Equal to the Task?

Investigative powers and effective enforcement of the 'Section 75' equality duty

Executive Summary

An Equality Coalition, research report, January 2018

Terms of Reference

"To overview the application and impact of enforcement powers over the 'Section 75' statutory equality duties, and to make recommendations to improve effectiveness."

Background to research

The **Equality Coalition, co-convened by UNISON and CAJ, is the umbrella representative body for the equality sector**, composed of NGOs and trade unions from all of the Section 75 categories and beyond. The Coalition successfully campaigned for the introduction of the statutory equality duty, which was provided for in the Belfast/Good Friday Agreement. The Coalition regards the equality duty as a key safeguard within the peace agreements.

However, notwithstanding **significant pockets of good practice it has been a strategic concern of the Equality Coalition for some time that the Section 75 equality duty is being regularly flaunted by many public authorities**. This has come into sharp focus in relation to austerity policy decisions over cuts in recent years with patterns of the duties being applied poorly or entirely circumvented in key policy decisions.

Coalition members have worked over many years with public authorities to attempt to remedy the above and related issues. This has included the submission of thousands of consultation responses and thousands of face-to-face meetings. There is still however limited compliance and a risk that key civil society stakeholders may 'give up' on the duty. The **Coalition has collectively come to the view that many of the above issues can only be addressed by robust enforcement of the duties through powers vested in the Equality Commission for Northern Ireland (ECNI) and ultimately the Secretary of State and Courts**. It was clear however that the enforcement powers were rarely triggered by civil society or the ECNI, and the Coalition therefore decided to undertake this research.

The timing of this research relates to informing and influencing the ECNI's ongoing review of the effectiveness of Section 75. The **methodology** of the research involved **desk based research** examining relevant written materials obtained online or through Freedom of Information requests. The second methodological strand was a number of **oral evidence** hearings with Equality Coalition member groups, where a panel consisting of the Coalition Co-Conveners and other persons heard member group experiences of patterns of compliance with equality schemes and of challenging failures to comply with the equality duty. A third strand involved **engagement with the ECNI** through a number of meetings and the presentation of preliminary findings at a meeting with a number of Commissioners and senior managers in summer 2017. The ECNI also provided comments on a draft of this report and finally in December 2017 the research was discussed at a seminar as part of the NI Human Rights Festival, with the Chief Commission of the ECNI providing a response to the research. Whilst the ECNI review had originally focused on the actions of public authorities in relation to Section 75, in late 2017 the ECNI did commit to a review of its powers of investigation over the incoming business year. We are grateful for the engagement of the ECNI and many Coalition members with this research.

Background: Section 75 and Equality Schemes

The **Belfast/Good Friday Agreement** (BGFA) provided for a statutory equality duty subsequently legislated for as **Section 75 and Schedule 9 of the Northern Ireland Act 1998**.

The Section 75 duties apply to most public authorities in Northern Ireland, and oblige public authorities to have '**due regard to the need to promote equality of opportunity'** in carrying out their functions across nine protected grounds (in summary): **religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, disability and dependents;**

The BGFA provided for a **second limb** of the duties to promote 'parity of esteem between the two main communities', but this was not legislated for and instead a second was inserted: a duty to have regard to the desirability of promoting '**good relations'** between three of the above categories (religious belief, political opinion or racial group). The 'good relations' duty is to be exercised 'without prejudice' to the equality duty.

Schedule 9 'Equality: enforcement of duties' of the same Act makes further provision in relation to the duties and the role of the ECNI in their oversight. The ECNI is to keep the effectiveness of the duty under review and provide advice to public authorities in relation to the Section 75 duties. Public authorities subject to Section 75 are to adopt **Equality Schemes.** Schedule 9 sets out that the Equality Scheme must contain arrangements on a number of mandatory elements (in summary arrangements for):

- Assessing its **compliance** with and **consultation** on matters relevant to the equality and good relations duties, and for **training staff**;
- **Assessing** and consulting on the **likely impact of policies** or proposed policies on **equality of opportunity**;
- **monitoring** any **adverse impact** of policies on **equality** of opportunity;
- **publishing** the results of impact assessment / monitoring on equality of opportunity;

Further duties are attached to the duty to conduct **impact assessments** on policies in relation to **equality of opportunity** namely to both **take into account** the equality impact assessment when making a decision on the policy and also to **consider alternative policies** and **mitigating measures** where policies do **adversely affect equality of opportunity.**

Equality Schemes are to conform to guidelines issued by the ECNI who also issue a template **Model Equality Scheme**. In practice arrangements for impact assessment are provided for in Equality Schemes through a two stage methodology recommended by the ECNI of:

1: initial **Equality Screening** (leading to a screening decision on the need for an EQIA)

2: and where required by a Screening decision full **Equality Impact Assessment (EQIA)**

Background: Enforcing Section 75 – compliance with Equality Schemes

The **enforcement regime over the Section 75 duties** is centred on the notion of a **public authority's compliance with the commitments in its Equality Scheme**.

A public authority can be subject to an ECNI investigation for 'failing to comply' with the provisions of its Equality Scheme. If the ECNI determines the Scheme has been breached it can make **recommendations** to the public authority. If the recommendations are not complied with the ECNI can refer the matter to the **Secretary of State** who has powers to **give directions** to the public authority in question. There is also growing scope to **Judicially Review** particular failures to comply in certain circumstances.

