently of particular screening and EQIA exercises.

We consider that the ECNI should produce a model audit of inequalities, on the basis of this initial exercise. In our view, the Department’s commitment to data collection in §4.30 of its draft scheme includes a commitment to a gap analysis. We consider that **a gap analysis should also be included in the first year of the Department’s action plans and that efforts to collect quantitative and qualitative data on priority gaps should be included in the subsequent years of the action plans.**

The introduction to the draft Action Plan claims that a gap analysis is being undertaken but Annex A sets out what the Department is doing, not what it is not doing. Without a comprehensive audit of inequalities, we cannot see how a gap analysis can be conducted.

McVeigh's scoping paper shows that there are significant gaps in research into the treatment of ethnic minority communities in NI. There is also an absence of research into the treatment of religious minority communities in the criminal justice system.

4.4 Annual Review

More generally, there should be a full review of the audit (and also the action plan) after the first year. This should be included in the Department's Annual Reports to the ECNI.

5 Draft Action Plans

5.1 Gap analysis in Draft Action Plan

We wish to see the annual review of audits and action plans, together with the gap analysis and subsequent evidence collection, included in the action plan itself.

5.2 Actions group-specific

We have been asking public bodies to set out their draft action plans in group-specific categories. The purpose of the action plan is to show how the Department will 'promote equality of opportunity' across the nine section 75 grounds. Those in ethnic and religious minority communities, and those who represent them, want to pick up the Department's action plan and see what it means to them.

We welcome the identification of four sets of issues of relevance to ethnic minority communities, namely 'domestic violence', 'under reporting of hate crime', 'commitment to good relations' and 'services to foreign nationals'.

However, the CJI Report and McVeigh's report and scoping paper indicate a wide range of issues which do not appear to have been taken into account in the partial audit of inequalities.

5.3 Tracking inequalities into the Draft Action Plans

We would also like to be able to track the identified inequalities from the audit into the action plan so that we can see what prioritisation processes have been undertaken. Since there is no effective audit of inequalities, and the prioritisation has already been made without explanation, we do consider the draft action plan to be a transparent exercise on the Department's part.

6 Conclusion

6.1 Equality outcomes through the effective operation of equality schemes

NICEM welcomes the introduction of audits of inequalities and action plans as part of the equality scheme revision process. **However our first concern is to see the section 75 mainstreaming duty work much more effectively than it has over the past 10 years.** The primary purpose of the audit of inequalities, and subsequent gap analysis, is to satisfy the Department's duty under its scheme to collect evidence of inequalities for the purpose of effective screening and EQIA processes and to improve the monitoring of policies across the nine section 75 grounds.

Similarly the primary purpose of the Department's action plan is to show examples of actions, outputs and outcomes which the Department intends to achieve in the process of mainstreaming equality throughout its work and

through the implementation of its equality scheme. The content of the action plan, even when reviewed and updated every year, is not a roadmap of all that the Department seeks to achieve through its screening and EQIA processes and must complement, rather than displace, the timetable appended to the Department's equality scheme.

In short, the valuable addition of audits of inequalities and action plans is not an alternative to the effective operation of the Department's equality scheme. Rather these audits and action plans allow the Department, not merely to comply with its equality scheme, but also to adopt best practice in terms of tackling the inequalities which ethnic and religious minority communities face.

6.2 Corporate and business planning

We accept that this call by the ECNI for revised schemes may well have occurred in the middle of business and corporate planning cycles. However we do wish to see the rapid integration of scheme timetables and action plans into these planning processes.

6.3 Consultative Forum

We note that a key recommendation in the CJI Report was in relation to a Consultative Forum for the sector:-

"We recommend that a consultative forum on criminal justice matters be established encompassing the major criminal justice agencies represented on the Criminal Justice Board. One of its first tasks should be to review, in conjunction with the section 75 representative groups, current consultation methods across the criminal justice system (paragraph 3.27)."

In our view, we also think it would be very useful to have a Consultative Forum across criminal justice sector including representatives of the section 75 groups. This Forum should be an annual opportunity to step away from day-to-day consultations on screening and EQIAs. **The focus should be on a holistic overview of the operation of the Department's scheme**, including the 'underpinning' duties, such as collection of evidence, training of staff and monitoring of policies. **This Forum could also consider the Department's gap analysis and actions directed at filling those gaps.**

We suggest that this overview Forum meeting should take place when the Department has its Annual Report to the ECNI in a late draft form, as the details to be considered at the Forum meeting should all be included in that draft.

6.4 Closing remarks

The CAJ, in its response, has picked up some apparent regression from the standards of the Model Scheme and we feel that these should be fully explained to the ECNI when the scheme is submitted for approval (and copied to interested consultees).

We have concerns that the CJI Report on mainstreaming in the criminal justice system is barely mentioned throughout the documentation rather than being central to both the audit and action plan.

We have significant reservations on the partial and opaque manner in which the Department has sought to identify inequalities without conducting a comprehensive audit of inequalities.

We also encourage the Department to conduct a thorough gap analysis, so that it can identify areas of potential inequality upon which it not yet collected quantitative and qualitative data.

There are valuable initiatives in the draft action plan, including action measures of relevance to ethnic minority communities in NI. But a comprehensive audit of inequalities is needed before the draft action plan can be properly assessed.

For further information in relation to this submission, please contact:

Barry Fitzpatrick
Deputy Director
Northern Ireland Council for Ethnic Minorities (NICEM)
Ascot House, 3/F
24-31 Shaftesbury Square
Belfast
BT2 7DB
Tel: +44 (0) 28 9023 8645
Fax: +44 (0) 28 9031 9485
Email: barry@nicem.org.uk