Equality Coalition

Equal to the Task?

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

An Equality Coalition, research report, January 2018

Glossary

"Complaints Driven" Investigation	An ECNI Investigation undertaken on foot of a complaint (also known as 'paragraph 10' investigations).
"Own-Initiative" Investigation	An ECNI Investigation undertaken without a complaint at the initiative of the ECNI (also known as a 'Paragraph 11' investigation)
CAJ	Committee on the Administration of Justice
CEDAW	UN Convention on the Elimination of All Forms of Discrimination against Women
CLC	Children's Law Centre
DDA	Disability Discrimination Act
DUP	Democratic Unionist Party
ECHR	European Convention on Human Rights
ECNI	Equality Commission for Northern Ireland
EQIA	Equality Impact Assessment
FETO	Fair Employment and Treatment (NI) Order 1998
NICCY	Northern Ireland Commissioner for Children and Young People
PPR	Participation and Practice in Rights
Schedule 9	Schedule 9 of the Northern Ireland Act 1998, containing the provisions for the enforcement of the equality duties.
SDIC	Statutory Duty Investigations Committee (of the ECNI)
SDLP	Social Democratic and Labour Party
Section 75	Section 75 of the Northern Ireland Act 1998, containing the equality duty
TEO / OFMdFM	The Executive Office (formerly Office of the First and deputy First Minister)

Equality Coalition Co-Conveners Patricia McKeown (Regional Secretary, UNISON) and Daniel Holder (Deputy Director, CAJ) at discussion seminar on research

Foreword- Equality Coalition Co-Conveners

In the decades that preceded the Good Friday Agreement (GFA) one of the few areas of reform that led to relative success was the enactment and application of anti-discrimination laws in the labour market. Significant inroads were made into long standing inequalities through the pursuance of 'fair employment' and anti-sex discrimination policies, whose statutes established the enforcement agencies which were, along with others, merged into the Equality Commission following the GFA. Key to the success of both the Fair Employment Commission and the Equal Opportunities Commission were that they were not afraid to use their enforcement powers when needed to ensure compliance with the law, even in much more dangerous and uncertain times than we see today.

The GFA led to the introduction of the 'Section 75' statutory duty on designated public authorities to promote equality of opportunity across nine protected grounds. This replaced the 'PAFT' (Policy Appraisal and Fair Treatment) initiative. A key difference between Section 75 and PAFT is that unlike its 'voluntary' predecessor Section 75 is legally binding and enforceable. This is not just through the potential for judicial review, but primarily through the powers of investigation vested in the Equality Commission that can be instigated on the foot of an admissible complaint, or at the Commission's own initiative.

However, almost two decades on from the GFA it is the view of the Equality Coalition that, notwithstanding some good practice, the Section 75 duties are regularly flouted to the extent the duties are currently ineffective in key policy areas. The Equality Commission itself also concurs there are currently significant patterns of non compliance with the Section 75 duties. However, t is also notable that there are few complaints and little proactive enforcement in relation to the duties, with only a small number of investigations having been completed, and it is this issue that this research further scopes out and examines.

Equality Coalition members have put considerable efforts in over many years through direct engagement with public authorities in an attempt to remedy patterns of non compliance, but we have as a Coalition reached the view that this can only be addressed by robust enforcement of the duties, by the Commission and ultimately the Secretary of State and the Courts. Whilst we note the concerns of the current Equality Commission that the process of investigation with public authorities is by its nature adversarial, we consider this as part and parcel of the role of being an enforcement agency, and see little alternative to enforcement if the duties are to reach their full potential.

This research was therefore initiated by the Equality Coalition and conducted throughout 2017 to provide an overview of the current application and impact of the enforcement powers of the Section 75 duties. This research was timed to inform the ongoing review of effectiveness by the Equality Commission of their duties. It also coincides with the launch of a new three year Equality Duty Enforcement Project within CAJ. This will employ a coordinator to work with the broader Equality Coalition to assist and build capacity within civil society to challenge non-compliance with the duties. We hope this project will help bolster the role of civil society and directly affected persons in engaging with application of the duties.

The Equality Coalition commends the recommendations of this report to the ECNI in relation to their review of the use of their own powers of investigation and enforcement.

Co-Conveners Patricia McKeown, UNISON & Daniel Holder, CAJ;








Pictures of Coalition members and others in attendance at a discussion seminar on this research as part of the Human Rights Festival in December 2017.

Contents

Background and Introduction

The law

The Belfast/Good Friday Agreement provided for a statutory equality duty legislated for as Section 75 of the Northern Ireland Act 1998. Schedule 9 of the same Act makes provision for enforcement of the duties. This includes the adoption of Equality Schemes by designated public authorities. Paragraphs 10 and 11 of the Schedule vest powers of investigation in the Equality Commission for Northern Ireland (ECNI). Investigations must focus on alleged breaches of equality schemes and can take place on foot of an admissible complaint by a directly affected person (who must have first complained to the public authority itself) or at the Commission's own initiative. Should public authorities be found by the Commission to have breached their scheme, the Commission can make recommendations to the public authority in question and if it considers that they have not been complied with in a reasonable time the Commission may refer the matter to the Secretary of State who has powers to give directions to the public authority in question.

The Equality Coalition and the equality duty

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 key public authorities:

- *Not conducting screening at all on policy decisions with significant equalities impacts;*
- *Conducting equality screening or impact assessments in an inadequate manner with the purpose or effect of disguising adverse impacts;*
- *Misunderstanding the nature of the equality schemes obligations in general.*

Among the key points emerging from the Equality Coalition 'austerity and inequality' conference in October 2015 was that there was:

- *A concerning pattern emerging whereby major policy decisions on social security or public sector cuts are studiously avoiding proper equality proofing. Equality Impact Assessments (EQIAs) require the consideration of alternative policies where proposed policies will negatively impact on equality. There is no exemption for austerity.*
- *The permanent disappearance of up to 20,000 public sector jobs and the services they provide under the 'Voluntary Exit Scheme' is being taken forward without an overarching EQIA. Some public authorities have already taken the view that there will be no equality impacts regardless of who applies and who is selected, even if the VES exacerbates the unemployment differential, unequal pay or leads to the under representation of other equality groups in the workforce;*

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 ECNI and ultimately the Secretary of State and courts. On commencing the research a number of issues had been pre-identified by Coalition members in relation to enforcement powers:

- relatively small numbers of 'failure to comply' complaints are ever made;
- relatively small numbers of investigations (including 'Own-Initiative' investigations) take place and tend to be large-scale and time consuming, with significant delays;
- many significantly strategic breaches of schemes are not being investigated and patterns of non-compliance are recurring;
- a sense that ECNI, whilst recognising patterns of non-compliance, do not consider more proactive enforcement as a remedy;

The Coalition therefore decided to undertake research into the enforcement of the Section 75 duties. The timing of this relates to the above matters but also with the purpose of seeking to influence the ongoing formal effectiveness review of the Section 75 duties by the ECNI.

Terms of Reference of the research:

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

Specifically the research seeks to:

- Set out the evolving scope of the enforcement powers contained within Schedule 9 and corresponding powers elsewhere in the UK and Ireland;
- Examine relevant case law in NI and the corresponding duties elsewhere in the UK and Ireland;
- Overview the level and patterns of complaints to public authorities and recurring patterns of non-compliance with Equality schemes;
- Overview 'paragraph 10' complaints to the ECNI from directly affected persons;
- Overview the use of 'Paragraph 11' Own-Initiative investigation powers by the ECNI;
- Overview the patterns and precedents of ECNI investigations;
- Make recommendations on improving the effectiveness of the operation of the enforcement powers;

There are three main strata of the methodology. The first was desk-based research involving an examination of relevant written materials obtained online or through Freedom of

Information requests.[1] The second 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 experience of patterns of compliance or non compliance with equality schemes and of challenging failures to comply with the duty. A third strand involved engagement with the ECNI through a number of meetings and written requests for information. Preliminary findings from the report were presented 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. In December 2017 the Equality Coalition organised a discussion seminar on a final draft of this report as part of the Human Rights Festival. The report was presented and a formal response was given to the report by the Chief Commissioner of the ECNI, Dr Michael Wardlow, followed by audience discussion. This seminar has informed a final version of this report. We are grateful for the engagement of the ECNI and many Coalition members with this research. The views in this report are those of the Equality Coalition.

Dr Michael Wardlow, Chief Commissioner, ECNI speaking at the discussion seminar on the research, December 2017.

[1] Including: Case law from NI, GB and Ireland, and analysis thereof; Previous reviews of the ECNI powers and proposals for change, current ECNI investigative procedures; Information on compliance with schemes and complaints to pubic authorities, quarterly screening reports and annual reports from selected public authorities during the 2011-2016 mandate, selected EQIAs and complaints to public authorities; Commission 'paragraph 10 and 11' Investigations Reports; Copies of complaints and requests for investigations submitted by member groups; Minutes of Statutory Duty Investigations Committee;

Chapter 1: Nature of the duties and Equality Scheme enforcement

1.1 The Section 75 duties

Strand 1 of the 1998 Belfast/Good Friday Agreement envisaged:

> An Equality Commission to monitor a statutory obligation to promote equality of opportunity in specified areas and parity of esteem between the two main communities, and to investigate individual complaints against public bodies...

The 'Rights, Safeguards and Equality of Opportunity' section of the Agreement then provided, subject to ongoing consultation (the Partnerships for Equality White Paper), that:

> ...the British Government intends, as a particular priority, to create a statutory obligation on public authorities in Northern Ireland to carry out all their functions with due regard to the need to promote equality of opportunity in relation to religion and political opinion; gender; race; disability; age; marital status; dependants; and sexual orientation. Public bodies would be required to draw up statutory schemes showing how they would implement this obligation. Such schemes would cover arrangements for policy appraisal, including an assessment of impact on relevant categories, public consultation, public access to information and services, monitoring and timetables.

The main implementation legislation for the Agreement – the Northern Ireland Act 1998 – legislated to introduce this statutory equality duty in the following terms:

> Section 75
> (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity—
> (a) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
> (b) between men and women generally;
> (c) between persons with a disability and persons without; and
> (d) between persons with dependants and persons without.

The Section 75 duties apply to designated public authorities in Northern Ireland with some exceptions, most notably, schools and key UK government departments. The ECNI's oversight of the Section 75 duty is set out in Schedule 9 of the legislation, where the Commission is placed under a duty to keep the effectiveness of the duty under review and provide advice to public authorities in relation to the Section 75 duties.

The same Act also set up the ECNI as an amalgamation of four predecessor equality bodies whose functions it assumed. This included the ECNI taking on functions under anti-discrimination statutes which (separately from Section 75) place duties on the Commission

itself to promote equality of opportunity across their protected grounds.[2] There is yet to be single equality legislation in Northern Ireland.

Strand 1 of the Agreement committed the UK to a second limb of the statutory duty on 'parity of esteem between the two main communities', however, this disappeared when the legislation was brought forward.[3] Instead the Northern Ireland Office (NIO) inserted a second limb as a duty to promote 'good relations' between three of the nine equality categories. Following concerns from Trade Unions and human rights NGOs that an undefined good relations duty risked being used to undermine the equality duty itself (through challenging equality initiatives on the grounds that they were politically contentious) the good relations duty was made subordinate and hence complementary to its equality counterpart:

> (2) Without prejudice to its obligations under subsection (1), a public authority shall in carrying out its functions relating to Northern Ireland have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group.

The Race Relations (Northern Ireland) Order 1997 also contains a 'due regard' statutory duty on local government to promote both equality of opportunity and good relations between persons of 'different racial groups' as well as to eliminate unlawful racial discrimination. This duty is to be carried out without prejudice to the other duties under the same legislation.[4] The Disability Discrimination Act 1995 (DDA) following amendment in 2006 also contains a 'good relations' type duty codified as a statutory duty to 'promote positive attitudes towards disabled persons' and 'encourage participation by disabled persons in public life'.[5]

1.2 The Schedule 9 enforcement regime

The enforcement powers over the statutory duties are also contained in Schedule 9 of the Northern Ireland Act 1998 entitled 'Equality: Enforcement of Duties'.

The Schedule sets out that designated public authorities have to develop and submit an 'Equality Scheme' to the ECNI which the Commission is to approve or refer to the Secretary of State.[6] The Equality Schemes must conform to any form or content guidelines the ECNI issues with the Secretary of State's approval. The Equality Scheme must set out how the public authority proposes to fulfil the Section 75 duties in general but must in particular include the following arrangements as to how the public authority will:

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[2] For example, see Art. 54 of the Sex Discrimination (Northern Ireland) Order 1976, in relation to the duties of the predecessor Equal Opportunities Commission which included the promotion of equality of opportunity as well as working towards the ending of discrimination.

[3] A statutory 'parity of esteem' duty, formulated as a duty to ensure equality of treatment for the identity and ethos of both main communities, without prejudice to other minorities, was subsequently recommended by the NI Human Rights Commission for incorporation in the Bill of Rights for Northern Ireland. This however has not been legislated for.

[4] Article 76, Race Relations (Northern Ireland) Order 1997.

[5] Section 49A Disability Discrimination Act 1995 (inserted (N.I.) (1.1.2007) by The Disability Discrimination (Northern Ireland) Order 2006 (S.I. 2006/312 (N.I. 1)).

[6] Separate arrangements apply for UK government departments.

- assess compliance with the Section 75 duties and how and who it will consult on matters relevant to the duty;
- assess and consult on the likely impact of policies (or proposed policies) on equality of opportunity;
- monitor any 'adverse impact' of policies on the promotion of equality of opportunity;
- publish the results of such equality impact assessments and monitoring of policies on equality;
- train staff;
- ensure public access to its information and services.

There are also the following further duties arising from Equality Schemes:

- When publishing results of impact assessments on equality, the public authority must state the aims of the policy and give details of any consideration of:

  (a) measures which might mitigate any adverse impact of that policy on the promotion of equality of opportunity; and

  (b) alternative policies which might better achieve the promotion of equality of opportunity.
- In making policy decisions a public authority must 'take into account' the result of the assessment and consultation on the impact of the policy on equality of opportunity;

Summary of minimum enforceable duties:

In accordance with Schedule 9 a public authority must include in their Equality Scheme as a minimum, arrangements for the matters below. By virtue of inclusion in the Scheme such matters, where not complied with, can therefore be subject to 'failure to comply' complaints and investigations.

In relation to the statutory duties (i.e. both the equality duty and the good relations duty):

1: Training staff and ensuring access to information and services;

2: Assessing compliance with and consulting on matters relating to both duties.

In relation to the equality of opportunity limb of the duty only:

3: Undertaking an impact assessment on the policy in relation to equality of opportunity;

4: Consulting on this impact assessment on equality of opportunity (and publishing it);

5: Monitoring any adverse impact on equality of opportunity (and publishing the results);

6: When publishing either of the above state consideration given to: a) mitigating measures and b) alternative policies in relation to equality of opportunity;

7: To take into account the above impact assessments on equality of opportunity, and the consultation on same when taking policy decisions.

1.3 The enforcement criteria: 'failure to comply' with an Equality Scheme

In practice the enforcement regime vested in the ECNI's powers of investigation is built around the notion of the public authority's failure to comply with their Equality Scheme. As the seven matters enumerated above must be included in an Equality Scheme non-compliance with any one of them can be enforced as an actionable breach of Equality Scheme. However, under this formulation any other commitment in the Equality Scheme that is not adhered to can also be the subject of 'failure to comply' complaint.[7] This means that anything else committed to in the scheme outside of the mandatory elements (e.g. we will adopt an equality action plan within six months) could, in theory, be subject to enforcement action if not complied with.

Whilst Schedule 9 in its entirety provides for the enforcement of duties, in practice once a scheme is adopted the mechanism within it to redress non compliance is through complaints and investigations by the ECNI. This is hence the focus of this report and the investigation provisions will be referred to throughout the report as the enforcement mechanism.

In relation to assessing compliance with the statutory duties *per se* Equality Schemes do contain a commitment from the public authority that they will comply with the duties themselves. This is often contained in paragraph 1.3 of schemes in the form of a general statement that the public authority is 'committed to the discharge' of the Section 75 obligations. This assists in allowing what could be referred to as a *substantive* breach of the duties (i.e. not paying due regard to the equality of opportunity duty, or not paying regard to the good relations duty) being the subject of a failure to comply complaint. In this vein failure to comply with other elements of the mandatory duties above could be characterised as *procedural* breaches of the statutory duties (e.g. failure to consult, failure to impact assess etc). This formulation of 'substantive' and 'procedural' breaches has been alluded to in the Courts in the *Neill case* and will be used in this report. Whilst complex, given as the duties themselves can be characterised as duties of process rather than outcome, it does help differentiate both between matters that are purely procedural –e.g. a complaint that there was no screening on a technical policy that really has no equality implications; and matters which do have significant equalities impacts. Whilst such issues can emerge in the formal process of policy appraisal the question of 'substantive' breaches also arises in policies which refer to a particular course of action taken by the public authority. The first ECNI investigation to deal with the question of general breaches of the statutory duties per se is that of *Paul Butler v Lisburn Council* in 2009. In this instance Mr Butler, a Sinn Féin councillor on the council, had instigated a complaints-driven investigation after the Mayor of the Council had set fire to an 11th night bonfire beacon with Mr Butler's election posters on it. The ECNI investigation centres on what it refers to as the 'substantive issue' of the

[7] A question arose following the approval of the PSNI's Equality Scheme which was contained within a broader 'Equality, Diversity and Good Relations Strategy 2012-2017'. The scheme differed entirely from the ECNI recommended model format for a scheme, but it contained all the above listed mandatory elements of an Equality Scheme and thus met the legislative requirements for a scheme, and accordingly was approved by the ECNI. However, there was then significant ambiguity as to which sections of the document constituted the Equality Scheme (and hence could be subject to 'failure to comply' enforcement') and which did not.

propriety of the Mayor's action and provides some guidance as to what the Commission would consider as a general breach of the duties:

> This is the first occasion the Commission has authorised investigation of a complaint based on alleged infringement of the general s. 75 duties. The view has been that Schedule 9 is designed to allow the Equality Commission to investigate complaints that specific commitments contained in approved Equality Schemes have been breached, for example in relation to screening and EQIA**. Investigation based purely on alleged infringement of the general statement of and commitment to the statutory duties contained in an approved Equality Scheme is however appropriate if the public authority is potentially acting in an extreme or clearly unacceptable manner, for example if it acted in an overtly sexist, racist, homophobic or sectarian way**. At face value a Mayor publicly burning a representation of a political adversary appears extreme, and as a minimum should have been explained by the Council. On the basis of the allegations made by the complainant, and the Council's failure to deal with the substantive issue of the propriety of the Mayor's action when the complaint was raised with it, the Commission took the view that investigation of the Mayor's role in the matter was needed to establish if his actions breached the Council's commitment to the statutory duties.[8]

This appears to allude to the position put forward by Counsel in a 2006 judicial review that remedies by the courts be available for *substantive* rather than *procedural* breaches of the duties.[9] Commentary on this refers to 'substantial' breaches of Section 75 presumably meaning "situations where a policy is actually causing an inequality of opportunity or bad relations, rather than, for example, situations where there has been a failure to consult on a proposed policy."[10] The above investigation however signals the ECNI's position that it can also use its powers of investigation to deal with substantive breaches of the general Section 75 duties.

The precise content of equality schemes is shaped both by the mandatory elements of the legislation but also by the recommendations of the ECNI through their statutory function to offer advice to public authorities on the duties (schedule 9(1)(b)) and the ECNI's permissive power to issue any guidelines on the form and content of Equality Schemes. The Commission issued a Guide to the Statutory Duties in 2000, and revised Guides in 2005 and 2010. In the 2010 Guide to Public Authorities on the Duties three chapters were approved by the Secretary of State to constitute the Commission's Guidelines as to the form and content of an Equality Scheme that public authority's schemes must conform to.

Practical guidance on Equality Impact Assessment was also issued in 2005 and is still in force. A template 'Model' Equality Scheme was issued by the ECNI in 2010 and forms the basis of most public authority Equality Schemes.

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[8] ECNI Paragraph 10 Investigation Paul Butler & Lisburn City Council October 2009, Page 7 (emphasis added).
[9] See *In the Matter of an Application by Peter Neill for Judicial Review* [2006] NICA 5, cited in Brice Dickson and Colin Harvey '*Assessing the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998*' (November, 2006), page 120.
[10] As above.

There are a number of significant implications of the ECNI's guidelines on how schemes should be structured. The most obvious example relates to the methodology to take forward the mandatory duty of assessing impacts on equality of opportunity. The Commission recommends a two-stage process:

- Stage 1: Screening
- Stage 2: Equality Impact Assessment (EQIA)

Outside of its formal approved Guidelines the ECNI recommends that a number of questions be assessed as part of screening. The first is "What is the likely impact on equality of opportunity for those affected by the policy (minor/major/none)" on each of the nine Section 75 equality grounds. The second relates to whether there are opportunities to better promote equality of opportunity. Under the ECNI Model Equality Scheme public authorities make the following commitments to an EQIA further to a screening exercise if it (in summary):

- Identifies a 'major' impact on one or more s75 categories an EQIA will normally be conducted;
- Identifies a 'minor' impact on one or more s75 categories 'on occasion' an EQIA will be undertaken, but if not, mitigating measures or alternative policies will be considered;
- Identifies that the likely impact of a policy is 'none' the policy may be 'screened out' and no EQIA will be undertaken.[11]

A number of public authorities have chosen to add the aforementioned DDA questions (e.g. re opportunities to promote positive attitudes to people with disabilities) to their screening questions. In such schemes the DDA duties, which will complement and not conflict with the equality duty, can therefore become enforceable through a failure to comply complaint.

More controversial has been the ECNI's recommendation to also include a screening question on the 'good relations' impacts of policies in the same terms as what is provided for in the legislation in relation to equality. This therefore can actually trigger a full EQIA and consideration of alternative policies and mitigating measures on *good relations* grounds. This conflicts with the intent of the legislation to tie the impact assessment duty that must be in Equality Schemes to the equality limb of the duty only.[12]

[11] ECNI Model Equality Scheme, November 2010.

[12] This recommendation to trigger an EQIA on the basis of good relations *impacts* was first made by the Commission in 2007 and then incorporated into the Commission's Model Scheme in 2010, and consequently adopted into 'second generation' public authority equality schemes at that time. Equality Coalition members have raised serious concerns that, particularly in the context of Good Relations not being defined in the NI legislation, this has led to the obstruction of rights and equalities policies on the grounds they are politically contentious (and hence bad, in lay terms for 'good relations'). This issue was dealt with at length in the 2013 CAJ report 'Unequal Relations' and will not be further dealt with in this research, except insofar as it has impacted on enforcement investigations.

1.4 The enforcement mechanism: complaints and ECNI investigations

The main way to trigger enforcement is by way of raising the matter directly with the public authority that it has failed to comply with its own equality scheme. If this does not result in a satisfactory resolution a complaint can be lodged with the ECNI under terms set out in Paragraph 10 of Schedule 9 (and hence often referred to as 'Paragraph 10' complaints). In addition to having complained directly to the public authority concerned and having given them a reasonable chance to respond, to be admissible the complaint to the ECNI must be made:

- in writing (in practice e-mail is accepted);
- by a person who claims to have been 'directly affected';
- within 12 months of the complainant knowing of the matters alleged.