The types of failures to comply can be **procedural** in nature – for example failure to Equality Screen a policy decision adequately (or at all), failure to consult, failure to conduct an EQIA. Failures can also be **substantive** breaches (i.e. not paying general due regard to the equality duty).[1]

There are **two formal mechanisms** by which concerns equality schemes have not been complied with can be raised **directly with a public authority**:

- **Screening Decision Review request –** a helpful mechanism recommended in the ECNI Model Scheme allows any consultee to request a review of a screening decision
- **Complaint to the public authority –** for any failure to comply with its Scheme

In relation to the powers of investigation vested in the ECNI these can be triggered in two circumstances:

- **Complaints-Driven Investigation** (also known as Paragraph 10 investigations): where the ECNI receives a written complaint from a person who claims to have been directly affected within 12 months of the alleged failure to comply;
- **Own-Initiative Investigations** (also known as Paragraph 11 investigations) where the ECNI launches an investigation on its own initiative without a complaint.

The ECNI has accepted that a 'person' can be a legal person (and hence an organisation).

The ECNI has an internal Commissioner Committee to make decisions on the authorisation of investigations and an 'investigations procedure' policy. The policy provides that it will use the 'Own Initiative' power on matters of strategic importance

The research report examines the counterpart statutory equality duties in both Great Britain (under s149 of the Equality Act 2010) and in the Republic of Ireland (under s42 of the Irish Human Rights and Equality Commission Act 2014). These duties do not have the same mechanisms for compliance as Section 75.

[1] Whilst complex, as the duties themselves are duties of process rather than outcome, this formulation does help distinguish between failures which are purely technically procedural and those which have significant impacts on equality. These terms have been alluded in the Courts and are used in the report.

Previous reviews of the effectiveness of the Section 75 duties and proposed change

The ECNI is under a duty to **keep under review the effectiveness of Section 75**. There have been a number of previous reports covering the early years of operations of the duties.

A review **paper in 2004 by Professor Chris McCrudden** included specific comment on the use of enforcement powers, noting that the ECNI compliance strategy at the time could be characterised as more relying on a 'name and shame' approach rather than use of its enforcement powers, and had proved unsuccessful. McCrudden recommends the ECNI develop an enforcement strategy, which could tackle the 'worst examples' of deficient EQIAs through efficient complaints handling and targeted investigations. McCrudden notes that the legal enforcement route had largely been held in reserve in anticipation that 'persuasion' would be sufficient, but that more formal methods of complaint were going to be needed to be resorted to.

An **assessment** of the role of the ECNI in relation to the Section 75 duties **by Professors Brice Dickson and Colin Harvey was published in 2006** and contains a critique of the operation of enforcement powers at the time. At the date of the report the ECNI had considered 34 Complaints -Driven investigations and authorised nine (with some still under consideration), there had only been three Own-Initiative investigations, and the report is critical of the 'rather convoluted' process for their authorisation. The assessment is also critical of the minimum time the ECNI states an investigation will take (four months) arguing that the matters being investigated 'are not terribly complex' as to warrant such a protracted period during which the policy in question may be implemented regardless.

Despite these critiques the **ECNI's 2008 'Final Report' into its effectiveness** review of Section 75, which the above reports had fed into, **did not lead the ECNI to modify its investigations procedures**. It did concede that the timeframes needed improvement, and committed to a more strategic approach to monitoring compliance with the duties to better identify breaches and use the powers of investigation. **It is notable that many of the same problems identified at this time and not dealt with were subsequently recurring at the time of this research,** particularly in relation to lengthy delays in conducting investigations.

In the interim there have been a number of **proposals to amend Section 75** and Schedule 9. This has included attempts to amend the Section 75 categories, to define 'good relations' on the face of the legislation, or to amend the manner in which the good relations duty is enforced under both the Shared Future and 'T:BUC' community relations strategies. There were concerns that the latter could potentially weaken the equality duty. However no proposals have ultimately been legislated for to date and **the duties, insofar as they relate to enforcement, remain without amendment.** The report also details a number of other **related mechanisms** that can be harnessed to seek to enforce equality commitments including the Ad Hoc Committee on Equality requirements, the GFA's NI Bill of Rights, Ministerial Code, Petitions of Concern (NI Assembly), and 'Call in' (local Councils).

The **ECNI committed to a further review of effectiveness of the Section 75 duties** as part of its draft 2016-2019 Corporate Plan and commissioned a number of review reports taken forward by Policy Arc Limited, Kremer Consultancy Services and Professor Hazel Conley. The former of these reports examined a whole range of equality screening templates. Some of the main findings include encountering '**wide disparities' and 'dramatic differences' in different public authorities regarding their level of Section 75 activity**. On the one hand it

did identify significant evidence of **good practice** but on the other also a **minimalist approach** in other public authorities noting that there were "*large elements of business that appear not to attract scrutiny under Section 75."* The report states that the quality of available Equality Screening documents 'revealed a somewhat underwhelming picture' with 64% of screenings identifying no impacts at all and 25% only positive impacts, with only 6.4% recommending any mitigating actions; the review held that '***For the majority, there was little evidence of genuine engagement but instead a 'cut and paste' or 'box ticking' approach had become commonplace****, an approach that did little to inspire confidence that the policy had been genuinely scrutinised against the four screening questions*.' The review of screening templates revealed that the majority either included "*no data or general information (e.g. census figures, staff profile) that was often of little relevance to the policy in question.*" The report found that the **quality of EQIAs tended to be good** with a meaningful use of data however such EQIAs were rarely being conducted and tended to focus on outward facing politically contentious issues.

