



Response to the Northern Ireland Law Commission

Consultation Paper

Bail In Criminal Proceedings

February 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 brief response to this consultation.

We have seen the response of the Children's Law Centre and wish to endorse their remarks, particularly on the issue of the inadequacy of the Commission's compliance with its equality scheme.

We do not intend to respond to the substance of the proposals made in the Consultation Paper. In terms of its advice services, NICEM (and now the Belfast Migrant Centre) has little experience of clients in bail or remand proceedings. Although NICEM has conducted research into the criminal justice system,³ this focussed on the policing of hate crime and did not cover issues of bail and remand in criminal proceedings.

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.

³ Robbie McVeigh, 'The Next Stephen Lawrence? Racist Violence and Criminal Justice in Northern Ireland', NICEM, 2006

2 Compliance with the Commission's Equality Scheme

We have found a range of publications on the Commission's website but not its equality scheme. The Equality Commission's Model Equality Scheme (2005), on the basis of which we presume the Commission's scheme was approved, states, at para 8.2:-

"a copy of the Scheme will also be posted on the *Insert type of body website*;"

We are disappointed that the Commission does not appear to have done so.

However the Commission has published both an equality impact assessment (EQIA), 'Equality Impact Assessment on proposals for Land Law Reform' (2009) and an accompanying 'Equality of Opportunity Screening Analysis Form - Land Law Reform' (2009), together with a 'Equality Impact Assessment (EQIA) on proposals for Land Law Reform Monitoring Report' (2010). Much as this exercise is to be welcomed, it seems strange to us that this exercise can be undertaken but that extensive proposals on bail and remand should be 'screened out'.

We also have concerns at the supposed screening exercise in Appendix A of the Paper. First, at A. 19, it is stated, "A full screening form can be made available on request to the Commission." This, in our view, is not acceptable.

Paragraph 5.9 of the 2005 Model Scheme states:-

"A detailed report of the screening exercise will be provided to consultees and included in the Annual Report sent to the Equality Commission. The report will include details of: (1) those policies which will be subject to

equality impact assessment, (2) those policies proposed by those consulted, as appropriate for impact assessment, but have not been subsequently included – giving a explanation for this course of action, (3) the factors for prioritising assessments, and (4) the timetable for equality impact assessments. (emphasis added)”

Particularly where an extensive consultation is being conducted, and a decision is made to ‘screen out’ all of a wide range of complex proposals across all section 75 grounds, it is, in our view, a failure to comply with the Commission’s equality scheme to require consultees to request the screening form. The screening form should have been included in Appendix A so that proper scrutiny of the Commission’s ‘explanation’ for ‘screening out’ could be undertaken.

Secondly, the Commission does not even ask itself the four screening questions in Appendix A, entitled ‘Consultation on Equality Impact *Screening*’ (emphasis added), even though it does so in the EQIA on land reform. It does include ‘tick boxes’ on the “impact of the project in relation to social need, effect on people’s daily lives, effect on economic, social and human rights and its significance in terms of strategic importance and expenditure” but leaves the key process of setting out its perceived impact on section 75 groups to generalities.

Thirdly, again at A. 19, it is stated, “The Commission will consider whether a full EQIA is required after the consultation responses have been received and analysed.” This is again unacceptable. It is not the role of the community and voluntary sector, or those involved in the criminal justice

system, to comply with the Commission's scheme. The Commission itself should conduct this exercise.

Fourthly, the Commission's 'screening out' decision is untenable. At A.17, it is stated, "The Commission is of the view that the proposals contained within this paper will not impact adversely on any of the section 75 categories." The question must be asked, how does the Commission know?

It states, at A. 13, "There is, however, very limited statistical information available specifically in respect of bail decision making that is reflective of the section 75 demographics. As part of this consultation, consultees are invited to provide the Commission with any data which they consider to be of relevance to this initial screening exercise and any further screening exercise or full EQIA."