Within Equality Schemes that follow the ECNI's 'Model Scheme' there is also a mechanism whereby any consultee can trigger a review of an Equality Screening decision, through the provision of evidence that raises concerns regarding the original decision; the provision reads:

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

In relation to admissible complaints the ECNI must either launch an investigation into the complaint or give the complainant reasons for not investigating the complaint. These 'Paragraph 10' investigations[13] will be referred to as 'Complaints-Driven' investigations in this report.

Under Paragraph 11 of the Schedule the ECNI can also launch an investigation on its own initiative without requiring a complaint from a directly affected person. This is often officially referred to as a 'Paragraph 11' investigation, and will be routinely referred to in this report as an 'Own-Initiative' investigation. The same paragraph provides that both forms of an investigation will lead to a report which will be sent to the public authority concerned, the Secretary of State and any complainant. In the case of most public authorities the NI Assembly is also to be sent a copy of the report. The Commission can recommend remedial action by a public authority and if the ECNI considered such action has not been taken in a reasonable time can refer the report to the Secretary of State who has powers to give directions to the public authority on the matter. In practice the Commission publishes its investigation reports on its website. Information about requests for investigations considered but not initiated can also be found in the published minutes of the Commission's 'Statutory Duty Investigations Committee' on its website.

[13] In reality all investigations take place under paragraph 11 of the schedule although the complaints provisions are within paragraph 10.

1.5 The Equality Commission Investigations Procedure

In relation to how the ECNI exercises the level of discretion granted to it as to whether to investigate or not, whether on the basis of an admissible complaint or on its own initiative, further detail is set out in its internal 2010 'Investigations Procedure' policy document.[14]

Internal structures:
Internally the Commission has a staff 'Investigations Team' and a Commission sub-committee entitled the 'Statutory Duty Investigations Committee' (SDIC). In summary the Investigations Team's role is to provide advice to both potential complainants and the SDIC, present Paragraph 10 complaints to the SDIC, and to undertake the Investigations, and follow up. The SDIC takes decisions to authorise 'Complaints-driven' (Paragraph 10) investigations; to 'assess the potential strategic value' of an Own-Initiative (Paragraph 11) investigation; make recommendations to the full Commission as to whether such Own-Initiative investigations should be authorised; and essentially to recommend to the Commission the signing off of investigation reports and whether to refer a matter to the Secretary of State. Consequently the full ECNI board will authorise Own-Initiative investigations, formally approve investigation reports and formally decide whether to refer a matter to the Secretary of State.[15]

Key concepts:
The Investigation Procedure provides further interpretation of some key concepts, including:

- In interpreting what a 'reasonable period of time' complainants should allow for a public authority to respond to a direct complaint, 'one month' will normally be sufficient;
- That the legislation refers to persons who 'claim' to be directly affected, and the Commission will establish if there is a 'sufficient connection' to meet this threshold;
- That the legislation refers to a directly affected 'person', not individual, and hence it is open to a 'legal person' (e.g. a company) to issue a complaint;

Complaints-driven investigations ('Paragraph 10')
Chapter 4 of the Investigations Procedure sets out how 'Paragraph 10' complaints will be handled. Following a determination on admissibility the SDIC will make a decision as to whether to investigate. The Investigation Procedure provides a list of reasons why the SDIC may decide NOT to investigate a complaint. The first of these is that the complainant has not established an 'arguable case' that the Equality Scheme has been breached. Other reasons not to investigate include (in summary):

- The public authority has agreed to submit the matter to EQIA/or if doing an EQIA has agreed to consult on the matter in question;
- The policy is an affirmative action measure;

[14] Equality Commission NI 'Investigation Procedure under Paragraphs 10 and 11 of Schedule 9 of the Northern Ireland Act 1998' January 2010 (revised 2014 to reflect internal restructuring of depts.)
[15] As above, paragraphs 2.1-2.3.

- The policy is due to be reviewed, discontinued or superseded;
- The nature of the complaint is such that the person affected by it will not derive any benefit from investigation;
- A better remedy is provided for by anti-discrimination legislation;
- The action taken by the public authority in response to the original complaint has remedied any failure to comply with the equality scheme;
- The complainant is not co-operating with Commission staff;
- An investigation is already underway into the same matter;
- 'Any other relevant consideration'.

The Investigations Procedure sets out an internal appeals process whereby a decision by the SDIC whether to authorise investigation can be subject to a request for review either by the complainant or the public authority. The wording of this paragraph is somewhat ambiguous as at face value it could be read as only applying to admissibility when this does not appear to be the intention or practice.[16]

Own - Initiative ('Paragraph 11') investigations

Procedures are set out in chapter 5 as to when the Commission will launch an investigation on its own initiative. This power allows investigations to take place where it is not possible or appropriate for a person to meet the 'directly affected' threshold, or otherwise where there is not a complainant. It allows the Commission also to address repeated or systemic failings. The Investigations Procedure states that Own-Initiative investigations *"can be generated purely from within ECNI's own knowledge, or from matters of general importance brought to its attention by interested third parties*."[17] The procedure sets out that 'Paragraph 11' will:

- be used 'strategically' to tackle potential breaches of schemes which "may impact significantly on equality of opportunity/or good relations" [5.2];
- take into account whether it is unlikely that a paragraph 10 complaint would/could realistically be pursued (e.g. if directly affected persons are children) [5.3];
- arise from various sources: within ECNI's own knowledge; during the course of a Paragraph 10 investigation or brought to attention by external parties;

In relation to investigations arising from matters within the Commission's own knowledge the Investigations Procedure states:

[16] Paragraph 4.5 in the ECNI Investigations Procedure states: "Either party may seek a review of the Committee's decision in respect of whether or not the complaint has been made in accordance with the criteria set out in Paragraph 10." However, in practice in at least one case we are aware of this has allowed a substantive review of the SDIC decision, rather than a review as to whether the complaint was admissible (i.e. was made in accordance with the Paragraph 10 criteria).

[17] Investigations Procedure, Paragraph 1.3.

> The Commission has put internal mechanisms in place to permit a regular evaluation of such information so that all parts of the organisation have input to this process and Commissioners can be advised of areas where the Paragraph 11 discretion could or ought to be exercised.[18]

The Procedure outlines that when Own-Initiative investigations are proposed, the Investigations Team will first raise the matter with the public authority and give them a reasonable opportunity to respond, before referring the matter to the SDIC. Referrals to the SDIC will be based on an assessment as to whether the alleged failure to comply 'significantly impacts' on equality of opportunity and/or good relations, considering the following four questions:

- Is the perceived failure one of substance and/or of strategic importance?
- Is there potential to raise awareness of Section 75 and/or of the Commission's role in this regard?
- Is there potential to change policies, practices and/or attitudes in public authorities?
- Is the perceived failure one that might not otherwise be pursued?

The SDIC is to consider if the referral is 'sufficiently strategic' to warrant a Paragraph 11 investigation. The Investigations Procedure then narrows the SDIC's discretion by stating that if the SDIC come to the view that 1) the scheme has likely been breached and 2) the issue is sufficiently strategic, then the SDIC must recommend investigation to the full Commission:

> If the Statutory Duty Investigations Committee concludes that it would be appropriate to form the required belief, and that the potential failure to comply is a strategic matter that merits the initiation of an ECNI-generated investigation, it will recommend authorisation of a Paragraph 11 investigation.[19]

The investigation

Methodologically there is no difference in how Complaints-Driven or Own-Initiative investigations are taken forward. Investigations are inquisitorial, and will involve meetings as well as the disclosure of information from the public authority. There is also a provision for a hearing before the SDIC. Investigating officers may also obtain the advice the Commission itself has or would have given regarding the alleged failing. The procedure also commits the Commission to publish copies of Investigation Reports on its website.[20]

[18] Paragraph 5.4.
[19] Paragraph 5.7.
[20] Section 6.

1.6 Counterpart enforcement regimes for equality duties elsewhere in the UK and Ireland

There are also public sector equality duties in Great Britain and the Republic of Ireland with their own compliance regimes. The case law for all jurisdictions is considered in the next chapter.

Equality Act 2010

Single equality legislation was passed by Westminster for Great Britain (GB) in 2010 across eight protected equality grounds[21] in the form of the Equality Act 2010. Section 149 contains a 'public sector equality duty'. This duty is three pronged providing, in summary that public authorities have due regard to the need to:

- Eliminate discrimination, harassment, victimisation etc.
- Advance equality of opportunity;
- Foster good relations.

The GB duty further codifies the concepts within it, which is particularly helpful in relation to the good relations limb of the duty given this concept, unlike the others, is not one that directly appears in international standards and jurisprudence. In relation to 'advancing' equality of opportunity this specifies (in relation to the equality groups), 'in particular' that this means removing or minimising disadvantages; taking steps to meet specific needs and encouraging participation in public life or other activity where there is under representation. 'Specific needs' explicitly include positive action to meet the particular needs of persons with disabilities.[22]

The duty to 'foster' good relations is defined as being, in particular, a duty to:
a) tackle prejudice, b) promote understanding.[23]

[21] Namely: age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

[22] 149 (3) Having due regard to the need to advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to—
(a)remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic;
(b)take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it;
(c)encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low.
(4) The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities.

[23] In addition to the concept being defined on the face of the legislation the GB 'good relations' duty differs from its NI counterpart in that it extends to all the equality groups in the legislation and it was not deemed necessary to have safeguards subordinating it to other parts of the duty.

Across all its limbs it is on the face of the legislation that positive action measures are permitted and may be required.[24] The Public Sector Equality Duty commenced in April 2011.

In relation to enforcement of the GB duty, the powers and mechanism is entirely different from Northern Ireland. The GB Equality and Human Rights Commission has powers to conduct assessments as to "the extent to which or the manner in which a person has complied with a duty under or by virtue of... [the public sector equality duty]."[25] Having conducted such an assessment the GB Commission then has powers to issue public authorities with 'Compliance Notices' in relation to the findings of the assessment either obliging compliance with the duty or serving the public authority with notice that they must set out the steps which they propose to take to comply with the duty within a specified time period. There is no requirement to refer the matter to the Secretary of State or equivalent. In the event of non-compliance the Commission can directly seek a court order.

Compliance can relate to breaches of the 'general duties' in the public sector equality duty. The GB Commission set out that the duty requires public authorities;

> ...to consider at the formative stage the potential consequences of the [policy] decision for people who share protected characteristics and to take these consequences into account before the decision is finalised. A public authority must be able to show that there has been proper consideration of all three aims of the duty within the decision-making process.[26]

The 'specific duties' which set out the procedural requirement to implement the duty are set out in secondary legislation and differ in England, Scotland and Wales.[27] In England the specific duties are limited to publishing information annually to demonstrate compliance with the duty and public authorities publishing one or more 'objectives' to achieve the aims of the duty at least once every four years. In Scotland there are also duties to publish progress reports and outcomes, including specific information on the gender pay gap, procurement, equality monitoring of employees and ministerial action lists. Regulation 5 in Scotland however involves an 'equality impact assessment' type duty. Listed public authorities must 'where and to the extent necessary to fulfil the equality duty' assess the impact of a proposed, new or revised policy against the public sector duty. In doing so the public authority must 'consider relevant evidence' and 'take into account' the results of the assessment in respect of the policy/practice. The assessment must also be published – this is similar to the equality impact assessment process in NI, albeit in a less complex manner that is not equality schemes based. The Welsh specific duties are also more comprehensive than

[24] The GB Act also contains a separate public sector duty envisaged to reduce socio-economic inequalities, albeit that the 2010-2015 Conservative-Lib Dem Coalition Government decided not to commence this duty. Section 1 'Public sector duty regarding socio-economic inequalities'- Subsection (1) provides 'An authority to which this section applies must, when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage.'

[25] Section 31 Equality Act 2006 (as amended), and the further provisions in schedule 2 of that Act.

[26] Equality and Human Rights Commission (Great Britain) 'A guide to regulation of the Public Sector Equality Duty in England, Scotland and Wales' (January 2015) paragraph 1.4.

[27] The Equality Act 2010 (Specific Duties) Regulations 2011; The Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011; The Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012.

those in England, and include provision for impact assessments.[28] Whilst there is no formal provision for complaints the GB Commission indicates that matters of compliance with the Public Sector Equality Duty can be brought to its attention by third parties – in this sense the provision can be seen as similar to 'Own-Initiative' investigations.[29] The GB Commission also has published criteria, which includes the severity of any breach, on which it determines its enforcement decisions.[30]

Irish Human Rights and Equality Commission Act 2014

Section 42 of the above Act establishes a public sector equality duty requiring public bodies to have regard to the need to:

(a) eliminate discrimination,

(b) promote equality of opportunity and treatment of its staff and the persons to whom it provides services, and

(c) protect the human rights of its members, staff and the persons to whom it provides services.

In relation to specific duties on public authorities, there is a qualified requirement for public bodies to set out in an accessible manner in their strategic plan an assessment of human rights and equality issues relevant to its functions and plans / actions in place to address such matters, and to report annually on progress.

The Irish Equality and Human Rights Commission, when it considers there is evidence of a failure by a public authority to perform its functions consistently with the equality duty, may invite the public body to carry out a review of its functions in relation to the duty or prepare and implement an action plan in relation to the duty or specific failings relating to it.

In general the Commission also has powers of inquiry, at its own volition or when requested by Ministers, to investigate any public body in qualified circumstances where there are serious violations of human rights or equality of treatment obligations, or systemic failures to comply with such obligations. Inquiries must be necessary and appropriate and be into matters of grave public concern. Following such inquiries the Commission has powers to issue compliance notices.[31]

[28] Equality and Human Rights Commission (Great Britain) 'A guide to regulation of the Public Sector Equality Duty in England, Scotland and Wales', paragraph 1.5-7.
[29] As above, paragraph 3.18.
[30] As above, 3.21.
[31] Sections 35-36 of the 2014 Act.

Chapter 2: Reviews, Proposed Legislative change and case law

2.1 Official reviews of the Section 75 powers

One of the duties of the ECNI under the legislation is to keep under review the effectiveness of Section 75.[32] There have been a number of reviews and related reports published in relation to this:

- Eithne McLaughlin and Neil Faris '*The Section 75 Equality Duty –An Operational Review'* volume 1 (November 2004).
- Chris McCrudden *Mainstreaming Equality in Northern Ireland 1998-2004: A Review of the Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998,* (2004).
- Brice Dickson and Colin Harvey '*Assessing the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998*' (November, 2006)
- Equality Commission '*Keeping it Effective - Reviewing the Effectiveness of Section 75 of the Northern Ireland Act 1998*' Final Report (November 2008)

The ECNI committed to a further review of the effectiveness of the duties as part of the institution's 2016-19 Corporate Plan, with a focus on the current practice of public authorities in fulfilling the duties.[33] A Working Group of Commissioners on the statutory duties first met on the 31 May 2016 to consider a number of commissioned reports on the duties namely:

- Policy Arc Limited and Kremer Consultancy Services '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice for The Equality Commission for Northern Ireland'* (June 2016) (along with summary version)
- Policy Arc Limited and Kremer Consultancy Services Ltd '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice Technical Report'* (June 2016)
- Professor Hazel Conley University of the West of England, Bristol '*A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties for the Equality Commission for Northern Ireland'* (2016)

The methodology of the Kremer reports involved engagement with public authorities. There was no engagement with civil society on the current review until the Commission attended an Equality Coalition meeting in April 2017. Emerging findings of this research were

[32] Paragraph 1(a) Schedule 9 Northern Ireland Act 1998.

[33] A draft of the plan published for consultation committed to "*Examine the evidence we have of current practice in public authorities of fulfilling their statutory equality and good relations duties in order to prepare for a formal effectiveness review of these duties."* The Commission does not appear to have published a final approved plan but did submit one to the Executive Office twice in 2016.

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 and set forth draft recommendations and proposed actions identified for public authorities and for the Commission's remit relating to the Section 75 duties.[34] The following sections will examine the outworking of the above documents in relation to enforcement.

The 2004 Operational review reports

The 2004 McLaughlin-Faris review of the operation of the equality duty had been commissioned under direct rule, as a result of commitments in the 2003 Joint Declaration of the British and Irish Governments and incorporates as an annex the above review by Professor Chris McCrudden. The Joint Declaration explicitly singles out 'enforcement' as being within the terms of the effectiveness review, a matter accordingly reflected in its terms of reference.[35] The review covered the 1998-2004 period of the operation of the duty. The Equality Coalition engaged with but had significant reservations about the review.[36] The issue of enforcement is dealt with in several paragraphs of the review report and the authors indicate they received considerable comment on the matter, largely directed at the question of the lack of sanctions for non-compliance. The review took the position that sanctions were not in the Commission's gift, and not the 'best way forward'. The review argued that matters of fast-tracking and internal commission procedures had largely been addressed in forthcoming guidance to the statutory duties. It did agree that the ECNI should adopt an 'inquisitorial approach' to complaint investigation, cautioned against the separation of advice from enforcement functions and recommended the Commission consider independent research specifically on the question of compliance and enforcement, including the adequacy of enforcement powers.[37]

Part V of the paper by Chris McCrudden deals specifically with implementation and enforcement of the Equality Duty. This notes views that the Commission's 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 that such an approach had proved unsuccessful. It notes that informal resolution of complaints had been a significant 'growth area' rather than using investigation powers. McCrudden alludes to the potential for a litigation strategy to come into play, noting 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 need to be resorted to. McCrudden predicts that the Commission will at some point need to resort to targeted investigations, but does paradoxically note a risk that public authorities may rush through controversial decisions to ensure implementation before investigations can be completed. McCrudden recommends the Commission develop an enforcement strategy, which could tackle the 'worst examples' of deficient EQIAs through efficient complaints handling and targeted investigations, and

[34] ECNI Section 75 "Statutory Equality and Good Relations Duties: Acting on the evidence of public authority practices" October 2017.
[35] Joint Declaration of the British and Irish Governments, 2003, paragraph 10.
[36] The Equality Coalition Co-Conveners were part of the advisory group for the review but subsequently resigned over aspects of the Review which the Coalition in general had felt should have assessed the extent of compliance by public authorities with Section 75, and had wished for the review to be fully independent.
[37] Eithne McLaughlin and Neil Faris '*The Section 75 Equality Duty –An Operational Review*' (November 2004), paragraphs 5.23- 29.

that the Commission should also consider, as should civil society, a litigation strategy for judicial review.[38]

The Dickson-Harvey report 2006

Two years on in 2006 the assessment of effectiveness of the statutory duties by Brice Dickson and Colin Harvey at the Queens University Belfast (QUB) human rights centre also specifically examines the role of enforcement powers. This report contains a detailed critique of the operation of the enforcement powers at the time. The assessment first notes the relative weakness of the enforcement powers vested in the Commission in comparison to powers under anti-discrimination statutes.[39] It alludes to several interviews advocating for a much stronger enforcement strategy from the Commission, the recommendations of Professor McCrudden and also the advocacy by Professor Tom Hadden of a more proactive approach by the Commission. The Dickson-Harvey report examined the approach to informal resolution of complaints noting that in general the Commission will advise complainants and assist drafting complaints to public authorities on a *without prejudice* basis to any decision on an investigation. The report notes the Commission's (then) procedures and is surprised 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." (This criterion remains in the Commission's current guidance.)

The report records that since the Commission started considering complaints in 2002, until the time of the report (2006) there had been a total of 34 'Paragraph 10' complaints considered for investigation, nine had been authorised for investigation, and further ten were still under consideration at the time of the report. The report notes that there had only been three Own-Initiative investigations by the Commission in this time frame and was critical of the then process for their authorisation which the authors considered 'rather convoluted'. The process involved one team in the Commission first seeking a response from the public authority on the matter before taking a decision as to whether to refer it to the Committee by way of a *preliminary* investigation report which assessed the matter on the basis of four questions[40] which the authors are critical of as too 'demanding'. The

[38] McCrudden, Chris *Mainstreaming Equality in Northern Ireland 1998-2004: A Review of the Issues Concerning the Operation of the Equality Duty in Section 75 of the Northern Ireland Act 1998,* 2004 in Eithne McLaughlin and Neil Faris '*The Section 75 Equality Duty –An Operational Review'* volume 2, pages 55-57, p73.

[39] For example it sets out that "Under the Fair Employment and Treatment (NI) Order 1998 the Commission is empowered to determine that a person or entity it has investigated should take action to promote equality of opportunity. The Commission must 'use its best endeavours' to ensure that this action is in fact taken and can, where appropriate, 'secure a written undertaking by [that person or entity] that such action will be taken'. If the undertaking is not given or if, though given it is not complied with, the Commission must serve a notice directing action to be taken. Such directions can include the setting of goals and timetables. If the Commission's directions are not complied with within a period considered reasonable by the Commission, it can apply to the Fair Employment Tribunal for an enforcement order specifying what action has to be taken and by when. Failure to comply with any part of such an enforcement order can render the employer liable to be fined up to £40,000." Brice Dickson and Colin Harvey '*Assessing the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998*' (Equality Commission, November 2006), page 91.

[40] Namely: (a) whether the perceived failure to comply with the Equality Scheme is one of substance and/or of strategic importance, (b) whether there is potential to raise awareness of Section 75 and/or of the Commission's role in relation to it, (c) whether there is potential to change policies, practices and/or attitudes in public authorities, and (d) whether the perceived failure is one that might not otherwise be pursued. Cited

authors are also critical of the difference in criteria between Own-Initiative and Complaint-Based investigations. (In the most recent guidance these four questions are still maintained as the provision to decide if a matter is sufficiently strategic to warrant an 'Own-Initiative' Paragraph 11 investigation.)

Dickson and Harvey are critical of the 'minimum time' that the Commission state it can complete an investigation in, which is four months – describing this as 'regrettable' mainly as "in the interim the alleged failure to comply with the Equality Scheme in question could be impacting very adversely on individuals or organisations who are within one or more of the groups 'protected' by Section 75." [41] Whilst recognising investigations do need to be thorough it is contended that the matters being investigated 'are not terribly complex' so as to always warrant such a protracted process.

The report examines the ten investigations reports the Commission had then published. Five of the seven Complaint-Based investigations had held a breach of Scheme had occurred and four had led to recommendations. In three Own-Initiative investigations, a breach had been found in one but no recommendations were made. Dickson and Harvey find the quality of the investigation reports 'variable' noting one Complaint-Based investigation did not even clarify the nature of the policy which had led to the complaint. However, they also note that the two most strategically significant investigations of the time, into the NIO decision to introduce ASBOs and Lisburn Council's decision to fly the Union Flag 365 days at numerous council buildings, had been proactively pursued by the Commission. Dickson and Harvey conclude by noting that, whilst there was a case to be made for additional enforcement powers, the majority of interviews in their research had taken the view that the Commission could make use of the existing Schedule 9 enforcement powers.

The 2008 effectiveness review report

It was 2008 when the ECNI published a 'Final Report' in its effectiveness review of Section 75 to which the above reports fed into. Among the issues raised by the Commission are that their recommendations to broaden the scope of equality schemes, to for example include a commitment to a particular action, would mean the scope for complaints and enforcement could be widened. The Commission considered that a subsequent review of effectiveness could clarify if this approach had been successful. The Commission did not concur with the position that its procedures were 'convoluted' arguing this could be a perception based on lack of understanding of the legislation, and did not propose changes to the procedures. The Commission did however conclude that work was required to improve the 'timeliness' of its interventions to enforce the duties, both in terms of the time given to public authorities to respond to complaints and the length of time taken to complete an investigation.[42] The Commission also committed to:

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in Brice Dickson and Colin Harvey '*Assessing the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998*' (November, 2006), page 105.