An earlier **Commission paper** in November 2015 had also **identified negative trends regarding Equality Schemes compliance**, but pointed to further ECNI advice and support work rather than further enforcement as a potential remedy. The remit of the above review report was to examine practice of public authorities, rather than the effectiveness of the ECNI in its enforcement role. There was no engagement with civil society on the current review until the ECNI attended an Equality Coalition meeting in April 2017. Emerging findings of this research were presented to Commissioners and senior staff in July 2017. In November 2017 the Commission published a report for consultation which presented evidence gathered in the above reports on public authority practices and set forth draft recommendations and proposed actions. At this time the ECNI had **included a commitment to now review the use of its investigation powers within the incoming (2018) business year**, as a final step before considering its overall position in relation to reviewing the effectiveness of Section 75.

The report includes analysis of the **case law**. There was no case law in the Republic of Ireland but there have been a **significant number of judicial reviews in Great Britain** under the current Public Sector Equality Duty and its predecessors. These cases had established a number of **significant precedents**, including the **Brown Principles** on assessing compliance with the equality duties. These include principles that the duties must be fulfilled prior or when a decision is being taken and not afterwards; the duties being of continuing nature; and needing to be exercised in substance and not as a box ticking exercise. NI cases and the ECNI investigations have subsequently drawn on the Brown Principles.

The report also summarises the **Northern Ireland case law** and in particular the recent precedent set in the 2017 ***Toner*** judicial review. The small number of NI cases reflect early judicial findings, particularly in ***Neill*** in relation to ASBOs, **that scope to challenge Section 75 compliance through the courts was limited in light of there being a statutory remedy through enforcement by the ECNI**. The ***Neill*** case did not entirely close off scope for judicial review, and whilst not being prescriptive, it did imply that such remedy would be open in relation to *substantive* rather than *procedural* breaches of the duty. The 2017 decision in ***Toner***, relating to the impact on persons with disabilities of a public realm scheme in Lisburn, **significantly clarified and advanced the scope for judicial review into Section 75**, where there are such underlying substantive equality issues.

Separately one Judicial Review, *Worton,* relating to the naming of the Raymond McCreesh play park in Newry, dealt **directly with the ECNI closing off scrutiny of its own investigation** recommendations, a decision reversed by the ECNI in light of the Judicial Review.

Patterns and problems of compliance with equality schemes

The research was informed by a series of **expert oral evidence sessions** in early 2017 from a cross section of **members of the Equality Coalition**, detailing their experiences of working with Section 75 and its enforcement processes. Respondents included trade unions, human rights NGOs, children's, young persons' and older persons' rights organisations, and women's rights, ethnic minority, LGBT, Trans and disability groups.

Many Coalition groups had responded to formal consultation processes, with one group, Disability Action, having **responded to over 3000 consultations** since the onset of the duties. The existence of the duties was felt to provide groups with an important **'way in'** to public authorities on equality issues that otherwise would not exist. There were also however instances where Section 75 was **'turned on its head' and used against groups facing disadvantage** – particularly in the context of women's rights and funding conditions that overlooked targeting objective need and specific disadvantage.

There was a general sense that whilst the duties were not working effectively, they could work, if operationalised properly. There were also **significant examples of good practice**, demonstrating how the duties can work including: the NI Law Commission EQIA on Reform of Bail Law; the Equality Screening by the Department of Health (DH) on its Suicide Prevention Strategy; 'co-design' with the Disability Sector including the DEL Disability Employment Strategy and the DH and Housing Executive Adaptation Review.

There were however significant patterns of non-compliance including:

- **Lack of data gathering and monitoring**

  "Without data you cannot properly equality screen as you will have absolutely no idea what the impacts are going to be". *LGBT group*

  "[Equality Screening] just presented facts and figures and states the policy applied equally to everyone. No recognition that women start at a worse position..."

Respondents pointed to the regular breaching of commitments in schemes to consider "all relevant information and data, both qualitative and quantitative" when Screening. There was a particular reluctance to gather data on sexual orientation, but also a dearth of data on other categories. Data was often presented without any correlation to data on existing inequalities and there was significant frustration that this issue has been raised for a long time but with little improvement.

- **Not Equality Screening at all**

Respondents pointed to key policies where the Equality Screening duty had been evaded in its entirety at the time of the production of the policy – this includes a range of decisions on budget cuts, including cuts to funding or the closure of facilities, it also included:

- The Gay Blood Ban (Department of Health)
- Childcare Strategy (NI Executive)
- Strategic Housing Reform Policy & Housing-based regeneration (DSD)
- Homelessness strategy (DSD)
- Civil Service Voluntary Exit Scheme (Dept Finance)
- Corporation Tax cut (Dept Finance)
- Community Halls Fund (Dept Communities);

- **Quality of Equality Screening**

There were significant concerns about the quality of Equality Screening exercises, including:

Timing and conclusions

> "The screening exercise is often being conducted AFTER the fundamental decisions had already been taken and staff and their resources in situ – a mere tick box approach..."