The Equality Commission's Model Scheme 2005 states, in relation to 'evidence':-

- 5.5 The ***Insert name/type of body*** will make arrangements to obtain relevant information, whether quantitative or qualitative, so that it can clearly demonstrate why a policy is screened in for impact assessment or screened out as not requiring an equality impact assessment.
- 5.6 Evidence may include information from the ***Insert name/type of body***'s own information management systems, including service monitoring and complaints handling systems, or from engagement in research, surveys or consultation exercises. Information may also be sourced from commissioned research or from research produced by other public authorities, representative groups, umbrella groups, and trades unions or universities. Information from consultation exercises on previous equality impact assessments, or those undertaken by other public authorities within the same sector will also be

considered. Anecdotal evidence, feedback from service users and affected groups or ongoing experience within the authority will also be considered.

The point which we make here is that all public bodies in the criminal justice system are under the same obligation to collect evidence and it should not be left to the community and voluntary sector to do so.⁴ Perhaps the Commission could have expressed its disquiet in para A. 13 that the necessary evidence had not been collected?

Fifthly, as far as potential adverse impact on ethnic and religious minorities in Northern Ireland is concerned, as stated in the Introduction, we do not have sufficient evidence in relation to bail and remand proceedings. One indicator might be the extent to which interpreters are used in these proceedings. Unfortunately, the Court Service's Quarterly Bulletin on Interpreter and Translation Services does not break down use of the services into bail and remand categories. There again, it might well be possible for the Court Service to identify these statistics, if requested.

⁴ In NICEM's response to the Department of Justice's EQIA on the draft Justice Bill, we stated, "We do have some concerns that there is very limited data on ethnic minority communities in these sections. The only data on ethnic minorities is in para 6.17 (on the number of racist incidents and crimes with a racist motivation). We note, at paras 5.11 and 12 that attempts are being made to improve equality monitoring but the NIO was operating under its equality scheme for 10 years.

Why is ethnic monitoring of the criminal justice system only being reformed now? How can it be that this major legislative exercise is being undertaken within very limited relevant data on involvement of ethnic and religious minorities in the criminal justice system?"

Therefore we fully endorse the response of the CLC that an EQIA is necessary on these proposals. We would also propose that ‘racial group’ should be included in the EQIA. The answer to screening questions cannot simply be ‘don’t know’ as a basis for screening out. If the Commission is prepared to conduct some elementary research and specifically consult ethnic and religious minority groups as part of that EQIA process, a productive process could be initiated.

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”.⁵

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,⁶ the Secure Training Centre (Amendment) Rules 2007

⁵ We made the same point to the Department of Justice on its EQIA on the draft Justice Bill.

⁶ [2008] EWHC 171 (Admin).

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,⁷ the Department for Justice had produced a Race Equality Impact Assessment which the Court of Appeal dismissed as being too late.⁸

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

3 Conclusion

This is a brief response to this Consultation Paper. In our view the Law Commission should be promoting best practice in performance of its statutory duties. It does not appear to have publicised its equality scheme on its website, it has required consultees to request its screening form and it has not asked itself the screening questions in Appendix A: ‘Consultation on Equality Impact Screening’.

It has decided to screen out every proposal across every section 75 ground without even explaining why it was doing so (except for bland assertions about absence of data). It does not appear to have attempted to gather any evidence on the experiences of ethnic minority people in relation to bail and remand nor to inquire why other public bodies in the criminal justice system

⁷ C. R (on the application of) v Secretary of State for Justice [2008] EWCA Civ 882.

⁸ Incidentally, the English Court of Appeal quashed the Regulations on the basis of a serious breach of the GB public sector race duty.

have not complied with their equality schemes by failing to collect that evidence.

The CLC makes a compelling case for an EQIA on grounds of age and also indicates that there is a strong case for an EQIA on grounds of gender, religion and disability. In our view, the paucity of evidence on the effect of these proposals on ethnic and religious minorities in Northern Ireland is a sufficient reason to include ‘racial group’ in the EQIA and we trust the Commission will do so.

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