[41] Brice Dickson and Colin Harvey '*Assessing the Role of the Equality Commission in the Effectiveness of Section 75 of the Northern Ireland Act 1998*' (November, 2006), page 109.

[42] The following recommendation was contained in the report: "*The Commission has concluded that work is required to enhance the timeliness of Commission intervention regarding enforcement of the Section 75 duties. The Commission will consider a range of issues to ensure its interventions are timely and effective."*

> ...a more strategic approach to monitoring compliance with the duties, and aims to use this approach to better identify alleged breaches of schemes and use its investigatory powers to respond to any breaches in a more timely manner.[43]

The report did not propose any changes to the legislation in relation to enforcement. The next section will however overview other initiatives to amend Section 75 and Schedule 9.

2.2 Attempted and proposed changes to the legislation

Despite a number of proposals and attempts to amend them, the text of both Section 75 and Schedule 9 remain intact in their original form insofar as they relate to enforcement. Proposed changes have focused on amending the number of Section 75 categories and a number of issues relating to the good relations duty, namely: proposals to define the good relations duty; change its relationship with the equality duty; and to directly change the manner in which it is enforceable. Attempts to amend the duties in general have been as much about seeking to weaken the duties as they have about strengthening them. This section provides an overview of past attempts, but also the outworkings of proposals in the Together: Building a United Community (T:BUC) community relations strategy of the 2011-2015 mandate.

Amending the Section 75 categories

There have been a number of suggestions from Equality Coalition members and others to add to the nine current Section 75 categories. One of the proposals has been the explicit inclusion of a ground relating to socio-economic status, albeit arguably such considerations should already be implicit across all grounds in interpreting the duty compatibly with treaty-based human rights commitments. There have also been suggestions that other categories be added which would be referenced in international standards on discrimination, such as former prisoners, HIV status, rural and urban dwellers and gender reassignment. There has also been a concern however that opening up the legislation may lead to attempts to remove existing Section 75 equality grounds, particularly sexual orientation.

The most recent attempt to table an amendment to Section 75 to amend the nine categories came in 2013 during the passage through Westminster of what became the Northern Ireland (Miscellaneous Provisions) Act 2014. A clause in this legislation to allow 'part designation' of some public authorities for the purposes of Section 75 (such as the BBC) brought the duties within its ambit enabling the tabling of amendments. DUP MPs tabled such an amendment which would have added two further categories to Section 75, namely 'victims and survivors of the conflict' and 'members of Her Majesty's armed forces.' Both proposals appeared to relate more to broader issues around the definition of a victim[44]

[43] Equality Commission 'Section 75 Keeping it Effective Final Report November 2008 'pp55-58

[44] The proposal to add victims of the conflict would have provided a more restrictive definition of victim than in the present definition in the Victims and Survivors NI Order 2006. The amendment supported by the DUP and Alliance would have excluded anyone with any 'serious criminal conviction', anyone who was 'wholly or partly responsible' for the act which led to them becoming a victim, and also would have only defined a person as a victim if they were a victim of 'a criminal act' which could have excluded almost all victims of the state.

and the application of the Armed Forces Covenant in Northern Ireland.[45] The amendments were not supported.

Defining 'Good Relations'

In the absence of a definition of the concept in the Section 75 legislation, significant concerns had arisen regarding 'lay' interpretations of the 'good relations' duty. This included the assessments of policies (including those based on rights and equality) as 'adverse impacts' on 'good relations' grounds essentially as they were politically contentious, thus undermining the purpose of both the equality and good relations duties. The phenomenon arose following the incorporation of the ECNI recommendation that 'good relations' *impacts* also be considered in equality screening within 'second generation' equality schemes from around 2010. The problem was the subject of the May 2013 CAJ '*Unequal Relations?*' research report where a range of examples are provided. Since that time there have been further instances of perverse outcomes. This includes a screening exercise implying in one instance (in Fermanagh and Omagh Council) that marriage equality if implemented, whilst positive for equality would adversely affect 'good relations' on grounds of religions belief. Conversely, but equally strangely, the Department for Communities maintained that the implementation of the bedroom tax would be good for good relations on grounds that persons compelled to move into less favourable housing conditions may meet more persons from the other side of the community.

The ECNI for its part disagreed with the conclusions reached in the CAJ Unequal Relations report and stood by its recommended methodology on the good relations limb of the duty,

As a consequence of the *Unequal Relations* report an amendment was tabled to the aforementioned Northern Ireland (Miscellaneous Provisions) Bill at Westminster by the SDLP MP Mark Durkan. This proposed amendment would have defined good relations on the face of the legislation in the same manner as it is in the counterpart duty in Great Britain (i.e. as being in particular about 'tackling prejudice and promoting understanding'). There was support for the amendment at Westminster with the Shadow Minister Stephen Pound MP stating that the report should be 'compulsory reading'; and the Labour Party being 'extremely sympathetic' to the amendment. The NIO Minister stated however that whilst it

[45] In the case of the latter it had been contended by the DUP [see Hansard, public bill committee, 16 July 2013, Jeffery Donaldson MP, column 20] and the Regimental Association of the Royal Irish Regiment that the Military Covenant was not being applied in Northern Ireland due to Section 75. The ECNI and CAJ all gave written and oral evidence to the contrary to a Northern Ireland Affairs Committee inquiry which considered the matter. Both organisations stated that was no conflict between Section 75 and ensuring the removal of barriers for equality of access to services for service personnel, whilst highlighting the principles of objective need and that that any *preferential* treatment for soldiers in health and housing waiting lists would engage questions of indirect discrimination. The Committee ultimately concluded that whilst 'serious concerns' had been raised that NI equality law and particularly Section 75 was a barrier to implementation of the Armed Forces Covenant, they had received reassurance that the NI equality framework did not create any additional barriers to such implementation above and beyond what would already be the case through anti-discrimination legislation elsewhere in the UK. [See Northern Ireland Affairs Committee, 'Implementation of the Armed Forces Covenant in Northern Ireland', First Report of Session 2013–14, HC51]. The British Legion also downplayed the suggestion of significant problems with the implementation of the Covenant and a Committee member had asked CAJ whether the Section 75 issue had been raised as a 'red herring', a point also drawn attention to by the Committee's Alliance MP. In this context it is possible to view the issue as having been mooted with the purpose of providing a rationale to criticise the equality duty.

did not oppose the amendment in principle the matter should be best dealt with by the devolved institutions, and the amendment was withdrawn.[46]

In 2014 the Northern Ireland Assembly had the opportunity to debate defining 'good relations' insofar as it related to the new community planning functions on local councils. The Minister, the SDLP's Mark H Durkan MLA, told the Assembly that good relations in the context of community planning: "...are intended to be interpreted in line with the definition of good relations that has been in legislation in Great Britain for a number of years under the Equality Act 2010 as meaning across the grouping in Section 75 and as primarily being about tackling prejudice and promoting understanding."[47] The Minister went further by seeking to place this definition on the face of the legislation. With the exception of the Alliance Party, there was broad support from other political parties that the concept should be defined in law. The SDLP and Sinn Féin voted for the above definition to be placed on the face of the legislation after the debate. The Unionist parties, whilst not opposing a definition *per se* advocated for more work to be done on the wording (DUP), a 'proper, full and detailed debate' (NI21) or that the definition 'may be a bit narrow and a bit too focused' (UUP). In this context the amendment fell, albeit that the Minister's intention as to how the 'good relations' element of community planning should be interpreted remains on the record. The Alliance Party also called for wider discussion, expressing the view that they were not convinced there was a need for a definition, but also indicating that if there was one, it should be broader to encompass matters of 'reconciliation, integration or sharing.'[48]

Whilst a definition has not been therefore placed on the face of legislation in 2015 the debate did move on when the ECNI released formal guidance to local Councils which provides a fresh definition of the elements of the concept of good relations. This definition corresponds to duties under international standards, the former part draws on provisions originally found in Section 10 of the Equality Act 2006 – which sets out the powers and duties of the Equality and Human Rights Commission in Britain. The Commission had proposed there should be a definition of good relations in statute "to ensure clarity and consistency of purpose in shaping actions and promoting good relations." in the context of the NI Executive's T:BUC strategy:

> "The Commission has indicated that there are a number of elements that would be helpful in the formulation of such a definition. Good relations could be said to exist where there is:
>
> - a high level of dignity, respect and mutual understanding
> - an absence of prejudice, hatred, hostility or harassment
> - a fair level of participation in society.
>
> The definition contained in Section 149 of the Equality Act 2010 in Great Britain is also useful in that it provides public authorities there with direction on how they should comply with their duty to have due regard to the need to foster good relations, as follows:

[46] Hansard UK Parliament HC 18 Nov 2013 : Column 1020
https://publications.parliament.uk/pa/cm201314/cmhansrd/cm131118/debtext/131118-0003.htm
[47] Official Report (Hansard) Northern Ireland Assembly Further Consideration Stage (1 April 2014).
[48] Official Report (Hansard) Northern Ireland Assembly Further Consideration Stage (1 April 2014).

> *(5) - Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to:*
> *(a) tackle prejudice, and*
> *(b) promote understanding"*[49]

Prior to this paper the ECNI had put forward a 'working definition'[50] of good relations. This working definition has been adopted into the glossary of Equality Schemes that follow the ECNI model scheme. The definition and interpretation of the concept of 'good relations' will influence the potential for equality scheme complaints on good relations grounds. For example, if a public authority accepts that part of its good relations duty is to 'tackle prejudice' it can be held to account if no action is taken when there are opportunities to do so.

The relationship between the two duties

As alluded to earlier, safeguards were introduced into Section 75 to ensure that 'good relations' could not trump equality of opportunity considerations. The legislation was formulated in a way that ensured primacy for the equality duty, with the good relations duty to be undertaken, for example, 'without prejudice' to it. There have been a number of attempts over the years to make inroads into this position. This included in 2014 two proposals by the Alliance Party to introduce equality and good relations considerations without this safeguard into local government legislation. These proposals provided for equality and good relations considerations by councils among the long term objectives for improving social wellbeing in their districts under new Community Planning duties. On both occasions a Petition of Concern (requiring a cross community vote) was tabled by Sinn Féin and the SDLP to prevent this formulation and protect the safeguards over the equality duty. Instead the SDLP Minister put forward a clause which stated "*the reference to improving the social well-being of the district includes promoting equality of opportunity in accordance with Section 75 of the Northern Ireland Act 1998 and, without prejudice to this, having regard to the desirability of promoting good relations*" which, as the Minister told the Assembly was "*framed to ensure that the type of existing safeguards between equality and good relations in Section 75 of the Northern Ireland Act 1998 are maintained*."[51] Ultimately all parties accepted this formulation which now stands as Section 66(3)(a) of the Local Government (Northern Ireland) Act 2014. Promoting equality and good relations are also mentioned in the Children's Services Co-operation Act (Northern Ireland) 2015, as part of the definition of wellbeing of children and young persons. There is no explicit reference to safeguards between the two duties in this legislation, albeit the Act provides that the definition of well being itself stands to be interpreted compatibly with the provisions of the

[49] Equality Commission advice on Good Relations in Local Councils, (Equality Commission), September 2015, page 4.
[50] Namely: "The growth of relationships and structures for Northern Ireland that acknowledge the religious, political and racial context of this society, and that seek to promote respect, equity and trust, and embrace diversity in all its forms". Promoting Good Relations, Guide for Public Authorities, ECNI 2007, paragraph 3.26 (note the reference to 'equity' was qualified).
[51] Official Report (Hansard) Northern Ireland Assembly Local Government Bill Further Consideration Stage (1 April 2014).

UN Convention on the Rights of the Child.[52] What both these pieces of legislation do have in common is that the good relations considerations are not expressly limited to the three categories in Section 75.

2.3 Alternative 'non-compliance' enforcement mechanisms

This section considers the envisaged Special Committee of the Northern Ireland Assembly on conformity with equality requirements; the NI Bill of Rights, the Ministerial Code, 'petitions of concern' in the Assembly and the 'call in' mechanism for key decisions in local government, in relation to the ability of each to enforce compliance with the equality duty. This section will then also examine proposals put forward for the good relations limb of the duty, including most recently the proposals in the NI Executive's T:BUC community relations strategy.

Special NI Assembly Committee on Conformity with equality requirements

An alternative mechanism to challenge non-compliance with the equality duty, insofar as it engages measures and legislative proposals is found in the provisions in the Belfast/Good Friday Agreement for a 'Special Committee' of the Northern Ireland Assembly. The Committee is to have a remit to 'examine and report' on conformity with equality requirements, which can include Section 75 as well as the ECHR and the provisions of what was to be the Bill of Rights for Northern Ireland.[53] Provision for such a Committee on an ad hoc basis must be and is provided for under Standing Orders of the Assembly. However, the Committee has only ever been convened on one occasion, in relation to the Welfare Reform Bill, in what was not a satisfactory experience for the Equality Coalition.[54]

In 2014 the Assembly and Executive Review Committee of the Northern Ireland Assembly published a review into 'Petitions of Concern' which considered the option of a mandatory vote on convening the Special Committee on conformity with equality requirements when petitions of concern were tabled. Whilst this proposal was supported by the SDLP, Sinn Féin and Alliance it was opposed by the DUP and UUP and the reform was not progressed.[55]

Research for the Equality Coalition has concluded that even if this Committee is convened in future "it appears that it would be reconstituted every time around a specific issue with new members each time it is established – it would thus develop no institutional memory or competence based on experience." The potential for this Special Committee to enforce compliance with the Section 75 equality duty is therefore currently limited.[56]

The Northern Ireland Bill of Rights

The Belfast/Good Friday Agreement provided for a Bill of Rights, containing rights supplementary to the ECHR reflecting the particular circumstances of Northern Ireland. The

[52] Section 1, *Children's Services Co-operation Act (Northern Ireland) 2015.*
[53] Strand 1, paragraph 11, Belfast/Good Friday Agreement, April 1998.
[54] See for example http://www.thedetail.tv/articles/committee-accused-of-allowing-ethnic-minority-leaders-to-be-mocked-at-stormont.
[55] NI Assembly Report: NIA 166/11-15 (Assembly and Executive Review Committee) 25 March 2014. The subsequent Protocol on the use of Petitions of Concern in the 'Fresh Start' Agreement reflects this.
[56] Bell, Christine and McVeigh, Robbie *'A Fresh Start for Equality? The Equality Impacts of the Stormont House Agreement on the 'Two Main Communities'* (March, 2016) p19.

NI Human Rights Commission discharged its remit under the Agreement to issue advice on the content of the Bill of Rights in 2008 yet successive British Governments have not introduced the legislation, having introduced a pre-requisite, not contained in the Agreement, of cross-party consensus on content.

Among the rights recommended by the Human Rights Commission for incorporation were a statutory duty on public authorities to take all appropriate measures to eliminate unfair discrimination and to take positive action to ameliorate the conditions of disadvantaged groups across a range of protected equality grounds listed in the advice, which include – but go beyond – the Section 75 categories.[57] The Commission also advised the introduction of a statutory duty to "*fully respect, on the basis of equality of treatment, the identity and ethos of both main communities in Northern Ireland. No one relying on this provision may do so in a manner inconsistent with the rights and freedoms of others*."[58] The introduction of such provisions in a Bill of Rights could have an impact on the question of equality enforcement and the interface with the equality duty– the proposed statutory duty on the elimination of unfair discrimination, is notably similar to provisions in the equality duty in Great Britain. The implementation of the Bill of Rights remains a treaty-based obligation.

Ministerial Code

The statutory basis of the Ministerial Code is provided for under Section 28A of the Northern Ireland Act 1998 (as inserted by the Northern Ireland (St Andrews Agreement) Act 2006). Under s28A(1) NI Ministers must act in accordance with the Ministerial Code. The current Ministerial Code includes provisions that Ministers must "operate in a way conducive to promoting good community relations and equality of treatment". The Ministerial Pledge of Office includes a provision to "serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination."[59]

At present however the only available enforcement avenue to compel a Minister to act in accordance with the code is judicial review. On the 24 January 2017 just before the NI Assembly was dissolved for the March 2017 snap election, the Assembly approved a motion tabled by the Green Party MLA Steven Agnew, calling on the Executive Office to urgently legislate to expand the remit of the Northern Ireland Assembly Commissioner for Standards to the investigation of alleged breaches of the Ministerial Code of Conduct.[60] The motion was supported by all parties except the DUP (whose approval would be required for the Executive Office to introduce legislation on the matter should the institutions be reconvened).

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[57] Namely: race, membership of the Irish Traveller community, colour, ethnicity, descent, sex, pregnancy, maternity, civil, family or carer status, language, religion or belief, political or other opinion, birth, national or social origin, nationality, economic status, association with a national minority, sexual orientation, gender, identity, age, disability, health status, genetic or other predisposition toward illness, irrelevant criminal record, property or a combination of any of these grounds, on the basis of characteristics associated with any of these grounds, or any other status.

[58] NI Human Rights Commission 'A Bill of Rights for Northern Ireland 'Advice to the Secretary of State for Northern Ireland' 10 December 2008; p41, 33.

[59] https://www.northernireland.gov.uk/sites/default/files/publications/nigov/Northern%20Ireland%20Ministerial%20Code.pdf

[60] Northern Ireland Assembly (Official Report) Ministerial Code: Independent Investigation of Alleged Breaches 24 January 2017

Petitions of Concern in NI Assembly

Among the power sharing elements provided for within the Belfast/Good Friday Agreement is the "Petition of Concern" mechanism, which when a valid "Petition of Concern" is presented requires votes to be carried with 'cross community' support. In practice this means the support of sufficient numbers of both nationalist and unionist MLAs. The criterion for a valid Petition of Concern is the support of 30 MLAs.

The Petition was envisaged to protect minority rights and can be used to stop measures which would not be in conformity with the equality duty. Whilst there are examples of Petitions being used for this purpose, including the aforementioned example of a petition being tabled to prevent the erosion of safeguards between the Section 75 duties themselves, there are also examples of Petitions being deployed to block equality initiatives in the Assembly. This included in 2015 a vote on marriage equality for persons of minority sexual orientation, supported by the majority of MLAs, but defeated by a Petition of Concern from the DUP. On a previous occasion an attempt to amend the law to remove an obstacle to provision for caravan sites for the Irish Traveller community was also blocked by a Petition of Concern. The misuse of Petitions is compounded by there being no criteria whatsoever which have to be met to table a Petition of Concern, beyond 30 MLAs signing the Petition. Such Petitions however do retain the potential to be able to at least prevent provisions in legislation which would have a regressive impact on equality or the equality duty. The following section examines the equivalent mechanism in NI Councils.

'Call in' mechanism, local government

May 2015 saw the coming into existence of 11 new Councils with enhanced powers. Section 41 of the legislation, the Local Government (Northern Ireland) Act 2014, introduced a mechanism known as 'Call In' for 'key decisions' by Councils. This was described by the Minister (Mark H Durkan MLA) as a "*key mechanism for providing a protection for the interests of minority communities in council decision-making."* The 'Call In' mechanism provides that decisions, when 'Called In' by 15% of elected representatives, are to be reconsidered and only approved if then passed by a 'qualified majority' of 80% of councillors.

Unlike the Petition of Concern the merits of a Call In have to be determined by a legal opinion and the primary legislation does at least set out some criteria, namely that the decision in question would 'disproportionately affect adversely a section of inhabitants' of the local government district. This implicitly includes equality duty considerations, with the language of adverse effect close to that used in the enforcement provisions for the Section 75 equality duty itself. The problem is that the broader term of 'disproportionately adversely affect' is not further elaborated on in the legislation. It was consequently subject to criticism by CAJ and the Environment Committee of the NI Assembly for lacking legal certainty. There are powers vested in the Minister however to introduce secondary legislation on the matter. The first attempt at such regulations was rejected in February 2014 via a DUP Petition of Concern in the Assembly. At this stage the concerns were that the draft still lacked legal certainty and a qualified majority still would have been required regardless of the merit of the Call In.

The secondary legislation was therefore redrafted and presented to the Assembly as the draft Local Government (Standing Orders) Regulations (Northern Ireland) 2016. These regulations would have tied the 'Call In' to circumstances where a legal opinion indicates a risk the decision is, among other matters, incompatible with a Council's equality scheme insofar as it relates to the equality duty contained in Section 75(1) of the Northern Ireland Act 1998. Whilst this position was supported by all other parties (SF, UUP, Alliance and SDLP itself), it was not supported by the DUP who tabled a Petition of Concern which blocked the regulations. The DUP told the Assembly their position was in particular based on opposition to the Section 75 equality duties being part of the Call In consideration, instead expressing a preference for the less legally certain concept of being 'disproportionately adversely affected' being maintained without such qualification. The power to make regulations was transferred under the short lived 2016 mandate to the new Department of Communities under DUP Minister Paul Givan, and no further regulations were taken forward. In the interim key council decisions which are not compliant with the equality duty could still be called in as constituting a 'disproportionate adverse affect'. However, there is also the potential for 'Call Ins' against measures which would promote equality of opportunity, albeit such attempts will not be so open ended as provided for under 'Petitions of Concern' given the requirements to obtain a legal opinion and demonstrate adverse affects.

The proposed wording of the 2016 draft regulations was clear that the equality schemes considerations only applied to the equality and not good relations limb of the Section 75 duties. This should be understood in the context of 'good relations' not yet being defined in legislation and the consequent risk of subjective interpretation of the concept defeating the purpose of the regulations in increasing legal certainty over the application of Call In. The following section will examine proposals regarding enforcement of the good relations duty.

Proposed enforcement mechanisms for the 'good relations' limb

As outlined in the summary of enforceable duties under Schedule 9 set out in Chapter One of this report, two of the seven summary mandatory provisions relate also to the good relations duty. The first is the general duty around training on the statutory duty and ensuring access to services and information. The second relates to the general duty to assess compliance and consult on matters relating to both duties. The other five duties are explicitly provided for in the equality limb of the duty only covering the duty to conduct and publish impact assessments on the equality impacts of policies and consequent monitoring, consideration of alternative policies and mitigating measures.

The intentional attaching of these duties to the equality limb of the statutory duty only can be viewed in light of concerns that there is also a risk of subjective lay interpretations of the good relations duty. In this sense any attempt to 'copy and paste' equalities concepts – such as the assessment of 'adverse impacts' on to the good relations duty – risked simple negative perceptions, 'impacts' or 'tensions' in a lay sense being considered as an adverse impact when not actually objectively reaching the threshold. The risk is that if this approach is taken it could then be read that the public authority is 'required' to take measures against such an 'adverse impact' on good relations grounds, even if the policy had a positive effect on promoting equality of opportunity. Whilst the safeguard of 'impact assessment' only

applying to the equality limb of the duty remains in the legislation there have been a number of attempts to change this.

Over a decade ago the introduction of a 'good relations impact assessment' had been proposed under the Direct Rule 2005 *A Shared Future* community relations strategy. In this instance the strategy proposed redefining good relations in a manner quite distinct from how the concept has evolved in law as a duty to 'tackle prejudice and promote understanding.' A Shared Future proposed good relations impact assessments would be 'to assess impacts on the promotion of sharing.' The proposal raised significant concerns and was never legislated for. Whilst not redefining good relations in this way the ECNI in 2007 did nevertheless recommend that public authorities conduct 'good relations impact assessments' and that they do so by adopting the same methodology that had been designed and tailored for assessing equality impacts.[61]

The inclusion of this recommendation in the 2010 Model Scheme meant that such provisions, essentially for assessing lay good relations 'impacts' during Equality Screening, were subsequently adopted into public authority equality schemes. These duties are therefore as enforceable as the equivalent equality duty despite the intention of the legislation.