Respondents raised the late timing of screening and that very few exercises led to an EQIA or consideration of mitigating measures or alternative policies.

Misinterpreting Adverse Impacts

Respondents raised recurring mistaken conclusions that there are 'adverse impacts' on equality on the basis of general differentials (such as population statistics) or even attitudes. Conversely also highlighted was the conclusion in screenings such as on the Bedroom Tax that held there are no adverse impacts where was is no 'direct correlation' between evidence of, e.g. larger family sizes or greater rates of poverty in Section 75 groups and whether the same persons would be subject to the tax.

Blanket impact 'it will be great for everyone'"

One of the most significant recurring misinterpretations of the duty was the question of 'blanket impact' where a public authority makes a general assertion that a policy will impact positively on everybody without any proper consideration of the impact on Section 75 groups. PPR and a children's rights organisation described this as a long standing misinterpretation of the duty. A disability group pointed out that this approach assumes there are no existing inequalities; as did a women's rights group who noted the correlation with policies being presented as 'gender neutral' rather than considering adverse impacts.

Unsustainable conclusions

> "...probably the worst examples are where it is very, very clear that the public authority does not want to screen the policy in, they do not want to proceed to an EQIA and whilst there may be very clear equalities impacts that you can see there is often a lack of data and you get a stock response the entire way through the document which can be something like 'the impact of this policy will be beneficial for reasons x, y, z'... there is no real consideration of the nine Section 75 groups... Sometimes an impact will be identified but wrongly categorised as being minor, again presumably with the purpose of not having to proceed to a full EQIA." (Trade Union respondent)

Respondents gave a number of examples where decisions were taken to rubberstamp an existing policy or to avoid an EQIA. This included circumstances where a policy had been the subject of a prior political deal.

- **Equality Impact Assessments**

The main observation regarding EQIAs was that they were **rarely done** even when a properly undertaken Screening Exercise should have triggered an EQIA. It was generally thought that on the occasions **EQIAs** were undertaken they were **generally of much better quality than the average screening exercise**, and at times **quite thorough**. There were **exceptions** however to this, particularly the EQIA into the **Welfare Reform Bill** which avoided analysis of four of the nine Section 75 categories. In this instance the ECNI had been asked to use its enforcement powers, but declined to do so and the practice of not considering the four categories continued.

- **Challenging Poor Practice**

It would be fair to describe most of our **participants as frustrated (and some as exhausted) by their constant efforts to challenge the poor application of Section 75**, particularly screening exercises. This was often undertaken in responses to consultation exercises. There was general agreement that raising deficiencies in the application of the Equality Screening directly with the public authority was not making a significant impact.

This had led **some groups to go down the route of formal complaints** to the public authority or the ECNI. However, **most groups had not** gone down this route. The reasons for this were varied but included:

- The legal-technical complexity of issuing complaints that must be grounded in a 'failure to comply' with elements of an Equality Scheme;
- The real and perceived difficulty of not being considered a 'directly affected' person;
- Concerns that this would damage an organisation's relationship with the public authority – particularly when the public authority in question was their funder;
- Concerns, borne from the experience of others, that complaints would take too long to provide an effective remedy;
- Views that lobbying and campaigning around the issues would ultimately be more effective than the use of the formal mechanisms;
- View that there was an enforcement body in the Equality Commission and it should be proactively challenging public authorities and not leaving it to the sector and directly affected persons;

- **The role of the Equality Commission**

Evidence we heard was **critical of the ECNI as regards their role of ensuring compliance and the effective enforcement of Section 75**. It is notable that a number of member groups were **simultaneously complimentary of the ECNI as regards the manner in which it exercised other functions,** for example policy papers and guidance documents.

Concerns ranged from difficulties getting a 'straight answer' from the ECNI in relation to its advice giving function on Section 75, to an expectation that the ECNI should be doing more as an enforcement body, and that the ECNI was too heavily invested in 'good relations' approaches rather than challenging practices as adverse impacts on equality. Member groups felt **mystified that the ECNI would also agree with many of the concerns** of the sector about systemic poor practice in screening exercises, **yet did not appear to regard it as the Commission's role to address this through its enforcement powers**.

There was concern about the lack of a strategic approach from the ECNI to take proactive action in relation to issues that had been repeatedly raised with it, with a need for a greater emphasis on compliance.

In **discussion** on this research it became clear the **ECNI was concerned about the adversarial nature of investigations** and wished to consider its whole gambit of powers (e.g. advice and the adoption of equality schemes) as 'enforcement'. This has left and furthered the impression of reluctance on the part of the ECNI to enforce Section 75 through its powers of investigation. The ECNI has now however committed to reviewing the use of such powers.

Use of the Enforcement Mechanisms

The report covers analysis of the formal use of mechanisms provided for within Equality Schemes and the legislation to enforce Section 75 (**Screening Decision Reviews; complaints to public authorities;** ECNI **Complaints-Driven Investigations;** ECNI **Own-Initiative Investigations, and the patterns and precedents** such Investigations have set.)

- **Screening Decision Reviews**

Equality Schemes which follow the ECNI Model Scheme (almost all do) contain the provision:

> If a consultee, including the Equality Commission, raises a concern about a screening decision based on supporting evidence, we will review the screening decision.

This helpful mechanism is not explicitly provided for in the legislation but is recommended by the ECNI as part of its methodology, and assists in meeting the legislative requirements to assess impacts on equality of opportunity. The process is **straightforward to use**, any consultee can raise a concern about a screening decision with supporting evidence and the public authority is duty bound to review the decision (and could be subject to a failure to comply complaint if unreasonably declining to do so).

There is **no centralised repository of information** on the number of Screening Decision Reviews, however it appears **rarely used** by consultees, and perhaps surprisingly the ECNI. It has been used by the **Coalition** itself and members such as CAJ, CLC and UNISON.

A common contention is likely to be that the Screening Decision to 'screen out' a policy and not conduct an EQIA is flawed and should be reconsidered on the basis of evidence. A number of examples are considered in the report, in summary:

- **EnergyWise/NISEP scheme** (Department of Economy): CAJ sought a review of the decision to 'screen out' significant changes to a major fuel poverty scheme; further to this the policy change was put on hold and the original scheme extended;
- **Childcare Scheme** (NI Assembly Commission) CAJ sought a review of the decision to cut the existing childcare scheme with an average loss to directly affected employees of over £2k being categorized as a 'minor' impact; a review was conducted and some mitigating measures introduced;
- **Bedroom Tax** (Dept for Communities): Equality Coalition sought review of screening that had not considered four of nine categories and restricted analysis to a mitigated period; the decision was reviewed and (limited) evidence on other four categories considered, with an indication of screening the policy again before implementation;
- **Programme for Government** (Executive Office) Coalition requested review of limited scope of screening and lack of s75 monitoring, the latter was committed to;
- **Community Halls Pilot Fund** (Dept for Communities) this fund had initially not been screened at all then CAJ sought a review of a resultant screening exercise that did not consider evidence on any of the categories. The reviewed screening revealed significant (unjustified) differentials on gender and religion among grantees;

There are therefore a number of examples of this process being a **powerful tool** to seek reconsideration of decisions and proper application of the Equality Duty when the Section 75 process has been flawed. It remains however significantly underused.

- **Complaints Directly to Public Authorities**

Before the ECNI can instigate a 'Complaint-Driven' investigation the **complainant must have first raised the matter with the public authority** in question and given them a reasonable opportunity to respond. This process (rightly) allows a public authority to first remedy failures to comply with their Equality Scheme.

It is **not straightforward to obtain reliable statistics** for the number of complaints issued to public authorities in any given year: the ECNI does seek figures annually but qualifies the reliability of the figures citing examples of public authorities on the one hand counting complaints on other equality issues as schemes complaints, and on the other hand one public authority which received over 300 complaints, having counted them as one as they were on 'templates'. The ECNI states that complaints have been '**routinely low'** citing 21 in 2014-15. The figure of 300 is likely to relate to PSNI officer complaints to the Department of Justice regarding significant changes to pensions adversely impacting on younger officers.

A number of examples of complaints are covered in the report:

- **Mental Capacity Bill (Children's Law Centre):** the CLC complaint followed a decision late in the policy development process to exclude under 16s from the scope of the legislation without proper consideration of the equality impacts and consultation; remedial action was not taken;
- **Budget Cuts to Police Ombudsman** an affected individual challenged Departmental cuts particularly affecting the historical investigations directorate and delaying the consideration of cases. The cut had not been equality screened. The response from the Department was limited to asserting this was a matter for the Ombudsman;
- **Programme for Government** (Equality Coalition) further to a screening review request which had resolved some issues the Coalition lodged a formal complaint regarding failures to screen or properly consider evidence of impacts in a number of areas; the TEO conceded certain matters had not been screened, setting a framework for future screening and publishing a Screening Template;
- **NI Local Government Officers Superannuation Committee** (Equality Coalition) the Committee had reviewed its Equality Scheme but not consulted on its content precluding external impact. The Coalition complained this breached a commitment in the existing scheme, and the Committee reversed the decision and consulted;

As is demonstrated by these examples the process of a direct complaint to a public authority can prompt reconsideration of a decision and/or mitigating measures being put in place. On other occasions public authorities can decline to respond, or respond in a manner which does not satisfactorily address the concerns or failures to comply. The next stage in such circumstances is to refer the matter to the ECNI and seek a complaint-driven investigation.

- **Complaints-Driven ('paragraph 10') Investigations by the ECNI**

Since the advent of the duties until 2017 the ECNI has completed **and published 18 Complaint-Driven (paragraph 10) investigations**. The ECNI does not investigate all complaints it receives, but must either investigate an admissible complaint or give the complainant reasons for not investigating. The 'admissibility' criteria are in Schedule 9 (in writing, direct affect, within 12 months, and be first raised with public authority).