Whilst recognising that it is possible for public authorities to have alternative arrangements for the good relations duties[62] the ECNI has stuck to its recommendations and public authorities who have then deviated from their approach to date have faced long delays in having their schemes approved. This occurred when a number of new district Councils in 2015 declined to follow the ECNI recommendations and instead took the approach favoured by the Equality Coalition of both defining 'good relations' and framing it as a positive duty, rather than one that involves the assessment of good relations 'impacts.'[63] The ECNI subsequently withheld approval of the Council's equality schemes for some time, whilst offering the Councils further advice that largely focused on the good relations elements of their schemes. The Coalition contested the legal basis for this as Schedule 9 provides that the ECNI either approve Equality Schemes that are submitted to it, or in the alternative refer the matter to the Secretary of State. It is difficult to see how the Commission could not approve schemes that meet the legal requirements and the schemes of three councils were ultimately approved with the changes to the good relations methodology.[64]

The T:BUC proposals

May 2013 saw the publication of the Northern Ireland Executive's 'Together: Building A United Community' (T:BUC) community relations strategy, which had been committed to as a key 'building block' in the Programme for Government in the 2011-2015 mandate. The T:BUC strategy in addition to a series of project-based measures contained a proposal to subsume functions of the Community Relations Council into the ECNI as a 'Equality and

[61] Promoting Good Relations, Guide for Public Authorities, ECNI 2007.
[62] See for example Equality Commission 'Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act 1995' June 2015 page 6.
[63] Namely Derry City and Strabane; Mid Ulster; and Fermanagh & Omagh.
[64] This issue is dealt with in detail in correspondence between the Equality Coalition and Equality Commission in 2016 (20 June, 6 July, 31 August, 2 November respectively)

Good Relations Commission', a proposition we understand was introduced at a relatively late stage in the process. T:BUC also proposed to introduce what was referred to as an:

- enhanced good relations section for Equality Impact Assessments for all policies across government;
- augmented impact assessment that assesses the extent to which policies and other interventions contribute to meeting the objectives of this overarching strategy;
- enhanced EQIA template to ensure that future policy and/or spending commitments are screened for alignment with this strategy;

T:BUC set out that the above was envisaged to manifest itself in a statutory duty on the ECNI to:

- enforce and investigate as appropriate where there is a failure to comply with Section 75(2);

Reassurances were given that there was no intention of changing the wording of Section 75, and the language elsewhere in the strategy reflects the safeguards introduced within the equality duty. However, the proposals would have necessitated amendments to Schedule 9 with the intention of introducing a 'good relations' section into equality impact assessments. T:BUC is also clear that good relations in this context should be understood as screening policies for alignment with T:BUC, which is a further departure from the how the concept has evolved elsewhere. It is not clear how the proposed augmented assessment could work in this context, nor if any other methodology beyond simply replicating the 'impact assessment' duties in Schedule 9 for equality into good relations was considered. In a context where concerns about the existing ad hoc use of good relations impact assessments had been highlighted in the *Unequal Relations* research, Equality Coalition members expressed significant concerns about the proposals. The proposals were then shelved during the 2011-2015 mandate and not legislated for.

In March 2016 an internal Equality Commission paper gave further consideration to how the T:BUC proposed duty "To enforce and investigate as appropriate where there is a failure to comply with Section 75(2);" could be taken forward in the new mandate, in the context of commitments to T:BUC in the Stormont House and Fresh Start Agreements.[65] The paper contends that the "*T:BUC* proposal seems to indicate a different enforcement regime for Section 75(2), possibly additional to that which is in place in relation to equality schemes."[66] Whilst the paper notes "The current enforcement powers relate to both Section 75 (1) and (2),"[67] it overlooks setting out how the two limbs of the duty are treated differently in relation to enforcement powers – to the extent of curiously dropping the word 'equality' from the title of schedule 9 ("Equality: enforcement of duties") when citing same.[68]

[65] EC/16/03/3, *Together: Building a United Community* Strategy proposal on enforcement of the Section 75 (2) good relations duty, March 2016, cover page.
[66] As above.
[67] As above.
[68] EC/16/03/3, *Together: Building a United Community* Strategy proposal on enforcement of the Section 75 (2) good relations duty, March 2016. Paragraph 2.1 cites the title of Schedule 9 as "Enforcement of the Duties" the actual title is "Equality: Enforcement of Duties."

The ECNI paper states that the T:BUC intention for a power to enforce and investigate the good relations duty would require legislation and that the formulation in T:BUC is different from the current enforcement arrangements and could potentially indicate an enforcement approach empowering the Commission to issue 'compliance notices'.[69] The Commission identifies a number of risks in relation to taking forward the T:BUC enforcement proposals, raising concerns that the proposals did not reflect the current enforcement arrangements under Equality Schemes and the divergence in enforcement regimes could undermine the relationship between the two limbs of the Section 75 duties.[70] There was no obvious attempt to revive this element of T:BUC during the short lived 2016 mandate of the Northern Ireland Executive; clearly however such issues may be revived in the future.

2.4 The Current Equality Commission Effectiveness Review

The ECNI Corporate Plan for 2012-2015 included a target to develop a strategic plan to monitor public authority compliance with equality scheme commitments, for which the priority areas included the screening and EQIA assessment processes. Further to this a Commission paper in November 2015 reflects on a number of identified trends regarding schemes' compliance, including (in summary):

- Problems of Equality Schemes arrangements on occasions being interpreted as being applied to only a limited range of functions (paragraph 19b);
- Very few policies being screened 'in' for an EQIA - only seven EQIAs were received by the Commission as part of consultations during 2015 (paragraph 19v);
- Occasions of screening not being conducted in a timely manner and being used to gather, rather than present, evidence from consultees (paragraph 19 iii);
- Occasions of screening reports giving little consideration to impacts on equality grounds but rather stating that the policy aim is positive generally (paragraph 19 iv);
- Problems of variations in Screening methodologies (e.g., 'initial' or 'ongoing' screenings) differing from the adherence to Equality Schemes from public authorities (paragraph 19 i);
- Lack of clarity of the role of Screening in complex policy development processes (paragraph 19ii); [71]

The paper appears to point the Commission to further advice and support work to counter such issues. There is no indication of consideration of further enforcement work as a mechanism to ensure compliance.

The Review reports of 2016

In June 2016 the Commission concluded the aforementioned reports which reviewed recent public authority practice in screening and EQIA. In the context of T:BUC and the *Unequal Relations* report the review had a particular focus on how screening/EQIA was used in the

[69] EC/16/03/3, *Together: Building a United Community* Strategy proposal on enforcement of the Section 75 (2) good relations duty, March 2016 paragraphs 2.8-10.
[70] EC/16/03/3, *Together: Building a United Community* Strategy proposal on enforcement of the Section 75 (2) good relations duty, March 2016, paragraph 4.3.
[71] EC/15/11/06 Section 75: Monitoring Public Authority Compliance (November 2015)

context of the 'good relations' limb of the duty. The report however is useful in generally addressing patterns with Section 75 compliance. Its methodology involved widespread consultation with public authorities and the examination of over 500 equality screening templates produced in 2014/15 and 30 EQIAs that covered 2013-2015. Some of its main findings, most relevant to enforcement, include:

- 'wide disparities' and 'dramatic differences' in different public authorities regarding their level of Section 75 activity. It found 'considerable evidence' of good practice on the one hand, but on the other hand a minimalist approach in others where there were '*large elements of business that appear not to attract scrutiny under Section 75'*;[72]

- The quality of available Equality Screening documents 'revealed a somewhat underwhelming picture'; 64% of screenings identified 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*.'[73]

- 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.*"[74] Data was not always helpful in identifying likely impacts;

- EQIAs were now being undertaken quite rarely and often on outward facing 'highly contentious' or 'politically sensitive' decisions '(e.g. flags, language, closures, budget cuts).' However, the quality of EQIAs when undertaken tended to be good with a meaningful use of data.[75]

In relation to the focus on good relations the report finds that under the Commission's methodology: 'good relations' considerations were rare in screening exercises; there was confusion among public authorities as to what the term meant; public authorities had 'no appetite" to expand to include further good relations questions; felt it was more problematic to identify and resolve good relations issues and a number of respondents feeling that the good relations element skewed the screening process towards three of the nine Section 75 grounds.[76] The review clearly identifies a number of deficient areas

[72] Policy Arc Limited and Kremer Consultancy Services Ltd '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice' Technical Report (Equality Commission, June 2016), page 8.*
[73] Policy Arc Limited and Kremer Consultancy Services Ltd '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice' Summary Report (Equality Commission, June 2016), page 5.*
[74] Policy Arc Limited and Kremer Consultancy Services Ltd '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice' Summary Report (Equality Commission, June 2016), page 6.*
[75] Policy Arc Limited and Kremer Consultancy Services Ltd '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice' Summary Report (Equality Commission, June 2016), page 3.*
[76] Policy Arc Limited and Kremer Consultancy Services Ltd '*Section 75 Screening and Equality Impact Assessment: A Review of Recent Practice' Summary Report (Equality Commission, June 2016), section 6.6.1*

widespread in Equality Screening that could be addressed by 'failure to comply' enforcement action.

A further report commissioned by the ECNI in 2016 was undertaken by Professor Conley of the University of the West of England. This reviews impact assessment in policy formulation in the context of statutory equality duties and focuses on duties outside of Northern Ireland. It begins by recalling the antecedents of Equality Impact Assessments from gender mainstreaming initiatives following the 1995 Beijing Platform for Action; then examines the application of the duties in Great Britain and the Republic of Ireland. In particular a chapter of the report examines the role of Equality Impact Assessments in the enforcement by judicial review of the duties in Great Britain, the subject of the next section in this report. The Conley report concludes that the main advances of the duty in Great Britain and its proactive potential are lost if there are limited opportunities for engagement by civil society outside a judicial review process.[77]

Further to these reports in November 2017 the ECNI issued a report for consultation. The consultation report includes draft recommendations and actions; however none of these at present relate to the enforcement function of the Commission itself, however there is a commitment to now review the ECNI investigation powers, which affords an opportunity for many of the issues in this report to be addressed. There is no further detail as to what format the review will take but the forward states:

> One of the actions identified is a review of our use of investigation powers, scheduled in the current business year. On completion of this, the Commission will consider the overall position in relation to its function to 'keep under review the effectiveness of the duties imposed by Section 75'.[78]

The proposed actions section at the end of the document reiterates that the ECNI proposes to "…use the issues identified in this report and review its approach to investigations generally in the forthcoming period." Earlier in the report the ECNI cites two issues it has identified in this area. The first relates to Complaints where it notes that complaints have consistently reflected particular issues which are of concern to the complainant "which are not always clearly associated with what Equality Scheme arrangements provide for." The second issue relates directly to investigations with the ECNI noting they are 'adversarial' and 'mostly driven by particular circumstances'. The report contends that whilst investigations have provided some learning for public authorities, the 'ripple effect' of their findings can be limited.[79] These issues are more limited than those that are identified in this present report. More broadly in the consultation report there are recommendations to public authorities which focus on issues such as leadership, restating the importance of the duties, shifting focus from process to outcomes and ensuring consideration is evidence-based. The actions that the ECNI intends to take forward itself relate to matters such as highlighting the

[77] Prof Hazel Conley, *'A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties' (Equality Commission, 2016).*
[78] 'Section 75 Statutory Equality and Good Relations Duties: Acting on the evidence of public authority practices' ECNI Report for Consultation October 2017, forward iii.
[79] As above, actions 1.8 page 42 and paragraphs 8.24-25 respectively.

importance of the duties, engagement, conveying and communicating leadership, and also prioritising its advisory activities onto screening and EQIAs.

2.5 Case law in Great Britain and Ireland

Case law in Great Britain

There have been a significant number of judicial reviews in Britain under both the public sector equality duty provided for in Section 149 of the Equality Act 2010 and the predecessor duties under separate equality statutes. The civil society Equality and Diversity Forum (EDF) has produced a database of leading and recent cases,[80] and there is analysis of the case law in the paper produced by Professor Conley for the ECNI in 2016.[81]

The case law has led the Courts to take account of the 'Brown Principles' (named after one leading 2008 case) when assessing compliance with the public sector duties.[82] The six Brown Principles have been summarised by the ECNI as providing that:

1. a decision-maker must be aware that he/she is obliged to comply with the public sector duties;
2. the duties must be fulfilled before and at the time that a particular decision is being considered, and not afterwards;
3. the duties must be exercised in substance, with rigour and an open mind; and not as a "tick boxing" exercise;
4. the duties are non-delegable; meaning that it is the actual decision-maker who must comply with the duties, and not some other person;
5. the duties are continuing ones;
6. it is good practice to keep adequate records that will show that the statutory goals have actually been considered and pondered and to promote transparency and discipline in the decision-making process.[83]

Conley also notes a further principle established by another leading case, *Baker*, which is alluded to in *Brown* but not included within the above principles, is that the duty is not a duty of result, but a duty to have due regard to achieve the result.[84]

Whilst the process of an Equality Impact Assessment (EQIA)[85] is not as codified into the Equality Act 2010 as its Northern Ireland counterpart, Conley concludes that it is clear from analysis that the EQIA is a key feature as the main mechanism by which compliance with

[80] http://www.edf.org.uk/case-law/
[81] Prof Hazel Conley, '*A review of available information on the use of impact assessment in public policy formulation and in contributing to the fulfilment of statutory duties' (Equality Commission, 2016).*
[82] *Brown v Secretary of State for Work and Pensions and Ors* [2008] EWHC 3158 (Admin)
[83] 'Section 75, Northern Ireland Act 1998 and Section 49A, Disability Discrimination Act 1995 (short guide)' *Equality Commission*, 2015), p3.
[84] *Baker v Secretary of State for Communities and Local Government and Ors* [2008] EWCA Civ 141
[85] Often referred to by the acronym EIA in Great Britain, but EQIA used here for consistency.

'Due Regard' is established in almost all judicial reviews on the public sector equality duties."[86]

One area of analysis relates to the content and quality of EQIAs. The Courts have held that an EQIA, so long as it meets the particular due regard requirements, does not have to follow a particular format. This is of limited relevance to Northern Ireland given the more codified methodologies in public authority's equality schemes and Commission guidance.

Whilst early cases had focused on performing the duty generally, more recent cases post the 2010 Act have turned to the question of the quality of the EQIA.[87] In a challenge by a disabled person against Isle of Wight Council regarding changes of eligibility rules for adult social care, the claimants submitted that the EQIA had been flawed.[88] This centred on the lack of provision of necessary information in the process, in a context where the ultimate criteria had changed from the original proposals and hence had not been subject to sufficient scrutiny required by the duty. The Court concurred, citing previous case law holding that it was insufficient to have a process considering the needs of disabled persons. Rather, what the duty required was to "consider the impact of a proposed decision and ask whether a decision with that potential impact would be consistent with the need to pay due regard to the principles of disability equality..." and that the content of an EQIA could not be "vague and general."[89] The Court consequently held that the "the Council did not conduct the rigorous analysis and consideration required in order to satisfy the 'due regard' duty under Section 49A DDA 1995, principally because it did not gather the information required to do so properly."[90] The Courts have therefore established that the quality of the EQIA is important, as is the data within it, and that simply conducting an EQIA is not sufficient to ensure compliance with the duty, without consideration of its substance.

It has also been held that impact must be measured in relation to the *protected groups* and not just general impact. In *Sandwell* a Council's decision to restrict Council Tax reductions to those who had two years' residency in the borough found that in its EQIA there was 'no evidence that the Council conducted any assessment at all of the race or gender impact of the residence requirement' either on or before adopting the original policy.[91]

In summary, in relation to the content and quality of the EQIA, Conley identifies the following principles that can be derived from the case law:

- The quality of impact assessment is important and the analysis of impact must accurately match the information gathered;
- Impact must be assessed in relation to protected groups and should not consist only of general impact;

[86] Conley, 2016, p14.
[87] Conley, 2016, p16.
[88] *R (on the application of JM and NT) v Isle of Wight Council [2011] EWHC 2911 (Admin)*
[89] *R (W) v Birmingham City Council*, at [124] & [179].
[90] *R (on the application of JM and NT) v Isle of Wight Council [2011] EWHC 2911 (Admin) [140]*
[91] R *(Winder and Others) v Sandwell Metropolitan Borough Council and the Equality and Human Rights Commission (intervening) [2014] EWHC 2617 (Admin).*

- An equality impact assessment can be considered as evidence of compliance with the Duty but is not necessarily so;
- A large impact requires a higher level of due regard.[92]

Conley also examines the question of the use of EQIAs in decision-taking and policy making and identifies the following issues summarised with (our) commentary in the table overleaf.

Issue identified by Conley Report	Northern Ireland implications (our) commentary
Timing of assessment is important (notes that pre-2010 an EQIA was to be conducted prior to decision-making; but more recent cases call this into question;)	NI Equality Schemes tend to provide that screening should be conducted at the earliest opportunity in the process, with an EQIA then having to be carried out before the policy is implemented;
Legal duty must be clear to the decision-takers and they must be fully aware of the impacts of their decisions- this is reflected in the first Brown principle – decision makers can contemplate policy options but need to be aware of the impact of their decisions and for them to form part of the decision making process;	Stipulations are already in equality schemes regarding training yet this can assist in circumstances whereby decision-makers do not consider impacts of decisions.
Impact can be cumulative and can include fear of losing a service (some conflict in the case law regarding cumulative impact, but has been held could include loss of a service);	Assists in strengthening the question of which functions and policy decisions should be captured by equality schemes for the purposes of screening.
Consideration should be given to mitigation of adverse impacts and all reasonable available alternatives should be considered;	This duty is codified within the Section 75 duties where adverse impacts on equality are identified.
Impact assessment should not make effective decision-taking unreasonably onerous and does not need to be 'forensic';	Arguably this is codified in the Commission's two stage methodology of screening and full EQIA where necessary.
There is no duty to consult on the content of equality impact assessments – if the decision makers are appraised on all relevant equality issues;	The duty to consult on EQIAs is committed to in equality schemes – this however is less the case with Equality Screening.
The Duty is ongoing and impact should be kept under review;	Monitoring requirements are codified into the Section 75 duties to the extent public authorities are to monitor any adverse impact on equality of their policies.

[92] Conley, 2016, p16-17.

In essence it is notable that there is considerable case law in Great Britain. Although in part this should be considered in light of the same system of remedy via ECNI investigations not being available, the principles derived from the case law can strengthen the interpretation of the Section 75 duties.

Case law in Ireland

At the time of writing there is yet to be any case law on the Section 42 duty in the Irish Human Rights and Equality Commission Act 2014. This in part reflects the recent nature of the legislation but also the specific limitations in the Act under Section 42(1) that "nothing in this Section (42) shall of itself operate to confer a cause of action on any person against a public body in respect of the performance by it of its functions under [the duty]". An Equality and Rights Alliance report however sets out that this does not in itself preclude the potential for judicial review in certain circumstances when a public body has breached the duty, citing examples of if "*a public body failed to respond, or gave a frivolous response, to an invitation by the [Irish Human Rights and Equality Commission - IHREC] to complete a review or action plan, then it would be open for judicial review proceedings to be initiated by the IHREC*."[93] Like the Northern Ireland duty however the main enforcement mechanism remains through provisions vested in the IHREC.

2.7 Case law on the Section 75 duties

There are a limited number of Judicial Review cases relating to the Section 75 duties. This is largely as it was held at an early stage, particularly in the *Neill* decision 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. It is only in 2017 that the decision in *Toner,* relating to the impact on persons with disabilities of a public realm scheme in Lisburn, reopened the issue of the scope for successful judicial review of failures to comply with Section 75. This section provides a narrative of these developments.

An early case in 2001 was taken by a Sinn Féin MLA in relation to the decision by the Secretary of State for Northern Ireland to legislate for Northern Ireland government departments to fly the Union Flag on designated days.[94] Compliance with Section 75 was one of the grounds of challenge. Kerr J held that the Secretary of State was not a designated body for the purposes of Section 75 even if he had been exercising functions normally the preserve of the Northern Ireland Assembly. He also considered the legislation did not offend Section 75, concurring with the Secretary of State's position that the regulations reflected the 'constitutional status' of NI and were 'not designed to favour one tradition over another.'

In 2004 an unreported case dealt with a policy on 'standby/call out' arrangements in the Fire Service which had not been equality screened, and were also the subject of a complaint

[93] Equality Rights Alliance 'A New Public Sector Equality & Human Rights Duty Paper 3 of series: Setting Standards for the Irish Equality' March 2015, pp12-13.
[94] *In the matter of an application by Conor Murphy for Judicial Review* [2001] NIQB 34 (in relation to the Flags (NI) Order 2000 and the Flags Regulations (NI) 2000).

to the ECNI. In this instance both the Court and the ECNI investigation held that there had been a failure to comply with the equality scheme.[95]

In the same year the courts heard an application by the Children's Commissioner in relation to the decision by the Northern Ireland Office to introduce Anti-Social Behaviour Orders (ASBOs). This argued that: the NIO Equality Scheme had not been followed; no EQIA had taken place; ASBOs would have a disproportionate impact on children and young people and that there had also been a failure to consult and give proper weight to the Children's Commissioner's views. The Court however refused leave, and worryingly, in a seeming misunderstanding of equalities concepts, set out a position that "*all criminal law or quasi-criminal legislation will impact on persons breaking the law... Nobody of either sex or any class, creed, age or ethnic background is free to disregard the ordinary law or is entitled to carry out anti-social acts as defined. All are free to obey the law*" and consequently held that it could see no arguable case that ASBO legislation infringed the Secretary of State's obligation to promote equality of opportunity under Section 75.[96]

The *Neill* case, which also concerned ASBOs, was heard by way of a judicial review in the High Court and subsequently the Court of Appeal, with CAJ intervening in both cases. The applicant had been served with a summons to answer complaints of anti-social behaviour under the legislation and argued that there should have been an EQIA on ASBOs, and sought the suspension of ASBOs until the NIO had complied with Section 75. These proceedings were taken in the context where there was an ongoing Complaint-Driven investigation by the ECNI on ASBOs further to a complaint by the Children's Law Centre and others. The Court of Appeal decided that in the circumstances Judicial Review was not available to challenge the decision precisely because of the existence of a statutory remedy through the ECNI. The court noted that "*This is precisely the type of situation that the procedure under Schedule 9 is designed to deal with..."* noting that the ECNI is "...*charged with the duty to investigate complaints that a public authority has not complied with its scheme (or else to explain why it has decided not to investigate) and is given explicit powers to bring any failure on the part of the authority to the attention of Parliament and the Northern Ireland Assembly."* The Court further stated that "*It would be anomalous if a scrutinising process could be undertaken parallel to that for which the Commission has the express statutory remit."*[97] The Court did however state that there could be circumstances whereby Judicial Review could be available as a remedy for breaches of Section 75. Whilst not being prescriptive, it did imply that this would be the case in relation to *substantive* rather than *procedural* breaches of the duty:

> The conclusion that the exclusive remedy available to deal with the complained of failure of NIO to comply with its equality scheme [via a complaint to the ECNI through the procedures in schedule 9] does not mean that judicial review will in all instances be unavailable. We have not decided that the existence of the Schedule 9 procedure ousts the jurisdiction of the court in all instances of breach of Section 75. Mr Allen suggested that none of the hallmarks of an effective ouster clause was

[95] *In the Matter of an Application for Judicial Review by John Allen*, 30 June 2004 (unreported)
[96] *In the Matter of an Application for Judicial Review by the Northern Ireland Commissioner for Children and Young People* [2004] NIQB 40.
[97] *In the matter of an application by Peter Neill for Judicial Review* [2006] NICA 5 paragraphs 27-28

> to be found in the Section and that Schedule 9 was principally concerned with the investigation of procedural failures of public authorities. Judicial review should therefore be available to deal with substantive breaches of the section. It is not necessary for us to reach a final view on this argument since we are convinced that the alleged default of NIO must be characterised as a procedural failure. We incline to the opinion, however, that there may well be occasions where a judicial review challenge to a public authority's failure to observe Section 75 would lie. We do not consider it profitable at this stage to hypothesise situations where such a challenge might arise. This issue is best dealt with, in our view, on a case by case basis.[98]

A number of subsequent cases have essentially followed the position in *Neill* that remedy through judicial review is not available in so far as the statutory remedy through an ECNI investigation would be the enforcement mechanism. A case brought by the British Medical Association and heard in 2012 (regarding the discontinuation of clinical excellence awards in a context where no EQIA was conducted) and a case brought by a staff member in the Public Prosecutions Service heard in 2014 (regarding staff redeployment issues) also resulted in the restatement of this position.[99]

Neill also makes some reference to the interpretation of the provision in Schedule 9 that a complaint must be made to a person who claims to be directly affected. The ECNI had accepted the Children's Law Centre (CLC) as a legal person was a directly affected claimant, which the NIO contested. The NIO (ironically as the Secretary of State is the ultimate enforcer of Section 75) continued in the High Court to contest the lawfulness of the ECNI investigation arguing that CLC were not directly affected. Girvan J did state that whilst CLC had a legitimate interest in the policy he did not consider them to be directly affected as they could not be the subject of an ASBO; but in the circumstances did not agree with the NIO that this rendered the ECNI investigation unlawful.[100] In the Court of Appeal the NIO did not pursue this argument.[101] It should be noted that this conclusion was Obiter (i.e. not relevant) to the judgment, which essentially focused on the above matters as to the scope of remedy via judicial review in light of the existence of the Schedule 9 provisions.