The report examines a period between March 2013 and September 2015 where the ECNI received 13 complaints, and two decisions had been taken to investigate. **The most common reason for not authorising an investigation is that complainants, whilst they may well be raising equalities issues, do not raise an arguable case that the equality scheme has been breached**. In other cases the decision related to matters such as a view that the public authority had already taken sufficient remedial action or that the complainant themselves would not benefit from the investigation.

Internal reports which detail the contacts with potential claimants are examined in one **six month** period from October 2012, which detail around **35 contacts** and can lead to initial engagement with the public authority by the ECNI. The **range of topics are diverse** (e.g. processes within the Driver Licensing Agency for an individual with a disability; housing inequality in north Belfast; outsourcing by Ulster University, the placing without planning permission of a large crown on a roundabout in Larne; whether the Giant's Causeway visitor centre should include a creationist point of view; and concerns of racist stereotyping of an Africa day annual event held by the Council at Belfast Zoo.)

An issue raised by Coalition members was **the length of time it** would take between the ECNI receiving a complaint, a decision being taken on an investigation, and where applicable for the investigation to be completed. Periods in excess of a year are not uncommon. The first two investigations reports indicate a time frame of around 1½ years. The recent NICCY investigation report took 15 months.

Two case studies are **examined in further detail in the report** – a complaint by the **Children's Law Centre** in relation to age goods, facilities and services anti-discrimination legislation that excluded under 16s and a complaint regarding the **Department of Justice** funding cuts to the Police Ombudsman. **In both instances the ECNI declined to authorise an investigation, both led to appeals and there was concern about both delay and how its discretion had been exercised.** In the case of the Justice funding cuts, which related to the straightforward issue of there being no screening exercise, it took five months for the ECNI to correspond to initiate preliminary inquiries. It took nine months for a decision not to investigate, arguing that the complainant would not gain any benefit from the investigation, reasoning which appears to overlook the broader public interest in Section 75 compliance. In relation to the CLC complaint on age discrimination the ECNI declined to investigate on grounds it would investigate a NICCY complaint on 'broadly similar' grounds. In practice however the ECNI investigation was much narrower being limited to consultation issues only. At a NICCY public seminar on the complaint the ECNI declined to give reasons as to why the CLC complaint had not been investigated.

Excessive unnecessary delays by the ECNI and concerns over the manner in which discretion not to investigate had been exercised in a number of high profile cases were also issues raised in relation to 'Own-Initiative' investigations.

- **Own-Initiative ('paragraph 11') Investigations by the ECNI**

At the time of writing **eight Own-Initiative investigations** were published on the ECNI website. The ECNI **Investigations Procedure** states that Own-Initiative investigations can be generated from within its **own knowledge or** brought to its attention from **interested third parties**, and are to be used '**strategically'** to tackle potential failures which may '**significantly impact on equality of opportunity and/or good relations**.' It states that internal mechanisms are in place to regularly evaluate information to facilitate all parts of the ECNI having an input into where such discretion should be exercised to authorise investigations.

Not only however have few Own-Initiative investigations been produced, to date very few appear to have been entirely at the ECNI's Own-Initiative. Whilst this demonstrates on the one hand that the ECNI is receptive to considering requests from a diverse range of external organisations, on the other hand it is also not indicative of the ECNI strategically using its powers to tackle significant equality issues on the basis of self-generation.

In relation to the **eight published reports**, **two are not clear** as to how the matter came to the ECNI's attention (BELB closure of educational facility for pupils with emotional and behavioural difficulties; and Lisburn City Council – use of d'Hondt for transitional committees); **two were on foot of political requests** (Sinn Féin re DSD criteria change for regeneration support; and a DUP MLA – along with the Orange Order- re Newry Council Raymond McCreesh Play park); and **four by civic society** (NIO ASBO legislation - NICCY; Dept Finance, legislative position on reasonable chastisement -children's rights groups; DRD, cessation of Easibus service- disability and older persons' groups, and DSD Strategic Housing Policy – CAJ). Correspondence to an MLA in 2014 set out consideration of six investigations in the previous six months, two of which – including the McCreesh Park, the ECNI indicates as being ECNI-generated. Two others were not investigated (and are not listed above) and were requests from the Child Poverty Alliance over the Delivering Social Change Children and Young Peoples Strategy, and from CAJ regarding the Social Investment Fund.

There was a view expressed from **Equality Coalition members that some significant breaches of equality schemes with major equality impacts appear to be either not noticed or unaddressed by the ECNI where 'Own-Initiative' intervention would be expected**. This includes matters such as the Social Investments Fund, or the 'Two Child Rule' in social security and tax credits. Equality Coalition members did feel that a number of **'Own-Initiative' investigations that had taken place had generally been of good quality and had constituted successful interventions**. There was a view that some investigations could have had a broader scope and much stronger recommendations and there were concerns about both **excessive and unjustifiable delays** in dealing with requests and taking forward Own-Initiative investigations and about the **manner in which discretion had been exercised**. Two case studies of how requests have been dealt with are detailed in the report:

- CAJ request over TEO decision not to authorise a funding bid for the Lord Chief Justice's **Legacy Inquest Unit** (no screening): in this instance the ECNI took three months to write to the public authority, and waited four months for a response and took over a year to make a decision not to investigate on the basis of a technicality;
- Equality Coalition/Trade Union request for investigation into **Welfare Reform Bill**: following long time periods and the deferral of a decision the ECNI decided not to investigate DSD despite four of the nine Section 75 categories not being considered;

- **Patterns and Precedents in ECNI Investigation Reports**

The report considers the patterns in both types of ECNI investigations, that whilst not 'case law' per se do set precedents and highlight how the ECNI is likely to interpret the duties.

Duties to screen, consult and conduct an EQIA
Early investigations into public authority human resources policies held that evading screening on a policy is a breach of an equality scheme. An investigation into a CLC complaint on ASBOs also found that doing so where there is evidence of adverse impacts but no EQIA also constitutes a failure, as does failure to consult on a policy. Investigations into DSD housing policy also found that 'high level' policy decisions and decisions labelled as 'pilots' are policy decisions that require screening, as are decisions to cut funding (ECNI v DRD).

Consultation on Screening
Largely depends on the commitments in the Equality Scheme, with different outcomes in investigations dependent as to whether the public authority had committed to consultation on screening. Also a NIO consultation into ASBOs for less than eight weeks was not found to be a breach as the Scheme did not contain an 'unequivocal' commitment to do so.

Duties to take into account consultation and EQIA findings
Investigations have established a scheme can be breached when there is a failure to take into account consultation and EQIA findings when reaching a decision, however if such findings are given due consideration to opposing views and a policy decision to the contrary is nevertheless taken, the duties have been complied with. Contrast is made between the decision of *Paul Butler v Lisburn Council*, where a decision was taken to fly the Union Flag all year without due consideration of a contrary view and an EQIA, where a breach was found, and Jim Allister MEP's complaint alleging DCAL had not seriously considered opposition to proposals for an Irish language Act, where the Department were able to demonstrate due engagement with opponents to the proposals and a failure to comply was not established.

Items placed on the property of a public authority
Some investigations consider matters in a public authority's 'functions' that do not relate to the development of a written policy or proposals. Of particular significance is **the *Gerald Marshall & Omagh District Counci****l* report of 2007. In addition to being the only investigation that the ECNI has ever referred to the Secretary of State for the use of powers of direction, **the investigation focused on the placing of an item on the property of a public authority by a third party**. In this instance an unauthorised republican hunger strike memorial in the (Council-owned) Old Church Grounds and Graveyard of Dromore in 2001. The Council argued there was no duty to screen as there was no policy established, the Investigation rejected this holding that allowing the memorial to remain was a policy, alluding among other matters to the definition of policy in ECNI guidance as a 'course of action adopted or proposed.' This thus sets a useful precedent for such significant actions by public authorities requiring screening, including the placing of items by third parties on public property, which has significant precedents for items such as flags.

Also of interest is again a finding that in addition to the duty of Screening the above was the type of circumstance in which the public authority was required to conduct an EQIA. The threshold is set in the report of an EQIA being required by those policies that have 'significant implications for equality of opportunity'. (How this threshold is reached in this instance however is somewhat confused as the report refers to the action not being conducive to 'good relations' as an equality implication).

Scope of Functions and Decision Making

Some other investigations have found the matters raised did not fall to be policy decisions within their functions subject to equality schemes duties. One complaint against the Planning Service regarding a planning policy statement (which had been screened) found that the complaint related to houses of multiple occupation before they had been subjected to planning permission, and found no breach. Surprisingly an investigation also held that a change in policy by DSD in relation to selection criteria for Peace II funds (with the apparent purpose or effect of a more Catholic-Protestant 'parity' based approach to allocation, rather than using objective need deprivation measures where there is greater Catholic disadvantage) was not a 'policy decision' but a 'definitional tool' and did not require screening. Other matters that have been held to constitute policy decisions include a Council selling off land, and the methods for constituting membership of council committees.

Poor Screening

A screening exercise of insufficient quality can be held to be a breach of a scheme. A DRD policy on restricted access to parking was found not to comply with a scheme due to insufficient consideration of adverse impacts on persons with disabilities. Other investigations have found approaches to screening have been reasonable.

Substantive Breaches of an Equality Scheme

There are two investigations that deal with what we have termed 'substantive' breaches of the equality schemes, rather than the usual procedural issues around failures or inadequate screening exercises or EQIAs. In 2009 an investigation against Lisburn Council had resulted from a complaint from Sinn Féin Councillor Paul Butler over the Mayor officially participating in the lighting of an 11th night bonfire beacon with Councillor Butler's election posters on top of it. The report assessed whether such events constituted a general failure to fulfil the Section 75 duties, indicating this was appropriate if a public authority was potentially acting in "*an extreme or clearly unacceptable manner, for example, if it acted in an overtly sexist, racist, homophobic or sectarian way*." In this instance on the merits the ECNI decided the Equality Scheme had not been breached.