In 2011 there was more engagement with the question of Section 75 compliance in a written judgment in a challenge taken by a child against the introduction of Tasers by the PSNI on a pilot basis before the completion of an EQIA (as well as other grounds of challenge.) In this instance the High Court in Northern Ireland did reference the 'Brown' Principles on *due regard* in relation to equality duties, and notes that despite early reluctance the PSNI did ultimately agree to conduct an EQIA (albeit after the pilot had already started, and against the advice of the ECNI and Policing Board). The Court essentially measured *due regard* against the high judicial review threshold standard of irrationality in decision making and decides the decision was one a rational decision maker was entitled to

[98] As above, paragraph 30
[99] *British Medical Association's Application* [2012] NIQB 90 and *In the matter of an application by Michael John McCotter for Judicial Review* [2014] NIQB 7
[100] *In the matter of an application by Peter Neill for Judicial Review* [2005] NIQB 66
[101] *In the matter of an application by Peter Neill for Judicial Review* [2006] NICA 5 paragraph 13

make, and consequently ruled sufficient action was taken to satisfy the principles of Section 75.[102]

The question of the applicability of Section 75 to decision making by the Northern Ireland Office resurfaced in the 2016 Judicial Reviews regarding the Brexit process taken by a cross party group and civil society NGOs including CAJ and the Human Rights Consortium.[103] This covered the applicability of Section 75 to the function of the Northern Ireland Office of representing the interests of Northern Ireland at the UK Cabinet. The applicants, *inter alia*, argued the NIO was a designated public authority for Section 75 but there was no indication from the NIO that it had taken into account its Section 75 obligations in relation to the triggering of the 'Article 50' process of leaving the EU. The state responded that Section 75 was not engaged firstly as the Secretary of State was not designated and it would be the Minister giving advice to the UK government and therefore the NIO would not be performing any function. It further argued that, even if this was not the case, there was no remedy through judicial review, subject to exceptions, in light of the existence of the statutory remedy through the ECNI. The Court held that the triggering of Article 50 was not being carried out by the NIO or Secretary of State for Northern Ireland and consequently took the view that Section 75 was not engaged. However, it also held that if it was wrong on this point a claim of breach of Section 75 would be 'premature' as the triggering of Article 50 was only the beginning of a lengthy process. Whilst this point overlooks the largely irreversible nature of Article 50, the court held that it felt it was too early to seek the type of Section 75 analysis sought by the applicants. It also held that, whilst it did not need to decide on the point, it was minded to adopt the procedure in *Neill* whereby the arguments should be addressed through the statutory remedy to the Commission. This case was subsequently referred to the UK Supreme Court, and joined to the Brexit litigation cases in England. The treatment of the Section 75 issue in the Supreme Court ruling is somewhat cursory. The Supreme Court was to address the question as to whether the exercise of the power to trigger Article 50 in the absence of compliance of the NIO with its duties under Section 75 was lawful. Paragraph 133 of the judgement holds that the Secretary of State for Northern Ireland is not a designated public authority under Section 75 (although this had not been advanced by the applicants) and that the decision to trigger Article 50 was not a function of the Secretary of State for Northern Ireland within the meaning of Section 75.[104]

Whilst the indication from the *Neill* case that the scope for judicial review may be greater in relation to 'substantive' breaches of the duties stands, it is also notable that the Commission in its March 2014 investigation into the naming of a council play park after IRA hunger striker Raymond McCreesh by Newry and Mourne Council (as it was) itself dealt with 'substantive' issues regarding the duty. It was this investigation that led to leave being granted for a Judicial Review taken in 2016 by Bea Worton against the ECNI and Newry

[102] *In the matter of an application by JR1 for Judicial Review* [2011] NIQB 5 (referencing at para 33 *R (Brown) v Secretary of State for Work and Pensions* [2008] EW8C 3158 Aikens LJ

[103] *In the matter of an application for leave to apply for Judicial Review by Steven Agnew, Colum Eastwood, David Ford, John O'Dowd, Dessie Donnelly, Dawn Purvis, Monica Wilson, the Committee on the Administration of Justice and The Human Rights Consortium* [2016] NIQB 85

[104] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) REFERENCE by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review* [2017] UKSC 5

Council in relation to follow up action on the ECNI investigation. Ms Worton was granted leave to seek judicial review in April 2016. In March 2015 The Equality Commission, whilst expressing disappointment at the retention of the name, had closed off scrutiny of their investigation recommendations accepting the Council had complied with their recommendation to review the naming of the park in a transparent manner which took proper account of the Section 75 duties. The Applicant contended the Commission should not have closed off scrutiny of the recommendation and should have instead referred the matter to the Secretary of State who has powers of direction. The Commission subsequently rescinded its decision that the Council had complied with its recommendation in June 2016 'having given further consideration' to the matters raised in the judicial review application. The Commission then advised the Council that the Council should debate and vote on the issue in public and that Councillors should be provided with qualitative analysis of the consultation responses prior to the debate and vote.[105] The Applicant consequently withdrew the proceedings against the Commission.

January 2017 saw judgement in the *SK* '*Little Flower*' judicial review brought by a child through her mother and next friend to seek to challenge a decision by the Sinn Féin Minister of Education, John O'Dowd MLA, in March 2016 to merge the *Little Flower* girls Catholic Secondary School with the adjacent *St Patrick's College, Bearnageeha* Catholic boys school.[106] This decision had been taken on the basis of a development proposal on amalgamation devised by the Council for Catholic Maintained Schools (CCMS), who like the Department is a public authority designated under Section 75. Leave had been refused on other judicial review grounds but granted in relation to Section 75 compliance, with the judge at the leave stage expressly reserving for the hearing the issue as to whether Section 75 compliance should instead have been pursued by way of a complaint to the ECNI.

The applicants had argued both procedural and substantive breaches of Section 75. Procedurally, in that only the CCMS and not the Department of Education had conducted equality screening (and that screening had not taken into account the ongoing existence of separate boys and girls 'controlled' schools – i.e. those attended mostly by Protestant pupils in the same area). Substantively it was contested, in summary, that the decision left the local area (north Belfast) without a girls Catholic Secondary school, and that as girls perform better in single-sex schools this constituted a major adverse impact on equality. The Court held in relation to the duty bearer that it was reasonable in the circumstances for the CCMS and not the department to have conducted the screening, citing in part the ECNI advice that screening be taken forward at the earliest stage of the policy development process.

The Court sought to address these issues within the framework of *Neill,* which held that there is some scope for judicial review in relation to Section 75 breaches particularly where there are substantive rather than procedural breaches of the duty, with the Schedule 9 process providing a remedy for most procedural failures. There does appear to be some confusion in the reasoning in the judgement insofar as it contends that the purpose of the

[105] http://www.equalityni.org/Footer-Links/News/Delivering-Equality/Commission-rescind-decision-on-Newry-Mourne-Counci#sthash.rOc88py0.dpuf

[106] *In the Matter of an Application by SK (A Minor) acting by SJ1, Her Mother and Next Friend for Judicial Review* [2017] NIQB 9 http://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2017/[2017]%20NIQB%209/j_j_DEE10159FINAL.htm

complaints procedure in Schedule 9 is really about a 'defective scheme', when in fact the procedure relates to failures to comply with a scheme. The judgement did state that the only error it could identify in the process was that there was no evidence of consideration that the decision would create a differential between 'Catholic' and 'Protestant' schools in the locality, but considered this a procedural failure that per *Neill* was not appropriate for judicial review. On the other hand the Court did recognise that by that stage a complaint to the ECNI would be too late to provide an effective remedy to the matters raised as the amalgamation was at a late stage but held that this pointed to the need to have brought a Schedule 9 complaint much earlier in the process and dismissed the application. The Court did nevertheless continue to give its assessment as to whether there had been a substantive breach of Section 75, holding that there had not been. In doing so the court made reference to evidence in the screening document that the inequality of educational underachievement was evident with boys and not girls with the former benefiting from co-ed (mixed gender) schooling.[107]

In May 2017 judgement was delivered in the case of *Toner* which significantly clarifies and advances the scope for judicial review of failures to comply with Section 75. The general facts of the case relate to a Public Realm Scheme by Lisburn City Council (as it was) which, among other matters involved the lowering of kerbstones (usually around 100-130mm) to around 30mm in a city centre area. There is reliable evidence, including in research from University College London (UCL), that such schemes can have an adverse impact on the Section 75 category of persons with disabilities. Namely persons who have visual impairments are impeded in safely getting around and hence independent living by kerb heights of less than 60mm. Lisburn City Council however had neither conducted equality screening nor an EQIA in compliance with their equality scheme. Ms Toner, a blind woman who walks with the assistance of a guide dog, took the judicial review alleging, among other matters, failure to comply with Section 75. There had been no prior 'Paragraph 10' complaint by Ms Toner to the ECNI.[108] The ECNI did authorise an investigation in March 2015 into the same works and published a 'Complaints-Based' investigation (from an anonymised complainant) in September 2017 (after the *Toner* judgement), that held the Council had breached its scheme and put forward a number of general recommendations to the successor council.[109] It is surprising that the ECNI's Final Investigation Report in that complaint did not refer to the *Toner* judgement.

In court the issue of Section 75 compliance is dealt with in detail in 30 paragraphs of the judgement by Maguire J. The judgement takes into account both Equality Commission guidance on Section 75 and the case law in Great Britain, the principles of which are applied to the facts in this case. The Court makes a number of observations, in summary:

[107] In relation to the substantive points the court also considered that the two 'Protestant' schools in north Belfast were not a fair comparator for amalgamation as they were not on adjacent sites, the common cause that there had not been an improper motive by the Minister in taking the decision, the availability of single-sex Catholic secondary schools elsewhere in the city and other factors.

[108] *In the matter of an Application by Joanna Toner for Judicial Review* [2017] NIQB 49;

[109] http://www.equalityni.org/ECNI/media/ECNI/Publications/Employers%20and%20Service%20Providers/S75%20P10%20investigation%20reports/LisburnCC-P10InvestRpt2017.pdf

- There was little, if any, evidence the Council had discharged its Section 75 obligations; the duties lay with the Council themselves and were non-delegable so could not have been discharged by a consultant who managed the project and its consultation [141-2, 144];
- Had the Council discharged its Section 75 obligations it should have been documented and the Court is entitled to draw inference where there are no such records [143];
- The Court could not accept the Council's assertion the policy had been 'screened-out' when the consultation exercise had not highlighted adverse impacts on persons with disabilities, as there was no evidence of any screening decision 'worthy of its name' [145];
- Regardless of the lack of Section 75 assessment at an early stage, when disability advocates subsequently raised the issue of kerb heights on the basis of research evidence the Council should have been alive to its continuing duty under Section 75, and the matter should have been revisited by means of an assessment of an impact of the kerbs at that stage [146-7,149];
- The provision of copies of UCL research to Councillors did not in itself discharge the Section 75 duty [152];
- The Court did not accept the argument put forward by the Council that the duty was owed to disabled persons generally and not to blind or partially sighted persons [152];

Ultimately the Court was persuaded that the Council's actions "involved a clear breach of the Section 75 public sector equality duty." Noting that, whilst it would not definitely have led to a different decision, "at no stage in this lengthy saga was there a rigorous inquiry by officials or the Council" and therefore there had been a failure of process.[110]

The central argument of the Council had been that, in accordance with *Neill*, any breach of Section 75 should be dealt with by means of a complaint to the ECNI and not by the court. This issue is dealt with at length in the judgement. The Court first finds that a limitation on the role of the court would be unattractive in light of similar duties being subject to remedy via judicial review in Great Britain where case law had developed considerably since *Neill.* Noting the *Neill* case itself had left open the circumstances where judicial review may be a remedy with an indication that such remedy may relate to substantial rather than procedural breaches, the court in *Toner* determines the approach is to concentrate on the specific facts of the case. In this instance the Court held there was an underlying substantive equality issue of the safety of a section of the public with a disability accessing the city centre, which required a high level of consideration. The Court held that this meant the failure to comply was 'far greater' than "some simple technical omission or procedural failing".[111] The Court noted that in this instance a proper and timely application of Section 75 would have likely made a significant difference, and alludes to a significant number of persons being affected by the decision.

[110] As above, at paragraph 151.
[111] As above, paragraph 163.

The Court stated that whilst there had been no complaint to the ECNI by the Applicant, the Applicant held the view that the remedy sought of a change of view by the Council further to application of the Section 75 duties was unlikely to result from a complaint to the Commission. The Court held that this was not an unreasonable position to take in the circumstances.[112]

The Court ultimately held that in the 'exceptional circumstances' of the case it accepted it was the type of case amenable to judicial review of the public authority's conduct in relation to the Section 75 duties.[113] By way of remedy the Court reflected on the duty being a continuing one that could still be performed, and if the duty were properly performed it may make a difference in the outcome. The Court therefore quashed the decision impugned in the proceedings in order to open the way for the matter to be reconsidered in full compliance with the Section 75 duty.[114]

Toner therefore moves the case law on considerably from *Neill* in holding certain cases, including those where there are procedural failings that impact on substantive equality issues will fall to the jurisdiction of the Courts. Whilst there is a reference to 'exceptional circumstances' the parameters of this appear to be dependent on factors such as the general lack of effectiveness of Section 75 processes at all to very significant equality issues. The next chapter, focusing on Equality Coalition members' experiences of Section 75, outlines that such circumstances are far from rare.

[112] As above, paragraph 165.
[113] As above, paragraph 166.
[114] As above, paragraph 237.

Chapter 3: Patterns and problems of compliance with Equality Schemes- the views of Equality Coalition members

This chapter outlines the views and experiences of Equality Coalition members in seeking to ensure compliance with the Section 75 duties in their work.

The methodology for this work involved the hosting in early 2017 of a series of oral evidence sessions with member groups who had volunteered to do so. The evidence was heard by the Equality Coalition Co-Conveners and an independent person –Evan Bates– who has a wealth of experience of operating the Section 75 duties from within the public sector and also of advising NGOs on the operation of the duties. The evidence gathering sessions were organised by the Equality Coalition Coordinator, and were structured through a series of open ended questions which this chapter follows.

The evidence sessions were open to other Equality Coalition members to observe, and representatives from the Equality Rights Alliance in the Republic of Ireland were also present in this capacity. Other information through our Section 75 engagement with Equality Coalition members was gathered and informs this chapter.

3.1 The organisations and persons giving evidence

A broad range of persons with experience across the Section 75 categories gave evidence. This ranged from one organisation that had issued 3,000 consultation responses since the advent of Section 75 to an organisation run voluntarily that was relatively new to the Section 75 process and was still at the stage of seeking to end invisibility for the equality issues they raise. The following is a list of persons who gave evidence:

- Gavin Boyd – the Policy and Advocacy lead at the *Rainbow Project*; an organisation set up in 1994 originally as a gay and bisexual men's health organisation which over 23 years has developed into a broader LGBT advocacy organisation with extensive engagement on Section 75 issues;
- Edel Quinn – a long term active member within the Equality Coalition with over 20 years' experience in the women's, children's, older persons and human rights sectors –representing Age NI, a charity committed to ensuring everyone can enjoy a better later life;
- Representatives of Focus-The Identity Trust, charity established six years ago by transgender individuals, to represent, support and lobby on behalf of those transgender and intersex individuals and their families currently protected under existing Northern Ireland human rights and equality legislation, both in Northern Ireland and the bordering counties of the Republic;
- Patricia Bray–an active member of the Equality Coalition since its inception representing Disability Action, a charity and campaigning body bringing about positive change from five regional offices, serving over 45,000 persons a year with physical, mental, sensory, hidden or learning disabilities;

- Nicola Browne– the director of policy at PPR – (Participation and the Practice of Rights organisation), a human rights NGO which places economic, social and cultural rights at the service of the most disadvantaged people in society to make real change on the ground. To make these changes lasting, PPR focuses on ensuring the active and meaningful participation of excluded groups in government decision-making processes which affect their lives;
- Kellie Turtle (Women's Sector Lobbyist) and Anne McVicker (Women's Resource and Development Agency) WRDA is a leading women's organisation in NI set up in 1983 to empower women, with a policy and lobbying focus engaging in consultation with women's groups across Northern Ireland;
- Claire Bradley of the Children's Law Centre (CLC) an independent NGO working on children's rights issues, including a policy and legal focus, CLC is also a founder member of the Equality Coalition;
- John Patrick Clayton, policy officer with UNISON – the co-conveners of the Equality Coalition – with previous experience as policy officer with Children's Law Centre and Criminal Justice Programme Officer with CAJ;
- Patrick Yu former director of NICEM – the NI Council for Ethnic Minorities, a founder member of the Equality Coalition and campaigner for the Section 75 (and predecessor 'PAFT') duties;
- Geraldine Alexander, officer with responsibility for equality and human rights issues in the public sector trade union NIPSA, representing over 41,500 members employed across the whole of the public services in organisations as well as a significant number of members in the voluntary and community sector;
- Gemma McKeown, the solicitor with the human rights NGO CAJ, co-conveners of the Equality Coalition and with specific experience of pursuing Section 75 complaints.

Also contributing were former equality officers from government departments and the health sector, sharing a perspective from having worked within a public authority on Section 75.

3.2 Role of Section 75 – within and beyond the procedural

There was considerable discussion regarding the role of Section 75 and the impact it has had. Many organisations were heavily involved in the formal consultation processes; the existence of Section 75 was also used as a 'way in' to raise equality issues. Some stakeholders also highlighted limitations and ambiguities on Section 75 categories, and others ongoing problems of Section 75 being turned on its head.

Consultation and the formal process

Many Equality Coalition groups respond to formal consultation processes; quite a few quantified this to around a dozen major exercises a year. Some responded to many more with Disability Action having responded to over 3,000 consultation exercises since the onset of Section 75, an astonishing resource of information in itself. Some organisations would

engage directly with screening exercises when they formed part of the consultation, others focused more on raising equality issues in response to the substantive consultation without necessarily engaging directly with any equality screening documentation. The Children's Law Centre had responded to over 270 consultation exercises since the commencement of Section 75 most of which would have had an equalities specific section.

As a general observation across all witnesses there was no shortage of hard work within civil society to engage with the duties. It is also fair to say there was considerable frustration at how the duties were being operated and the heavy dependency on civil society input to make them work, with one respondent working on age issues stating that:

> "...the sector has, at times, felt overwhelmed by Section 75 consultations. The initial excitement about the duty and the opportunity to contribute evidence and influence service delivery has started to wane. Consultation processes can be laborious and unwieldy, and people start to look for other ways to influence policy and highlight inequalities."

Another problem faced by the sector had been its significant reduction in size due to austerity cuts; and the regular turnover of employees often in jobs with little long term security. This had had impacts both on the historical memory and practical experience of dealing with the duties. It is also the case that the ECNI has had a significant reduction in resources in recent years.

Witnesses from a women's sector organisation were concerned in general the Section 75 duties were being 'applied in the most conservative way possible' in conflict with their original intention. Others pointed to differences across different types of public authority. An LGBT organisation felt that health bodies were generally well engaged as were the PSNI and criminal justice bodies, where there had been significant reform. In relation to government departments this organisation argued that the level of support from a Minister was a significant factor:

> "We can easily tell by the Department if there is a Minister that is supportive who shows leadership on these issues and pushes officials to move on these issues, we have good communication with these departments and good relationships with them. We can tell when a Minister has no intention of having anything to do with us, and is 'too busy' to meet with us like the new Education and Communities ministers [from 2015]."

PPR pointed to an instance whereby an Equality Screening exercise in relation to housing need in north Belfast in 2008 had been brought about as the result of campaigning and garnering political support. The screening exercise was the place that housing inequalities were first officially acknowledged, and the exercise itself became a campaigning tool:

> "We did do a lot of work around Girdwood and we forced an equality screening on that regeneration project. It was one of the first to be screened but interestingly this equality screening on Girdwood was what led to the highlighting of Catholic inequality in housing need... We have used this since...it showed that between 2008-2012 95% of the need for social housing would be from the Catholic community in north Belfast. This has then been used as a tool... 'Unlocking the potential' mock

> equality screening we did is something we have used a lot. We used the equality screening as an organising tool."

Using Section 75 as a 'way in'

Beyond the formal screening processes our witnesses pointed to the very existence of the duties providing an important 'way in' to discuss equality issues. Focus: The Identity Trust pointed to how the existence of a consultation and screening exercise on youth justice had allowed its members to "get into a room one to one and explain the situation" with officials; who consequently took on board issues and revised policy. This was an opportunity that may not have otherwise arisen, but related to getting transgender issues on the agenda rather than formal engagement with the Screening exercise per se.

Another group described Section 75 as a good 'philosophical stick' to shame public authorities 'when they are doing insufficient work to promote equality of opportunity.' This approach had led to public authorities taking some initiatives, including committing to high level strategies, to ensure progress with the duties, it was felt at times to be more successful than engagement with the procedural aspects.

The Section 75 categories and limitations

There were felt to be significant gaps in Section 75 and a recognition that equality legislation in Northern Ireland now lags behind elsewhere in the context where neither the Bill of Rights nor single equality legislation referenced in the peace agreements have been taken forward. This included missing categories, and the explicit correlations with socioeconomic status and rural proofing. 'Language' was flagged as an explicitly missing category in particular in relation to the Irish language, which whilst provided for in UN and Council of Europe treaties is not in Section 75. Ironically despite this Irish language policies were often subjected to EQIAs, not because there were 'adverse impacts' but because they were politically contentious.

Section 75 does not have categories of gender or gender identity *per se* with the text of the legislation referring to 'men and women generally.' Focus: The Identity Trust stated that whilst ideally there would be a subcategory of gender identity within a Section 75 gender category, the ECNI had confirmed that in their view transgendered persons fell within the existing gender category.[115] In light of this interpretation the ECNI have included in the Model Scheme a list of example groups under each Section 75 category. Under 'men and women generally' the ECNI include "Trans-gendered people" and Transsexual people. The Model Scheme, and hence this provision have been adopted by the majority of public authorities.[116]

The non-designation of key public authorities was also raised in particular in relation to schools, but also UK government departments making policy for Northern Ireland.

[115] ECNI Chief Commissioner Correspondence to Maeve McLaughlin MLA, 23 August 2013.
[116] ECNI Model Scheme 2010, Appendix 2.

Turning Section 75 on its head

> "It does feel a little like institutionalised sexism – they do not believe that the inequality still exists for women!!"

From the outset of Section 75 there have been incidents of the duty being misinterpreted and used against Section 75 groups facing disadvantage. A prime example were perverse arguments that public authorities had to stop supporting women's organisations and women only services 'due to Section 75.' This position led to a significant rebuke from the UN CEDAW Committee.[117]

Women's organisations highlighted that such problems had not entirely gone away to the extent that there were still instances of the duties being turned on their head and used against the sector. An example was given of funding conditions that sought engagement across the Section 75 groups with little understanding of targeting objective need and specific disadvantage; compelling women's centres to employ or provide services for men and boys.

3.3 Good Practice

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:

- The Children's Law Centre (CLC) highlighted the Northern Ireland Law Commission's Consultation on its Equality Impact Assessment of the Reform of Bail Law and Practice in Northern Ireland in late 2011. CLC had responded to consultation on the matter earlier in the year and sought an EQIA given the potential for adverse impact on young males and possibly also on the grounds of religion and disability. The Law Commission consequently undertook the EQIA and undertook direct engagement with children and young people in line with the ECNI's publication, *Let's Talk, Let's Listen*. A child accessible version of the consultation paper was produced and used in carrying out consultation with several groups of young people in Hydebank Wood Young Offenders Centre, the Juvenile Justice Centre at Woodlands and with groups facilitated by VOYPIC and Include Youth. Additional data was also gathered for the EQIA which was produced to a high standard assessing impacts across the Section 75 categories in detail and depth. The outworking of the EQIA were significant changes to the proposals from the Law Commission; this included steps that bail conditions took into consideration those with caring responsibilities.

- The Equality Screening by the Department of Health of its Suicide Prevention Strategy in 2016. This used research to identify tailored interventions for identified higher risk priority groups within the Section 75 categories including "LGB&T; migrant populations and ethnic minorities; homeless persons; victims of abuse; certain occupations; males aged 19-55; persons in contact with the justice system and persons with mental illness, including addictions." The Screening includes

[117] UNDOC CEDAW/C/UK/CO/6 Concluding Observations on the UK, 2008, paragraph 273.

consideration of significant research and other data across the Section 75 categories;[118]

- A disability organisation highlighted a number of examples of good practice that had involved 'co-design' with the sector within the Section7 5 framework. These included:
    - Department of Employment and Learning (DEL) consultation on *Disability Employment Strategy* involving a pre-consultation and Advisory Group representative of organisations and disabled people; with an outcome of a much improved final document;
    - NI Assembly Commission – *Disability Advisory Group* involving pre-consultation and feedback; disabled persons involved in development of ramps at Stormont;
    - Department of Health and Housing Executive *Adaptation Review* – wide consultation across NI facilitated by Disability Action; NIHE has a Disability Forum as well as Race, Youth and a Section 75 forum;
    - Department of Health – *Independent Living Fund Review* to cease payment of fund to everyone – consultation with disabled people succeeded in keeping ILF for current recipients however not open to new clients.

Whilst this chapter largely focuses on the views of Equality Coalition members, we also took evidence from persons who had worked in public authorities trying to promote good practice in Section 75 compliance and some of the difficulties they encountered. Among these was the issue of getting little response to equality screening or consultations from either the ECNI or the Section 75 sector. Whilst it is not argued that Section 75 should be dependent on such responses it can lead to internal de-prioritisation of screening exercises:

> A Permanent Secretary will ask how many people responded to the equality screening and if you consistently say none it makes them think it is not worthwhile giving staff the time to complete the screening.... If a department is sceptical about equality then they will think no one is reading these so let's stop doing them. You do not even get acknowledgement back from the Equality Commission... that signals to a department that even the Commission does not care.

3.4 Persistent problems with the implementation of the duties

This section details a number of recurring problematic issues which had arisen, largely in relation to Equality Screening exercises.

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*

[118] https://www.health-ni.gov.uk/sites/default/files/consultations/health/doh-screening-template090916.pdf

> There is no coherent approach to identifying, disaggregating and reviewing data sources on older people across section 75 groups to ensure they reflect the diversity of older people of different ages, ethnic and community backgrounds, sexual orientation, disability and gender. *Older Persons Organisation*

> It must be remembered that S75 is a proactive obligation and not a reactive one- this premise is central to this call for evidence. *Disability Group*

Almost all of our witnesses raised the persistent issue of significant gaps in data gathering and usage within Section 75 processes; which itself becomes a barrier to the analysis required within Equality Screening. This falls short of the binding commitment in equality schemes which states:

> In order to answer the screening questions, we gather all relevant information and data, both qualitative and quantitative. In taking this evidence into account we consider the different needs, experiences and priorities for each of the Section 75 equality categories. Any screening decision will be informed by this evidence [commitment in paragraph 4.8 of Model Equality Schemes].

There were persistent problems of relevant data not being 'available' or gathered at all; this was particularly raised on the categories of sexual orientation and gender identity. This situation was felt to be 'pretty grim'. In relation to sexual orientation it was cited that public authorities would "rely on the lack of data or the lack of evidence on sexual orientation as a way to screen out inequalities that may be experienced by that community." However, data gaps went well beyond this category. Examples were also given whereby relevant data would have existed but was not sourced; for example in relation to the recent closures of residential homes the number of residents with disabilities was not provided.

Despite the clear commitment in equality schemes to consider "all relevant information and data, both qualitative and quantitative" there were regular problems of research, either from the sector or elsewhere not being considered with some Screenings arguing that only NISRA and other official data sets were sufficient. There was frustration that often available data is not used, one organisation felt that:

> "By and large the data is there and relevant data is not being included. Or there is research sitting there not being used, a pile of reports then that are not relevant get included. The data is not being disaggregated to apply to the policy areas but is just sitting not being used. Sometimes you do not even need to delve into the data to know something like male suicide rates – everyone knows."

Another issue was the presentation of impact statistics without any correlation with data on existing inequalities:

> "This equality screening it just presented facts and figures the policy applied equally to everyone. No recognition that women start at a worse position. The policy does not address this for women who are then still left at an adverse position."

> "The issues we encounter looking at it from a women's angle [are that] the strategies are being written to address an inequality and despite the fact the document may intend only to have positive impacts they do not adequately address how the policy will have different impacts on what is a pre existing problem [of inequality]".

Even in screenings whereby disadvantage within a Section 75 group was identified this was not necessarily reflected in the screening decision. For example the Domestic Violence screening by the Department of Justice did provide statistics that women were disproportionately victims; the strategy was however not assessed as having a particularly beneficial impact on women, but rather to generally have a positive effect for both men and women and no opportunities to further promote equality of opportunity for women were identified in the screening.[119] In relation to multiple identities the screening went on to hold that whilst victims might have multiple identities the policy applied to all victims "*irrespective of ethnicity, religion, gender, gender identity, sexual orientation or any form of disability or any combination of these categories*." This is indicative of a common misinterpretation of the duties derived in part from not duly considering data on existing inequalities i.e. that as long as the policy is 'applied' or open to everyone there are no equalities impacts.

Another group raised concerns about the generality of approaches to data in screening; being concerned that there was little effort to identify the causal link between a statistic and an inequality with a corresponding policy.

A further problem highlighted in Irish language screening exercises was not of insufficient data but of data that was not relevant to assessing adverse impacts of a policy under the terms of a scheme, being included and misused. Typically this would consist of 'attitudinal' information demonstrating differing levels of hostility to the Irish language within Section 75 groups. This data rather than being used to inform anti-prejudice or tolerance measures – was then conversely used as justification for limiting or restricting an Irish language policy. Whilst thankfully this bizarre approach has not generally been applied to restrict the rights of other equality groups (e.g. by using attitudinal data on homophobia, racism or misogyny as justification for restricting positive action measures) it remains a persistent problem for minority language speakers.

A children's rights organisation emphasised the impact of lack of baseline data in Section 75 processes within the criminal justice system as greatly affecting any reliable assessment of differential impacts on Section 75 groups. The ongoing lack of data in the two decades since Section 75 was legislated for was in itself felt to be a failure to discharge the duties:

> CLC consistently raise concerns about the lack of available data being relied upon in policy and legislative development in Northern Ireland, despite a clear obligation, since the implementation of the legislation, on all designated public bodies under Section 75 to collect data... As this duty has been in existence for nearly 20 years, we

[119] https://www.justice-ni.gov.uk/sites/default/files/consultations/doj/equality-screening-domestic-violence.PDF

> do not believe the absence of data constitutes a defence to the failure to properly discharge the Section 75 duty.

Concurrently NICEM recalled that they and other Equality Coalition members had been raising the issue of data gathering from the outset of the Section 75 duties:

> In 1999 we all made a submission to the Equality Commission around the guidance for Section 75 so at that time we were clear about monitoring data, for us it was crucial to enforcing Section 75. If we do not have any equality monitoring data we cannot bench mark any progress...

NICEM had consequently taken forward a body of work on ethnic monitoring in a collaborative project with public authorities in government and the health sector, with guidance on ethnic monitoring following. The Equality Commission had also produced detailed guidance on monitoring for public authorities.[120] Despite this there was ongoing concern that data was not being gathered.

Not equality screening at all

> "We have had and expressed serious concerns with regard to how the system is currently being operated within the public sector. Not least is the Government's apparent apathy to the application of Section 75 especially in relation to "high level" policy areas." Trade Union Respondent

The practice of not conducting any equality screening at all on key high profile policy issues with significant equality impacts was raised by a range of groups. Some of these policies are summarised in the table overleaf:

[120] Section 75 of the Northern Ireland Act 1998: Monitoring Guidance for use by Public Authorities, ECNI, 2007

Public Authority	Policy Area not Equality Screened
Various	Broad range of decisions on budget cuts, including cuts to funding or decisions to close particular facilities;
Department of Health	Gay Blood ban
Northern Ireland Executive	Childcare Strategy
Department for Social Development (DSD)	Strategic Housing Reform Policy (Facing the Future) Housing-based regeneration (building successful communities)
DSD	Homelessness Strategy;
Department of Finance	Civil Service Voluntary Exit Scheme (VES)*
Department of Finance	*Fresh Start* proposed cut in Corporation Tax
Department of Communities	'Community Halls Fund'+
Department of Employment And Learning (DEL)	Changes to European Social Fund (ESF)

Table: POLICIES FOR WHICH NO EQUALITY SCREENING TOOK PLACE

*There was no overarching impact assessment – on the VES, some individual public authorities did screen its application in their organization;

+ The Department did subsequently screen the policy after a complaint had been issued;

The above provide an example of the breadth of problems but are only a small sample of examples given. One organisation cited the failure to screen the Homelessness strategy as "defiance or indifference" to the statutory duties, given as it came on the back of a damning ECNI investigation, for previous failures to screen housing policy. The specific problems of non-screening of key equality policies, such as the Childcare Strategy, appeared grounded in an approach that as the policy itself was positive there was no need for screening.

A further example given was the decision by a further education college to close down a child care facility when it wanted to use the space for something else. The decision was not equality screened despite obvious impacts on persons with dependents and women. The facility being run by a private sector provider may have influenced the decision not to screen the policy change.

There were cuts to the budgets of the Northern Ireland Executive totalling £3.7 billion in the seven years from 2008-2015.[121] To give an example of one sizable public authority –the PSNI– the Chief Constable had outlined that the organisation had faced £386 million in cuts since 2004, with £108 million in the last three years (2014-17) and was facing a further 3% cut (£20 million) in the incoming financial year.[122] The health sector faced cuts in real terms of 6% a year over three years (2012-2015.)[123] There was a general view that budget cut decisions were rarely equality screened.

The numerous cuts of funding streams to the voluntary sector were also specifically raised. One example raised was policy decisions around the European Social Fund, summarised overleaf.

[121] A Fresh Start Agreement, Section B, paragraph 1.1.
[122] Chief Constable address to NI Policing Board, 24 May 2017.
[123] Jonathan Swallow, address to *Austerity and Inequality: 'A Threat to Peace?'* Conference Report and Papers (Equality Coalition, 2015).

European Social Fund (ESF) - cuts to Women's organisations by the Department of Employment and Leaning (DEL)

- As stated by DEL "*The aim of the Northern Ireland European Social Fund Programme is to combat poverty and enhance social inclusion by reducing economic inactivity*"

- NI women's organisations were recipients from the fund and delivering training and upskilling courses to get women into employment. There is significant evidence that women from disadvantaged communities face many barriers in attending Further Education (FE) Colleges for formal qualifications (including transport, childcare, mental health, poverty and confidence). Women's centres providing such courses were able to provide holistic support packages to facilitate attendance and prevent drop out.

- There was then a £9 million cut to FE colleges; subsequently monies from ESF were redirected towards the colleges by removing them from the women's education sector;

- Towards the end of 2014/15 the Minister announced policy decisions to restrict ESF courses in the sector to Level 1 courses only (equivalent to grade D-G GCSE), whereas the sector had been running courses to levels 2 and 3, and running courses at level 1 only was untenable and contrary to the policy aim of improving employability;

- The decision led to a decimation of significant parts of the women's education sector with organisations such as Footprints and Shankill Women's centres having to give up ESF funding. There were also significant impacts on learners, facing both barriers and loss of holistic support with the switch to FE colleges;

- The decision was subject to a complaint to the European Ombudsman and received significant political attention. Some concessions were made in relation to learners with disabilities but none on gender grounds;

- Despite clearly constituting a policy decision with significant adverse impacts on gender the ESF decision, was not Equality Screened at all.

Quality of Screening

> "Overall it is Disability Action's experience that Section 75 is often not applied, or applied late as an afterthought rather than central to decision making, without sufficient data on which to make a decision or without sufficient consultation or consideration of the equality impacts arising."
>
> "In terms of NIPSA's experience of the application of the Section 75 equality duty by Public Authorities it would be generally poor**."**
>
> "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 to equality impact assessment."

The other recurring theme was the poor quality of many screening exercises when they were undertaken and the small number that were leading to any mitigating measures or triggering an EQIA. Tokenistic screening undertaken late or after a policy decision had already really been taken, or merely to rubber stamp an existing position was a recurring theme. Coalition members argued that often screening was undertaken to deliberately avoid an EQIA. A trade union commented:

> ...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' or it will be beneficial for the population of NI as a whole or something like that... there is no real consideration of the nine Section 75 groups. There is no real consideration of the various needs, priorities etc. Sometimes there is consideration of data but the data is extremely general, its population levels etc. 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.

Another trade union gave the example of Department of Communities proposals to close three rural Social Security Offices and Job Centres, where they cited that no full EQIA was carried out under the rationale of "not having available evidence" of impact on Section 75 groups. NIPSA was concerned that the Department "rather than carry out an EQIA to gather [such] evidence they concluded that any impact on some Section 75 groups would be minor."

The issue of deviation from duties under the scheme on policies which have been subject to a prior political 'deal' was raised. This took place in a context where DUP Ministers did not want the legislation to cover children. Decisions by the Executive Office require consensus between DUP and Sinn Féin Ministers, and Sinn Féin (along with other parties and the ECNI and NICCY) were agreeable to the legislation covering everybody. There was a period of negotiation which led to a position whereby the legislation would protect 16-18 year olds, but not under 16s.[124] In February 2015 there was a Written Ministerial Statement from the

[124] For background see the comments of Junior Ministers and the Children's Commissioner to the Assembly: Committee for the Office of the First Minister and deputy First Minister, meeting on Wednesday, 15 April 2015

First and deputy First Ministers that a decision had been reached the legislation would only apply to over 16s.[125] This occurred two months *before* the public consultation process on the legislation. A respondent highlighted that the EQIA on the matter "despite it identifying clear disadvantage to children and young people they proceeded to recommend throughout the document that the legislation should only apply to 16 and up." This matter did lead to complaints regarding Equality Schemes compliance that are dealt with in the next chapter; yet is included here as an example of the duties not being properly applied when a political decision has already been taken.

One of the most significant recurring themes among respondents was this question of 'blanket impact' whereby screening would be conducted poorly and limited to stating that the policy would impact positively on everybody, without any proper analysis of Section 75 groups. The Participation and Practice of Rights organisation stated that some screening exercises are routinely limited to a 'very simplistic analysis' of essentially stating 'This policy benefits everyone' then concluding there is no need for an EQIA. PPR concludes this process is "a misinterpretation of the duty, but a long standing one." Disability organisations point out that such an approach assumes there are no existing inequalities:

> Disability Action has been concerned when Public Authorities state that the policy would be applied to everyone therefore by treating everyone equally there is assumption there is no adverse impact. They miss the basic concept that not everyone is at the same starting point. If they do consider anything it is mitigation rather than promoting proactively equality of opportunity. In such cases, the best we can hope for Section 75 groups is not making anything worse than what it is already.

A gay rights organisation also referenced such an approach of "this policy applies to everyone and so everyone will have a positive benefit from it" ignoring the specific needs of Section 75 groups. Women's rights organisations also raised concerns regarding increasing tendencies to ignore existing inequalities and instead present policies as 'gender neutral' that 'apply and be accessible to all people on an equal basis' with this approach in itself constituting an adverse impact on women. This approach appeared to have worsened in some departments in recent times but it was not clear if this was a result of direct political direction or pressure, with one respondent assessing "The civil servants find it too difficult and they do not want to deal with the DUP. I do not know if civil servants were instructed to write in a gender neutral way," but describing the development as "very worrying" and compounding approaches of not dealing with equality and inequalities.

A children's rights organisation raised 'general impact' concerns about mental capacity legislation across a number of protected grounds:

> Statements were made in the EQIA (in 2010) about the Bill applying regardless of sexual orientation or gender and that it will apply equally to all. This is a clear misinterpretation of the purpose of the Section 75 duties, which relate to the

http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=13160&eveID=7498

[125] FMdFM Written Ministerial Statement, 19 February 2015, available at: http://www.equalityni.org/ECNI/media/ECNI/Publications/Corporate/Commission%20Meetings/2015/cmeeting250215/EC_15_03_5.pdf

> identification of potential for adverse impact which arises as a result of policy proposals. It is not enough for a designated public body to say that their proposals will apply to all equally, as this does not address the impact that the policy may have depending on different needs or life circumstances.

A number of groups also referenced the neglect of the screening question on positive action steps that could be taken to promote equality of opportunity. The ECNI contend that this referenced in their guidance and advice (in addition to being a screening question) however a respondent did argue this element of the duty could be better promoted.

Equality Impact Assessments (EQIAs)

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. One recurring example being the EQIA into the Welfare Reform Bill which avoided analysis of four of the nine Section 75 categories.

Conversely there were examples of EQIAs being triggered when screening exercises should have concluded that there were no adverse impacts on equality of opportunity – these mostly referred to policies promoting the Irish language. Such policies had essentially been misclassified as raising adverse impacts – in part on good relations grounds - simply because they were politically contentious and there was hostility against the language.

3.5 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 – where groups would be critical about screening and ask for a full EQIA to be undertaken. The potential to do this was limited in consultation exercises which were restricted to yes/no type questions.

There was general agreement that raising deficiencies in the application of the Equality Screening directly with the public authority, whilst necessary, was not making a significant impact in improving practices. Some groups felt they were largely ignored. This had led some groups to go down the route of formal complaints to the public authority or the ECNI – the experiences in doing so are elaborated upon in the next chapter. However, most groups had not gone down the route of issuing formal complaints. The reasons for this were varied, and at times different from different groups and respondents. They included the following:

- 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;

- The complaint not relating to an identifiable policy decision but rather other breaches of scheme, such as failures to adequately train staff in Section 75;
- 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;
- There were few examples of the Section 75 duties achieving anything for issues such as gender equality and therefore a reluctance to rely on such challenges;
- 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;
- Diminished capacity in the sector to engage in formal processes;

In relation to this latter ground one organisation attributed this too:

> Overall the state of the sector...diminishing funding...the groups turn in on themselves to survive and it is important for the voice to advocate at a higher level. Individual groups do not have resources and time to go down that route.

A further factor inhibiting use of the formal mechanisms were groups not feeling supported or well advised by the Equality Commission, or that the Commission itself would not subsequently use its powers effectively.

3.6 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, NGOs pointed to the quality of some of the Commission's policy papers and guidance documents. Also raised was the ability of the Commission to achieve high profile broadcast and newspaper media coverage in anti-discrimination cases it had represented victims in against the private sector, which itself will act as a deterrent for malpractice in such issues. It was argued that whilst the Commission clearly had this ability to air such issues prominently in the public domain they chose to keep much more of a low profile in relation to Section 75. There was a general view that this may be to avoid conflict with government and public authorities; and that groups instead expected the Commission to be 'on their side.' An LGBT group called for a more challenge function relationship with government:

> I want to see them be the champion of LGBT people in Northern Ireland and an adversarial relationship between them and Government, they should challenge government every time it steps outside the boundaries of Section 75 and they should be forthright about that. There should not be soft conversations between them that we don't see evidence of. I personally would like much more independence from the Commission on an issue that is often deliberately lacking and it is unfortunate.

The ECNI in response to these views has stated that it is not the case that they choose to keep a much lower media profile in relation to Section 75, but rather that the reality is it is more difficult to interest the media in Section 75 work. The ECNI also contended that the perception that it did not challenge government should be considered in the context that its most recent investigation reports were against its own sponsor department and the Department for Social Development/Communities.[126]

Other concerns from respondents ranged from a general lack of effective enforcement by the ECNI of the duties to criticism of the advice giving function in relation to breaches of scheme, with one respondent arguing that it was "impossible" to get "a straight answer" from the ECNI regarding the likelihood particular action had breached a scheme. Women's organisations pointed to the limited capacity in the sector, and the expectation that the enforcement body would do more. Member groups also felt mystified that the Commission would also share 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.

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'.[127] This has left and furthered the impression of reluctance on the part of the ECNI to enforce Section 75 through its powers of investigation.

Some groups had 'given up' on seeking advice from the ECNI in relation to Section 75 compliance, arguing that it both took too long to get a response and responses were not always helpful. One example of both positive and negative experience related to Age GFS legislation. On the one hand groups regarded ECNI policy and research into the matter positively but not its handling of a Section 75 complaint, a matter further detailed in the next section.