In April 2014 the ECNI published its 'Own-Initiative' investigation report into Newry and Mourne Council's decision, originally in 2001, to name a Council-run play park after IRA hunger striker Raymond McCreesh, holding there had been substantive breaches of both the equality and good relations limbs of the Section 75 duties. The *McCreesh* decision does not reference there being an 'adverse impact' on equality of opportunity in reaching its decision, but looks at substantive compliance with the duties. The investigation holds that the Equality of Opportunity duty has been 'engaged' as: "the play park name presents a significant chill factor for the use of a Council run play park by families of a Protestant/unionist background." It then appears to be the failure to adequately consider this issue that is at the basis of the Investigation finding that the equality duty has been breached. The ECNI also cites the engagement and breaching of the good relations duty, although the reasoning in the report on this limb is less clear.

There are therefore a range of precedents in existing ECNI investigations reports that can inform future complaints or challenges to Section 75 compliance.

Conclusions and Recommendations

Both the Equality Coalition and the ECNI have expressed concern about the effective implementation of the Section 75 duties by public authorities at present. Notwithstanding some good practice both have identified similar patterns of significant non compliance with the duties.

There is clearly a need for remedial action to address these problems if the duties are going to function as intended, and this always draws the question as to whether a 'carrot or a stick' approach will be more productive. There have been enormous efforts by Coalition members over the years to persuade public authorities to comply fully with the duties. It would be fair to describe most of our member groups as frustrated, some indeed exhausted by their constant efforts to challenge the poor application of Section 75, particularly screening exercises. It is the contention of this research that a much greater emphasis needs to be placed on the 'stick' of enforcing the duty if long standing patterns of non-compliance are to be finally dealt with.

As summarised earlier in this report around ten years ago an independent assessment by Brice Dickson and Colin Harvey at the Queens University human rights centre scrutinised, among other matters, the use of the ECNI enforcement powers. This report, which among others fed into a previous effectiveness review, alludes to several interviewees advocating for a much stronger enforcement strategy from the Commission. The report is critical of the ECNI investigation procedures, expressing surprise that one of the listed reasons for not granting an investigation is that the "nature of the complaint is such that the person affected by it will not derive any benefit from an investigation". The Dickson-Harvey report is critical of the process for authorising Own-Initiative investigations, and the length of time ECNI investigations can take on matters which are 'are not terribly complex'.

It is notable that a decade on the above problems are still recurring, and the same procedures with the same flaws have been identified as issues within this report. The lengthy and sometimes inexplicable and extraordinary delays with progressing investigations that deal with issues that are 'not terribly complex' remain a significant problem which, without redress, renders the remedy an investigation can provide ineffective. The ECNI still does not have a strategic enforcement strategy that guides how it will exercise its 'Own-Initiative' investigation powers.

The present proposals by the ECNI set out in their October 2017 consultation document, do not currently address any of these issues. Rather there is a focus on the 'carrots' of greater leadership within public authorities. It is welcome however that this report does propose a further review that focuses on the investigation powers of the Commission itself in the coming year. Whilst there are no further details at present we would urge the ECNI to ensure the terms of reference of this review are sufficiently broad to encompass the range of issues referenced in this research in relation to the exercise of the powers. The ECNI plans to consider its overall position in relation to reviewing the effectiveness of the Section 75 duties. We were however concerned, particularly in the discussion seminar with the ECNI on this research, that the Commission is reluctant to use its investigation powers, and that without a significant change in attitude and process, the future for ensuring Section 75 compliance does not bode well.

It is clear also to us that much greater use of the enforcement procedures of screening decision reviews, complaints and investigation requests, and where possible, litigation

should be made by directly affected persons and civil society in general. The scope for litigation has been significantly assisted by developments in the case law, most notably the *Toner* decision in 2017.

In summary this report concludes that:

- Notwithstanding pockets of good practice there is currently widespread flouting of equality schemes compliance in relation to policy decisions and functions that have significant equalities impacts;
- The approach of seeking to collaborate, encourage and persuade public authorities to remedy patterns of non compliance has become insufficient and ineffective; non compliance with the duties appears low down the 'risk register.' In our view only more effective enforcement of the duties and a 'zero tolerance' approach to significant failures to comply can reverse the patterns of non-compliance;
- Whilst the enforcement powers could certainly be stronger and strengthened at present it is also the case that they are very much underused both by civil society and the ECNI. The ECNI has a good track record of, for example, obtaining significant publicity for tribunal cases - by contrast the Section 75 enforcement work – with some exceptions – has had a low profile;

In relation to recommendations for the Equality Commission:

- The ECNI in its assessment of public authorities' polices should make use of the screening decision review process when it has demonstrable concerns regarding a screening decision;
- The ECNI should develop a strategic enforcement strategy in relation to compliance with the statutory duties and proactively identify opportunities for 'Own-Initiative' investigations;
- The ECNI should give clear reasons for not investigating an admissible complaint;
- The ECNI should address the issues of long delays in relation to initiating investigations and consideration should be given by the ECNI to a 'fast track' investigative and enforcement process for more obvious procedural failures;
- The ECNI should also refer failures to comply with recommendations expeditiously to the Secretary of State;

In relation to recommendations to civil society and affected persons:

- Much greater use should be made of the enforcement procedures in relation to Section 75, we conclude this is the only way left to make the duties effective;
- In particular the screening decision review process with public authorities is rarely known and used by organisations and should be harnessed more to challenge ineffective screening exercises.