Several organisations raised concerns that the ECNI was giving too much prominence to the good relations elements of Section 75 rather than the equality element of the duty. Firstly, there were concerns from gay rights groups that the whole emphasis on good relations was itself negatively impacting on Section 75 groups, particularly in the sphere of denying groups funding, but that the ECNI was heavily invested in such 'good relations' approaches rather than challenging such practices as an adverse impact on equality for organisations working with Section 75 groups. A respondent stated:

> Good Relations impacts us negatively around allocation of resources... through direct funding like the Social Investments Fund which is a neat way of excluding us from allocation of government resources.

[126] ECNI comments on a draft of this research, copy on file.

[127] At the discussion seminar on this report the ECNI Chief Commissioner stated (in relation to the draft and its conclusion on the need for greater enforcement) that "There appears to be an undue focus on the Commission's use of investigations." advocating that "This is only one aspect of the enforcement provisions set out [in] Schedule 9. He later stated that the ECNI had "deployed our resources along the continuum of the "enforcement" functions that we have available, from providing advisory materials and direct advice to public authorities and others – as you know – to approving equality schemes and also to our responsibilities in relation to complaints and investigations." Speaking Note of Dr Michael Wardlow, 12 December 2017, page iv and v, copy on file.

The difficulty of enforcing the Section 75(1) equality duty in the context of issues around housing inequality was felt to be more difficult in relation to the ECNI 'good relations' focus on segregation rather than housing inequality. The Commission's former statement on Key Inequalities was felt to be particularly problematic. It was recognised that the ECNI had subsequently revised this statement and conducted research that had acknowledged housing inequality. However it was felt that this had only occurred in response to criticism from the sector making the original document untenable; and also the new recognition that there was housing inequality was still essentially attributed to having been *caused* by segregation. An NGO working on housing rights issues raised how untenable it would be for the Commission's counterpart body in Great Britain to attribute housing inequality for ethnic minority communities to 'self-segregation'.

A disability organisation was concerned about the lack of a strategic approach from the Commission to take action in relation to issues that had been repeatedly raised with it such as the question of monitoring data. It was pointed out that monitoring was committed to within paragraph 4.30 of the ECNI Equality Scheme template which the majority of public authorities use and that the ECNI had produced monitoring guidance; however, it was felt that there was consistently poor practice on the matter. It was felt the Commission should be proactively tackling the issue:

> The Equality Commission need to scope where we are with equality monitoring. We have highlighted the lack of evidence presented and lack of monitoring continuously at our meetings with them. We now need to request formally from the ECNI exactly what their plans are in this area.

Disability groups also felt that the last guidance from the Commission had been regressive and a great emphasis was needed on compliance.

The next chapter covers experiences of the formal enforcement mechanisms for the Section 75 duties.

Chapter 4: Reviews, Complaints and the use of enforcement powers

Introduction

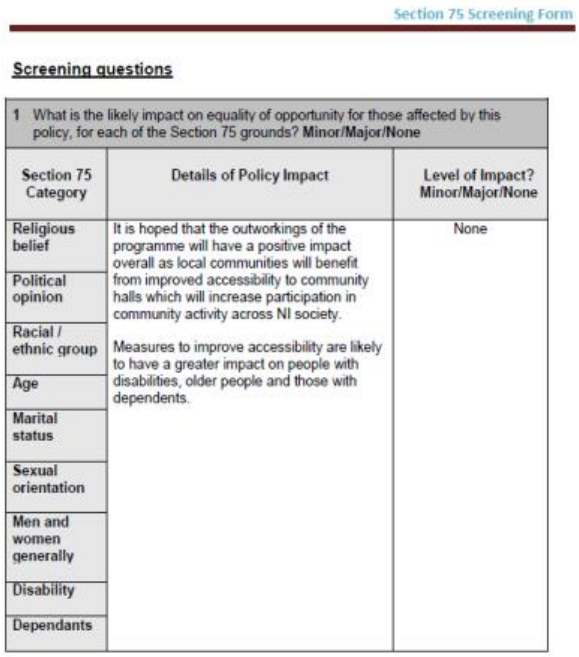
This chapter covers the formal use of mechanisms provided for within Equality Schemes and the legislation to enforce Section 75.

The chapter will first look at the mechanism of 'Screening Decision Reviews' provided for in public authority Equality Schemes, and subsequently complaints made directly to public authorities. These sections are informed by the evidence of Equality Coalition members provided to the research.

The following section will deal with 'Paragraph 10' complaints to the ECNI. This covers an analysis of the limited number of complaints-based investigations taken forward by the Commission and also examination of complaints in recent years which decisions have been made not to investigate.

The instigation of 'Own-Initiative' investigations by the ECNI will then be covered in the following section.

This will be followed by an analysis of the precedents and outcomes of Commission investigations, only one of which to date (relating to a republican memorial on publicly-owned land) has ever been referred to the Secretary of State for formal directions.



Section 75 Screening Form

Screening questions

1 What is the likely impact on equality of opportunity for those affected by this policy, for each of the Section 75 grounds? **Minor/Major/None**

Section 75 Category	Details of Policy Impact	Level of Impact? Minor/Major/None
Religious belief	It is hoped that the outworkings of the programme will have a positive impact overall as local communities will benefit from improved accessibility to community halls which will increase participation in community activity across NI society. Measures to improve accessibility are likely to have a greater impact on people with disabilities, older people and those with dependents.	None
Political opinion		
Racial / ethnic group		
Age		
Marital status		
Sexual orientation		
Men and women generally		
Disability		
Dependants		

Left: an example of a screening template where despite the clear commitment in equality schemes to assess impacts on each of the Section 75 categories the public authority has actually merged all nine boxes into one and contended that the policy will be good for everyone.

4.1 Screening Decision Reviews

All Equality Schemes which follow the ECNIs' Model Scheme (which almost all do) contain the following provision:

> 4.14 If a consultee, including the Equality Commission, raises a concern about a screening decision based on supporting evidence, we will review the screening decision.[128]

This provision is not explicitly provided for in the legislation but is recommended by the ECNI as part of its methodology, and does assist in meeting the legislative requirements to assess impacts on equality of opportunity.

The process is very straightforward to use and unlike a formal complaint is not limited to persons who can claim direct effect. Any consultee can raise a concern about a screening decision, provide some evidence to support this and the public authority is duty bound to review the decision. If a public authority unreasonably declined to do so the consultee in question could raise a failure to comply with equality scheme complaint with, by definition, the consultee being the directly affected person. 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 of the impacts of triggering screening reviews are provided below, and testify to the mechanism being an effective one in seeking compliance with Section 75.

The Commission's template annual progress reports on Section 75 submitted by Public Authorities do contain a question on Screening Decision Reviews but there is no centralised repository of information within the Commission in relation to reviews and hence no statistics are available. Sampling a number of Annual Progress reports it was notable that a department did answer 'yes' to the question on reviews but provided information related more to changes to the screening process in light of consultation responses rather than the formal screening review process.[129]

However, from the available information it does appear that the screening decision review is rarely used by consultees. Only CAJ, CLC, UNISON and the Equality Coalition itself had used the mechanism among the Coalition members who informed this research. Perhaps surprisingly given that the provision is recommended by the ECNI and makes explicit reference to them, it does not appear that the ECNI has used the formal review mechanism.

The following pages contain a number of examples of the process and outcomes of Screening Decision reviews.

[128] Equality Commission, Model Equality Scheme (November 2010) (note the paragraph number may be different in public authorities schemes.

[129] See for example the Department of Health annual progress report 2015-16, p41: https://www.health-ni.gov.uk/sites/default/files/publications/health/public-authority-2015-16-progress-report.pdf

Policy	Public Authority	Consultee triggering review
EnergyWise/NISEP Scheme	**Department of Economy**	**CAJ, 9 June 2016**
Policy Detail	The Department consulted on changes to a major grants scheme that is particularly relevant to alleviating Fuel Poverty providing grants for heating and insulation schemes for homes funded by a levy on electricity bills. The Department consulted on replacing the existing scheme (NI Sustainable Energy Programme –NISEP) with a revised scheme known as 'Energywise'. Two significant proposed changes were: • Changing the way revenue for the scheme is gathered by exempting business customers and transferring all charges onto domestic customers; • Ending a commitment to ring fence 80% of all spending to priority households (low-income households in the most objective need) Equality screening had been conducted but had 'screened out' the policy.	
Review Grounds	Further to discussions with Fuel Poverty groups CAJ lodged a review request, raising (in summary) the following concerns: • The categorisation of EnergyWise as a 'new' policy, limiting comparative consideration of equalities impacts compared to the NISEP scheme; • Misinterpretation of screening questions on five of the nine Section 75 categories through only considering 'direct differential impacts' on such grounds (and not adverse impacts resultant from indirect discrimination); • Screening impacts only appearing to consider the revenue stream changes and not the ending of ring-fencing spending to priority households, and thus not considering available data and research; • Consequently not considering official statistics which would have identified likely adverse impacts on Section 75 groups more likely to face fuel poverty (e.g. women, Catholics/nationalists); • (Rightly) finding 'major' adverse impacts in other Section 75 categories (age: older persons, racial group, disability and dependents) but not instigating an EQIA in accordance with the commitments in the Scheme;	
Outcome	Senior Officials from the Department met with CAJ and reviewed the screening decision. In August 2017 an announcement was made that the policy change would be put on hold and the NISEP scheme, which was to end in March 2017, would now be in place for 2017-18.[130] The NISEP budget is around £8 million a year. The fund was subsequently extended into 2019.	

[130] https://www.uregni.gov.uk/news-centre/update-northern-ireland-sustainable-energy-programme

Policy	Public Authority	Consultee triggering review
Staff Childcare Scheme	**NI Assembly Commission**	**CAJ, July 2015**

Policy Detail	The Assembly Commission (which runs the Northern Ireland Assembly) took a decision to discontinue its staff child care provision (a salary plus scheme) and introduce a less favourable scheme (voucher based scheme) in order to save £280k a year in light of budget cuts of 8.2% of 'controllable costs.' Equality Screening was conducted but only identified 'minor' impacts and hence did not lead to a full EQIA and consideration of alternative policies.
Review Grounds	Further to engagement with affected persons and the Trade Union NIPSA, CAJ lodged a review request raising the following matters: • The Screening exercise provided figures that the average loss to the 120 directly affected employees would be £2,333 per annum, which should clearly be considered a 'major' impact on persons with dependents and should have led to an EQIA; • Only an EQIA would be able to fully consider the equalities impacts on affected employees in categories such as gender; • No equality monitoring was planned further to the screening decision;
Outcome	The Assembly Commission treated the review request as a complaint against the Equality Scheme and issued a response in August 2015. This committed to: • Review of the screening exercise to generate and include detailed data where gaps exist in Section 75 categories; • Consultation on the policy followed by analysis of the data and consequent reconsideration of mitigating measures and whether to undertake an EQIA; Subsequently the following mitigation measures were introduced for: • Staff who incur additional childcare costs as a direct result of the need to attend their place of employment late into the evening to facilitate Assembly business; • Staff whose children have a disability that is unlikely to be accommodated within usual childcare arrangements; The Assembly Commission however still maintained the impact was 'minor' and did not complete an EQIA. This decision was justified citing that the response from the ECNI to the screening did not indicate the need for an EQIA.

Policy	Public Authority	Consultee triggering review
Bedroom Tax	**Department for Communities**	**Equality Coalition, 2016**
Policy Detail	The Bedroom Tax (officially the "Social Sector Size Criteria and Mitigation") relates to the delayed Northern Ireland implementation of a key tenet of UK welfare reform act policy; whereby the housing benefits will be cut from individuals and families, if they have a spare room. This will exacerbate poverty and have adverse impacts on a number of groups within Section 75 categories – for example single parents (mostly women) and persons from the Protestant and LGBT communities where family sizes tend to be smaller. The policy decision in question was to introduce the Bedroom Tax from January 2017, but under the terms of the Fresh Start Agreement to provide a supplementary mitigation scheme which would not practically apply the bedroom tax to claimants between January 2017 and 31 March 2020. A screening exercise was conducted in July 2016 and sent to consultees in October 2016. This document itself provides general evidence of a particular severe impact of Bedroom Tax in Northern Ireland due to the nature of housing stock where there are few 1-2 bedroom properties available, meaning it is less likely persons will be able to be re-allocated housing to avoid Bedroom Tax. The document then rightly points to the high levels of poverty in NI and rightly concludes "the introduction of SSSC [bedroom tax] could have a dramatic impact, driving a high proportion of working age HB [Housing Benefit] claimants into poverty." The document also highlights adverse impacts on some Section 75 groups including Gender (women) and Age (older persons). The screening decision however was for no EQIA.	
Review Grounds	There were three grounds for screening decision review sought by the Coalition: • *The screening decision unduly restricted the scope of measuring equality impacts of the policy decision to the mitigation period 2017-2020* • *The screening decision does not duly consider four of the nine Section 75 categories* (Religious belief, Political Opinion, Racial Group and sexual orientation) • *The screening decision, in concluding that the Bedroom Tax would be positive for good relations, misinterprets this limb of the duty*	
Outcome	The Department did review the screening decision and produced a revised template. This again only considered the mitigation period but did concede that it would be 'advisable' to re-screen the Bedroom Tax policy before 2018-19 prior to the lapse of the mitigation. The revised screening also now considered evidence on the other four grounds. This set an important precedent as the Department had not done so throughout welfare reform. However, only the sample evidence provided by the Equality Coalition was considered and was dismissed on the ground that there is no 'direct correlation' between the data and the bedroom tax impact. This in itself is a breach of duties in the scheme as 'adverse impacts' are not limited to direct correlations. The review did not address the application of the good relations duty to the tax.	

Policy	Public Authority	Consultee triggering review
Programme for Government	**The Executive Office (TEO)**	**Equality Coalition, 2016**
Policy Detail	The TEO launched a consultation exercise on the draft Programme for Government *Framework* 2016-2021 (PfGF) from the 27 May to the 22 July 2016. The PfGF differed from previous Programmes for Government in adopting an outcomes-based approach, it also proposed what that outcomes-based approach should be and committed to a number of other matters including the implementation of the Fresh Start Agreement. The PfGF consultation document contained a one-page summary on Equality Screening, but not the screening template on the decision. The summary stated that the decision had been to 'screen out' the policy and not conduct an EQIA, the policy scope however was limited to stating that the screening exercise had considered whether the adoption of an 'outcomes based approach' *per se* had adversely impacted on equality of opportunity;	
Review Grounds	A screening review request was issued on the 10 June 2016 (during the consultation) – focusing on the following concerns: *1: The duty under the equality scheme is to screen the proposed policy, not a part of it, yet the Screening Decision only considered whether there were going to be any adverse impacts through 'adopting an outcomes based approach' in principle rather than considering the impacts of what the Outcomes Based Approach was;* *2: The PfGF committed to the implementation of the Fresh Start Agreement – which includes significant policy decisions with likely major adverse equality impacts – including the proposed corporation tax cuts; but this was not considered at all in the screening;* *3: The PfGF proposed a range of specific outcomes based indicators, which positively include a number of equalities indicators (e.g. on health and educational inequality) but do not include direct inequalities indicators on other areas (e.g. housing or employment inequalities) and do not commit to desegregated monitoring of these indicators on s75 grounds despite commitments in the Equality Scheme.* *4: Seeking further information as to whether s75 consultation had been adequate*.	
Outcome	The TEO reviewed the screening decision and responded on the 5th August 2016 outlining: • The Screening Decision had now assessed the content of the proposed outcome framework, but did not consider it would lead to adverse impacts; • The Fresh Start Agreement was a pre-existing commitment, and there would be no equality impact from re-affirming a pre-existing commitment; • The TEO now would commit to provide disaggregated data on Section 75 identities across the PfG indicator set 'where possible'. • The TEO considered the consultation with Section 75 groups to have been adequate; The Coalition welcomed the commitment to disaggregate data; but sought clarification in relation to the revised screening exercise – as no screening template had been provided; in light of the above response also sought were details of when a Fresh Start had been previously screened, and a copy of its screening template. Despite reminders no response was received to either of these requests for over two months. The Coalition therefore concluded that no screening template (as required under the Equality Scheme) had been produced for either decision and proceeded to issue a formal failure to comply complaint (detailed further in next section).	

Policy	Public Authority	Consultee triggering review
Community Halls Pilot fund	**Department of Communities**	**CAJ , 2017**
Policy Detail	The Department for Communities (DfC) having not funded a predecessor *Community Facilities Improvement Scheme* quickly devised in the new May 2016 mandate a 'Community Halls Minor Works' Pilot Programme, which was launched in Salterstown Orange Hall in October 2016 with a budget of £500k; a budget which had increased to £1.9m by the time successful applicants were announced in Sixmilewater Orange Hall in January 2017. The programme focused on capital grants of around £25k per organisation. There had been no consultation on the scheme and it was revealed by a FoI request that no records were kept of how its criteria were devised. When the funding was announced there were political allegations that the fund was discriminatory. In light of this CAJ then requested on the 16 January 2017 a copy of the Equality Screening document to assess such claims. This was not forthcoming within the timescales and CAJ issued a 'failure to comply' complaint for not providing the screening document. It then transpired however that no screening had been undertaken, but was commenced on the 17 January and completed on the 2 February 2017.	
Review Grounds	The belated screening exercise was however tokenistic and CAJ were concerned that it had been conducted with the purpose or effect of disguising potential adverse impacts on a number of Section 75 categories, to avoid an EQIA. The initial screening exercise went as far as merging the equality impact boxes in the template for each category into one and substituted due analysis with a statement arguing that the policy would be positive for everyone. The clear differentials across Section 75 categories (on which it subsequently transpired DfC had data) were ignored, nor was there any analysis as to whether these differentials in recipients (on gender, religious belief, political opinion) constituted adverse impacts or were justified by meeting existing inequalities or addressing specific needs. In total nine related flaws in the screening decision were identified in the review request.	
Outcome	Amidst significant media coverage in the context that funding decisions in DfC had contributed significantly to the collapse of the Stormont administration, the DfC conducted a review and produced a revised screening template in March 2017. Documentation on the scheme was also released under Freedom of Information legislation. The revised Screening Exercise did identify significant differentials on some Section 75 categories. The screening decision was that these differentials constituted positive and not adverse impacts as they meet unmet need in the identified groups – ultimately mostly Protestant male-led organisations. However, the evidence put forward to support this contention was limited to an assertion that the policy addressed unmet need as such faith-based organisations did not seek lottery funds. However, figures released by the lottery to the media flatly contradicted this assertion. Consequently in the absence of any other evidence of addressing an existing inequality the Screening Decision should have led to findings of adverse impact and an EQIA. CAJ identified 19 substantive and procedural breaches of the DfC Equality Scheme in relation to the Community Halls scheme and sought a formal investigation by the ECNI. The ECNI announced in June 2017 that it would conduct an investigation into the scheme and DfC decisions to cut funding to the Líofa Gaeltacht Bursary Scheme in December 2016.	

As is demonstrated by these examples the process of triggering a screening decision review can be deployed as a powerful tool to seek reconsideration of decisions and the proper application of the Equality duty where the process has been flawed.

In relation to matters such as the Community Halls Scheme a screening decision review, coupled with Freedom of Information requests, have been the tools that have brought a significant level of scrutiny and accountability as regards how controversial policy has been developed.

Screening reviews can also inform (or prevent the need for) formal complaints for failures to comply with provisions of Equality Schemes. The next section will examine the role of complaints to public authorities.

4.2 Complaints directly to public authorities

General patterns of complaints to public authorities

Before the ECNI can instigate a 'Complaint-Driven' investigation the complainant must have first complained to 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 Commission does seek an annual equality schemes progress report from public authorities that includes a question on the number of complaints received. Model schemes contain no other requirement to draw complaints and their outcomes to the Commission's attention on an ongoing basis. The recent consultation document from the ECNI states the number of complaints reported annually has been 'routinely low' and cites that for the business year 2014-2015 that 21 complaints were reported in annual progress reports. However the ECNI, on further examination of the information, 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 one public authority which received over 300 complaints, having counted them as one as they were on 'templates'.[131]

It also appears that some public authorities have not published a report each year. For example a Progress Report produced by the Department of Justice for 2015-2016 states that zero complaints were received. However in the previous year, for which no report is presently published on the Department's website, we are aware that the figure was likely to be around 300 (and are likely to be those referred to above by the ECNI). These relate largely to significant numbers of complaints in late 2014 issued by younger PSNI officers in relation to proposed changes to pension arrangements. These complaints centred on procedural failures to comply in relation to duties within the scheme to consult with directly affected persons, with affected PSNI officers arguing that departmental engagement with the Police Federation did not suffice for scheme purposes. The impacts of the changes were also considered substantive by an estimated average reduction in the pension pot of around

[131] Section 75 Statutory Equality and Good Relations Duties Acting on the evidence of public authority practices, ECNI October 2017 p33-34.

£100k per officer. There is no reference to this issue and the outcomes of the complaints in the 2015 annual progress report.

One public authority respondent participating in this research attributed the low number of complaints to it being "too hard for a directly affected individual not part of any groups" to work out how to pitch a complaint or link it in to a breach of equality scheme. Suggestions were made for the authority to seek to link equalities complaints to potential breaches of the scheme, and an easily accessible complaint tool on public authority's websites to facilitate complaints. The model scheme itself was felt to be very complex for an untrained complainant to navigate.

A number of examples of Coalition member groups pursuing complaints directly with public authorities were presented in the hearings for this research. Complaints by Coalition member groups include those on straightforward 'procedural' issues, for example a CAJ complaint that the Department of Communities had not provided *on request* a copy of a screening template (as is committed to in the Equality Scheme) in relation to the Community Halls scheme. (It subsequently transpired this was as no screening had taken place, and was remedied by the Department then conducting screening and publishing the outcome.)

Specific examples of complaints to public authorities

The following pages contain a number of specific examples from Coalition members.

Children's Law Centre and the Mental Capacity Bill

The Children's Law Centre (CLC) has been involved in lodging of complaints for failures to comply with equality schemes in relation to the Mental Capacity Bill, the proposed Age (Goods Facilities and Services) discrimination legislation, the introduction of Anti-Social Behaviour Orders (ASBOs) and the proposal to introduce a legislative defence to the use of "reasonable chastisement". In CLC's oral evidence the NGO elaborated on their experience in relation to the Mental Capacity Bill consultation, a process in which CLC had serious concerns regarding compliance with the obligations under Section 75. In summary:

- The policy aim of the Mental Capacity Bill from its outset had been to to introduce a single comprehensive legislative framework for the reform of mental health legislation and for the introduction of capacity legislation in Northern Ireland. This dated back to the Bamford review in 2002 and the consultation process on the legislation had commenced back in March 2009;
- In October 2013, at an advanced stage in the development of the legislation a decision was taken however to entirely exclude under 16s from the scope of the Mental Capacity Bill, and retain with possible amendment for under 16s the terms of the Mental Health NI Order 1986;
- This decision constituted a new and distinct policy decision and should have been subjected to an EQIA and direct consultation with children and young people as the group most likely to be impacted upon by the decision;

- CLC both orally and in writing notified both Departments about the obligation to screen and carry out an EQIA on the proposed exclusion of under 16s from the Mental Capacity Bill and the retention of the Mental Health Order;
- The DHSSPS 'updated' an EQIA previously undertaken in 2010 and the DoJ screened and carried out an EQIA of its policy proposals in 2014. Following detailed examination and analysis, CLC was firmly of the view that the equality impacts were not adequately assessed.

Among the issues were:

- Insufficient information about the proposed amendments it intended to make to the Mental Health (Northern Ireland) Order;
- No examination of the potential equality impacts on specific groups of children and young people who disproportionately suffer mental ill health or have a learning disability, such as Traveller children, children with disabilities or LGBT children;
- There was no direct consultation with children or young people;
- An easy read version of the consultation document was not published until 6 weeks into the 12 week consultation period which took place over a summer holiday period;
- A worrying lack of data in relation to children and young people in both EQIAs with regard to levels of mental ill health and/or learning disability, disaggregated by age and other Section 75 categories;
- Misinterpretation of the duties in general through statements that the Bill had no impacts as it applied equally to all regardless of sexual orientation or gender;

A complaint was issued on five overarching grounds against DHSSPS.[132] CLC were disappointed that neither public authorities took remedial action to remedy the breaches of the schemes. A lack of confidence in the ECNI from previous experiences meant CLC did not seek further advice or intervention from the Commission.

[132] Namely: (i) a failure to carry out the EQIA in accordance with the procedures set out in Annex 1 of the ECNI's Guide to the Statutory Duties – including a failure to screen new/ amended policies; (ii) a failure to assess the equality implications of all new policies as they are being developed; (iii) a failure to carry out full, meaningful, open and inclusive consultation in line with Equality Commission's Guiding Principles with individuals of the Section 75 categories; (iv) a failure to ensure that barriers to proper consultation are removed and to ensure that information is made available in consultation with affected groups to ensure the highest level of participation in any policy decision making with regard to child accessible paperwork; and (v) a failure to use quantitative and qualitative data to assess the impact of the policy.

MB and budget cuts to the Police Ombudsman

In October 2014 the Department of Justice took a decision to cut funding to the Office of the Police Ombudsman (OPONI); a cut of £750,000 was reported. The Minister openly stated to the Justice Committee that the cuts would significantly impact on the historical investigations workload. This in a context where the independence requirements in such cases involve the contracting in of external detectives with no RUC connections, and where an earlier business case to take forward legacy cases in the Office of £400k had been left unfunded. The cuts would lead to compounding significant delays for family members awaiting legacy cases and compound an existing inequality as collusion cases tend to be those subject to ineffective investigations in the past. The issues of an adverse impact on a number of Section 75 categories flows from it being likely that most of the cases of deaths attributable to the RUC or in which collusion is suspected, and currently subject to historic OPONI investigations, relate to Catholics, nationalists and men. A directly affected complainant MB, assisted by CAJ lodged a complaint against the Department of Justice on the grounds that the funding cut decision had not been screened at all. MB was a directly affected person as a relative of a victim whose cases was being dealt with by the Historic Investigations Directorate, which had already been subject to significant delays, that could now be further delayed.

On the matter initially being raised with the Department of Justice it transpired that the named contact in the equality scheme for complaints and other equality scheme matters had since retired and not been replaced. It appeared to have gone unnoticed that the role was vacant and whilst it was consequently reassigned the experience was not indicative of equality schemes compliance being given a particularly high priority within the Department. Furthermore the response to the complaint entirely ignored the fact that the complaint related to a matter within the Department's functions (i.e. the decision to cut the budget) – rather the response was limited to stating that the issue was a matter for the Ombudsman in considering the implications of the budget reductions and how to implement the cuts. Given the dissatisfaction with this response a complaint was raised with the ECNI, which is detailed in the next section.

Programme for Government (PfG) 2016 complaint by the Equality Coalition

As mentioned in the previous section the Equality Coalition had triggered a review of the Screening Decision by the Executive Office (TEO) in relation to the PfG Framework. A number of issues had been resolved in the screening review including the introduction of a commitment to disaggregate outcomes related data on PfG indicators by Section 75 categories. The screening decision had also been revised to include the content of the PfG outcomes based approach, rather than limiting the exercise to consideration of the outcomes based approach *per se*. Other aspects of the Coalition's requests remained outstanding. The TEO had not responded to repeated requests to provide the actual screening template for the PfG programme (despite commitments in the Equality Scheme to provide the template on request). The TEO had responded that the elements of the Fresh Start Agreement that the PfG committed to taking forward were pre-existing commitments that were being reiterated and therefore there was no need for further screening; but had declined to provide a copy of a screening template containing the original screening of the Fresh Start Agreement. The Equality Coalition lodged a complaint of failure to comply with the scheme in relation to these and related matters, in summary:

1: Failure to provide evidence of screening of the Fresh Start Agreement provisions;
2: Failure to properly consider the implications on equality of a number of outcomes in the PfG (for example Outcome 11 which alluded to further privatisation of public services);
3: Failure to provide the screening template for the PfG;
4: Failure to comply with the stipulations in the Scheme in relation to consultation times;

The TEO responded to each element of the complaint, within the timeframe (by November 2016) in the following manner (our summary):
1: The TEO conceded that the Fresh Start Agreement had not been equality screened. The TEO argued that it was a high-level agreement and that equality screening had to be taken forward by Departments responsible for policy development and implementation of its provisions;

2: The TEO argued that the PfG outcomes framework did not contain commitments to individual projects, programmes, strategies or services and that equality impacts from PfG Delivery Plans (when developed) would have to be dealt with prior to their implementation;

3: The TEO remedied this issue by moving to complete and then publish a Screening Template along with an apology it had not been completed earlier;

4: The TEO justified the shortened consultation timeframe citing advice from the ECNI that there was no requirement to consult under the procedures in the scheme as the TEO had not identified any equality impacts.[133]

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[133] This advice on consultation from the Commission has caused concern among the Coalition, given it provides an incentive to public authorities to disregard any equality impacts of policies in order to evade the consultation duties within schemes.

NI Local Government Officers' Superannuation Committee – Equality Coalition

Equality Schemes following the Model Scheme contain a commitment (in the case of NILGOSC at paragraph 3.2) - stating that "We will consult on our equality scheme, action plan, screening, equality impact assessments and other matters relevant to the Section 75 statutory duties."

Public authorities must review schemes every five years.[134] Despite the commitment that "We will consult on our equality scheme," in 2016 NILGOSC reviewed and reissued a revised Equality Scheme, without any consultation. NILGOSC argued that it had not made any significant changes to its Scheme, that the only changes were minor (e.g. updating contact details), that Equality Commission guidance[135] on five year reviews only stated that if the public authority is making substantive changes then there is a requirement to consult and submit it as a new scheme; and that the duty to consult had already been fulfilled by consulting on a previous scheme in 2011.

It was uncontested that the changes to the scheme were minor. The concern of the Equality Coalition was that this position would mean that an existing flawed scheme could be maintained in perpetuity, without any input from consultees into the review. This view was compounded by concerns with existing schemes that had followed elements of the ECNI model scheme, particularly the methodology on good relations. The Coalition did not regard a previous consultation five years ago as sufficient, given as Coalition recommendations for changes to the model scheme had arisen in light of learning and developments since that time. Furthermore the Coalition considered that the ECNI guidance stating that consultation was a requirement before resubmitting a scheme, did not itself exempt public authorities from consulting in other circumstances. Notably the ECNI website read "*Public authorities must consult with representative groups when developing an equality scheme, and we also recommend that affected individuals are also consulted*".[136] The Coalition, in light of the clear commitment in paragraph 3.2 to consult on a scheme, lodged a failure to comply complaint.

NILGOSC responded at first instance in February 2017, reiterating its reliance on the ECNI review advice. However following an internal appeal NILGOSC in March 2017 subsequently reversed this decision and, by way of resolution to the complaint, reissued the scheme for consultation. A concerning precedent was therefore avoided, and other public authorities subsequently consulted as part of their reviews.

[134] Northern Ireland Act 1998, schedule 9, paragraph 8.
[135] ECNI Guidance on Conducting a 5 Year Review of an Equality Scheme, July 2016. There had also been correspondence between the Coalition and Commission on this matter on the 18 May 2017 and 2 June 2017.
[136] http://www.equalityni.org/Employers-Service-Providers/Public-Authorities/Section75/Section-75/Equality-Schemes-(1)#sthash.SQoedDoZ.dpuf), accessed 11 April 2017 (and subsequently removed).

> However, in July 2017 the Commission issued further guidance on developing equality schemes that, on this occasion, stated that no formal consultation was required when public authorities were not themselves making changes.[137] The Commission also removed the above statement from its website that states that consultation is required when developing a scheme. The revised position stands in contradiction to the explicit commitment in schemes that "we will consult on our equality scheme" which by its nature is referring to future revisions to the scheme. As the ultimate decision maker on a failure to comply complaint is the Commission itself this creates a significant problem for affected groups who would wish to see this provision enforced.

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 however 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.

4.3 Requests for Complaint-Driven Investigations to the ECNI

Since the advent of the duties until 2017 the ECNI has completed and published 18 Complaint-Driven (paragraph 10) investigations. This would constitute an average of one a year, although the first investigation was published in 2004.[138]

The Commission 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 for a complaint are set out in Schedule 9 (namely that the complaint must be in writing by a person *who claims to have been* directly affected by the failure to comply with the equality scheme; be within 12 months of when the complainant first knew of the alleged matters; and the complainant must have first complained to the public authority and given them a 'reasonably opportunity' to respond). The ECNI investigations procedure elaborates that in general terms the Commission will normally consider a period of around one month for a public authority to respond as sufficient. The ECNI has also interpreted 'a person' as including a legal person and recently investigated a complaint brought by a public authority - Northern Ireland's Commissioner for Children and Young People (NICCY) - although the ECNI in doing so cast some doubt as to whether they would accept an NGO complaint as meeting the requirements in these circumstances.[139]

Once accepting that a complaint is admissible the ECNI can decide not to investigate. The Investigations Procedure however narrows this discretion and gives a list of (non exhaustive) reasons as to why a complaint will not be investigated. This list includes that there is not an

[137] Equality Commission Guidance on developing an Equality Scheme, April 2017, p8.
[138] http://www.equalityni.org/investigations (last accessed November 2017).
[139] This has happened with a previous investigations report in 2006 when the Children's Law Centre lodged a complaint against the Northern Ireland Office over failure to screen the ASBO policy. The Commission at a public seminar on the NICCY investigation however stated that NICCY had met the criteria as a directly affected person due to their statutory remit.

arguable case that the scheme has been breached, but includes other factors.[140] The Investigations Committee is to provide a Record of the Decision, to the complainant and public authority setting out why they have, or have not, decided to investigate. Either party may seek a review of this decision.[141]

In September 2015 we obtained records obtained under Freedom of Information in relation to the number of received and granted complaints. In a period between March 2013 and September 2015 the ECNI received 13 complaints; at that time two decisions had been taken to investigate, and two complaints had either been withdrawn, or requested no action in their complaints.

We examined the reasons for declining an investigation in this time period where reasons were recorded in the SDIC Minutes. 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 hinged on the SDIC considering: that sufficient remedial action had already been taken by the public authority to remedy the original complaint; the complainant themselves would not benefit from the investigation; or that the matter was already subject to an Own-Initiative ECNI investigation.

Further useful documents are reports given to the SDIC by ECNI staff which detail the contacts with potential complainants over the time period. For example one of these documents, from October 2012 details around 35 initial contacts with complainants over around a six month period. Such contact can lead to initial interventions by the ECNI, in for example writing to the public authority. There are a broad range of inquiries raised. They range from the impact of processes within the Driver Licensing Agency for an individual with a disability to high profile strategic equalities issues such as the housing provision on a key north Belfast site (Girdwood Barracks); from the impact of outsourcing services from Ulster University to the more politically symbolic– such as the erecting without planning permission of a large jubilee crown on a roundabout in Larne, or an Ulster Covenant monument in Portadown, or an Operation Banner memorial in Belfast. There are also religious belief complaints from creationists arguing that a publicly funded facility at Giant's Causeway visitors centre is discriminatory for not including a creationist viewpoint. A number of the complaints relate to human resources policies within public authorities themselves by directly affected staff. One complaint relates to substantive equality issue of concerns of racist stereotyping of an Africa day annual event held by the Council at Belfast Zoo. It appears from the records a number of potential complainants on having initial contact with the ECNI do not follow up with formal complaints. This exercise gave an impression of the breath of issues that are raised with the Commission.

The initial potential complainant contacts give the ECNI a key opportunity for strategic issues brought to its attention to be subject to 'Own-Initiative' investigations or other remedial interventions. For example the non-screening of key policies decisions (referred to

[140] ECNI Investigations Procedure, paragraph 4.4.

[141] As above, paragraph 4.5 – this provision is somewhat ambiguously worded, reading as if a review can only be sought on admissibility grounds; however in practice on at least one occasion it has related to a substantive review of the decision.

by Coalition members in previous sections) such as the Gay Blood Ban (Dept Health - sexual orientation) or the cuts to the European Social Fund Programme (DEL -gender) were raised in advice calls with the Commission but there appears to have been no such follow up action.

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. The investigation reports themselves do sometimes contain information on how long the process has taken from start to finish. Periods in excess of a year are not uncommon.

The first two reports completed by the ECNI indicate timeframes of around 1½ years from receipt of the complaint to report. The most recent published report at the time of writing is the complaint by the NI Children's and Young Person Commissioner (NICCY), for which a complaint was issued in December 2015, a decision to investigate taken in April 2016 and a report agreed in January 2017 and published two months later (15 months).

Coalition members gave experiences of lodging complaints with the ECNI, with the following two case studies from the Children's Law Centre (CLC) and CAJ respectively.

The CLC complaint related to proposals on legislation to outlaw age discrimination in the provision of goods, facilities and services (Age GFS) developed initially by the Office of First Minister and Deputy First Minister (OFMDFDM -which subsequently became the Executive Office). Prior to the public consultation phase, there was not political agreement within OFMDFM on the scope of the legislation, with Sinn Féin taking the view that it should apply to all ages, and the DUP arguing that it should not apply in relation to children. Eventually before the consultation was launched, it was agreed between the parties that the legislation would only apply to persons aged 16 and over, with this being stated publically by the then Ministers with responsibility for the policy, Jennifer McCann MLA and Jonathan Bell MLA. The public consultation which followed was on the basis that the legislation would only apply to persons aged 16 and over.

The CLC pursued a complaint to the ECNI, in relation to the proposed exclusion of under 16s from Age GFS legislation, in part as this process would usually need to be followed before a legal challenge on Section 75 grounds. CLC lodged a failure to comply complaint on a number of grounds, namely:

(i) A failure to consider available data and research in conducting the draft EQIA of the policy proposals;

(ii) A failure to properly assess the potential for adverse impact that could be suffered by children and young people aged under 16 by exclusion from Age Discrimination legislation;

(iii) A failure to properly identify possible measures to mitigate any adverse impact and alternative policies which might better achieve the promotion of

equality of opportunity;

(iv) A failure to consult directly with children and young people that are directly affected by the policy proposals;

(v) A failure to extend the consultation period for children and young people, following the later release of the Young Person friendly version of the consultation document;

(vi) There was a pre-determination of the consultation exercise, in breach of the Equality Scheme requirements to take consultation and assessment of a policy into account;

A failure to take into account the findings of the draft EQIA as part of the policy development process

However, the ECNI decided not to investigate the CLC complaint. NICCY had also made a request that the Commission use its powers of investigation on a number of grounds and an investigation was initiated on some, but not all, of these grounds. The ECNI Investigations report into NICCY's complaint details that NICCY had sought investigation into five breaches of the TEO Equality Scheme – the first three – (relating to paras 3.3, 3.5, and 3.11 of the scheme) all referred to the consultation process, which the ECNI agreed to investigate. The latter two NICCY complaints (3.12 and 4.7) related to the duties to properly take into account impact assessments and consultations when reaching a policy decision and to the due application of the equality screening questions respectively. However, the ECNI declined to investigate these two areas leading to NICCY triggering the ECNI's review process asking it to reconsider not investigating the screening failings. However, the ECNI stuck to its position of declining to investigate any other matter than the failings in relation to the consultation process. These decisions by the ECNI greatly concerned CLC, as set out in their testimony to this research:

> The Equality Commission decided not to authorise investigation of this complaint due to the NICCY complaint being on "broadly similar grounds". The Equality Commission after considerable delay failed to provide CLC with sufficient information as to the reasons why they rejected CLC's complaint and viewed CLC's complaint as being addressed under the auspices of NICCY's complaint. In the absence of such reasons, it was difficult for CLC to progress to further challenge the Equality Commission's refusal to consider our complaint. The outcome of the NICCY complaint lodged was finally issued in March 2017. The report only dealt with the failure to consult directly with children and young people and not any of the other issues that CLC had raised.

At a public seminar on the outworkings of the NICCY complaints-driven investigations the ECNI declined to provide any further reasons as to why the Commission had decided not to investigate the CLC complaint. In finding a failure to comply with the scheme the ECNI recommendations to the TEO to remedy the complaint focused consequently on the need for a further consultation specific to the needs of children and young people. It is possible to critique this approach as the

ECNI narrowing terms of reference and providing a 'remedy' that is relatively straightforward for the TEO to comply with without taking on the substantive equalities issues raised by excluding children aged under 16 from anti-discrimination protection and by failing to properly conduct and take into account equality assessments that, conducted properly, could only have concluded that the policy decision amounted to a major adverse impact on children (protected under the Section 75 category of age). This could have prompted the consideration of alternative policies and mitigating measures. This is the intended role of the equality duty and a weak set of recommendations only partially furthers compliance with them.

The second example is a complaint by a directly affected individual, represented by CAJ, against the Department of Justice (DoJ) for the failure to equality screen a budget cut to the Police Ombudsman that had the effect of further delaying a legacy investigation into the death of the complainant's relative. The investigation related to a category of cases ('state involvement' or collusion cases) where there is an existing inequality as such cases tend to be those who have been subject to ineffective investigations in the past.[142] In this particular case the European Court of Human Rights had already held the UK in violation of the ECHR for failing to properly investigate the murder, and the Ombudsman investigation was to be part of a remedy to this failing. Whilst victims in such cases come from all sections of society (civilian, republican, loyalist, security force), there is a pattern of most victims being disproportionately Catholic, nationalist, and male, engaging a number of Section 75 categories. As alluded to above, the response of DoJ to the issue had been not to deny the impact the cut would have on delaying legacy cases, but to misinterpret and misapply their Scheme by insisting that the matter was one for the Ombudsman and not the DoJ.

Following the DoJ response to the complaint in November 2014, a complaint was lodged with the ECNI on the 16 December 2014. Despite the issue being quite straightforward – the DoJ did not contest that it had not equality screened the cut - it was not for five months (April 2015) that the ECNI corresponded to indicate they had initiated preliminary inquiries into the complaint. The ECNI did not contest its admissibility, although other documents obtained under FoI query whether an investigation is appropriate for the specific complainant.[143] In mid August 2015- a full nine months after the complaint had been lodged - the ECNI responded to state they would not investigate the complaint. Reasons were set out that the ECNI understood the investigation would proceed and that budget cuts were not as severe as originally proposed, and therefore the complainant "would not gain any benefit from

[142] See for example Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, 17 November 2016 (UN DOC A/HRC/34/62/Add.1) and CAJ Submission S465 to the United Nations Human Rights Committee Follow-up Procedure: "accountability for conflict-related violations in Northern Ireland" (CCPR/C/GBR/CO/7, paragraph 8). (June 2017).

[143] ECNI Internal Report to SIDC reference no SIDC/15/01/7 of March 2015, states question arises as "to whether Paragraph 10 investigation is an appropriate course for this complainant"

an investigation." This raises a number of issues. Even if it had been the case that the complainant's investigation was proceeding (and it was not, at the time of writing there has still not been a resolution), the ECNI appears not to consider the broader 'public interest' of proceeding to investigate, and the detriment to not doing so. It could be argued that allowing a public authority to entirely bypass equality screening in relation to budget cuts gives a green light for such practices to continue. Furthermore, this particular case involved the thwarting of a remedy required as a result of the implementation of a judgement of an international human rights court that had already been subject to significant delays to the extent that the mother of the deceased had since died without ever receiving a report into the death of her son.

In this context on the 4th November 2015 the complainant triggered the review process for the ECNI to re-consider the decision not to investigate the complaint, due to the above matters and also raising long delays. In March 2016, around 15 months after the original complaint, the ECNI responded advising that it had re-considered its decision and again decided not to investigate. Again the ECNI cited that the Ombudsman report would be soon completed (which has not been the case).

A year later in March 2017 in a judicial review involving another delayed Ombudsman legacy case the High Court found that the DoJ had acted "unlawfully by failing to provide a sufficient level of funding to the PO [Police Ombudsman] to enable the PO to carry out its statutory obligation to investigate the applicant's complaint within a reasonable period of time."[144] These proceedings did not involve Section 75 and in November 2017 were overturned by the Court of Appeal.[145] It is possible that had the ECNI investigation been prompt and effective and prompted the Department to consider mitigating measures and alternative policies there would have been some resolution to the matter at an earlier stage without costly court procedures.

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

[144] *In The Matter of an Application by Patricia Bell for Judicial Review of the Decision of the Police Ombudsman to Delay the Investigation of the Applicant's Complaint,* [2017] NIQB 38, Paragraph 58.
[145] Judicial Communications Office Tuesday 7 November 2017 Court of Appeal overturns Police Ombudsman Funding Decision, Summary of Judgment https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/SummaryJudgments/Documents/Summary%20of%20judgment%20-%20Court%20of%20Appeal%20overturns%20Police%20Ombudsman%20funding%20decision/Summary%20of%20judgment%20-%20In%20re%20Patricia%20Bell%20-%20071117.pdf

4.4 Own-Initiative 'Paragraph 11' investigations to the ECNI

Eight Paragraph 11 'Own-Initiative' Investigations Reports are published on the ECNI's website as having been completed since the onset of the statutory duties.[146] At the time of writing a further 'Own-Initiative' investigation was underway.[147]

The Investigations Procedure states that Paragraph 11 Own-Initiative investigations *"can be generated purely from within ECNI's own knowledge, or from matters of general importance brought to its attention by interested third parties*."[148] The Investigations Procedure sets out that "Paragraph 11 confers a powerful additional discretion on ECNI to initiate investigations" without a complainant, and therefore:

> Accordingly ECNI uses Paragraph 11 investigations strategically to tackle potential failures to comply with approved Equality Scheme which may significantly impact upon equality of opportunity and/or good relations.[149]

The Investigations Procedure cites various sources from which such an investigation can be initiated. This includes information obtained in the course of considering a 'Paragraph 10' complaint, information brought to the Commission's attention by external parties and also from within the Commission's own knowledge – the Procedure states that therefore:

> The Commission has put internal mechanisms in place to permit a regular evaluation of such information so that all parts of the organisation have input to this process and Commissioners can be advised of areas where the Paragraph 11 discretion could or ought to be exercised.[150]

In examining the 'Own-Initiative' Investigations Reports that have been produced to date it appears that very few have been entirely at the Commission's own initiative. The Commission does point out however that there are occasions where the ECNI will have been engaged with the public authority at the early stages of an investigation process prior to having receiving complaints from third parties, and that as such a process is not in the public

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[146] At least one other 'Own-Initiative' investigation has been concluded by the ECNI and has not been published but was released under Freedom of Information. This related to alleged failures to Equality Screen a re-structuring exercise at Ulster University resultant from budget cuts. The investigation had been initiated on foot of complaints by the University and College Union which had been raising the issue since 2012. The Statutory Duty Investigations Committee agreed an investigation in May 2013 and the Commission endorsed this and initiated the investigation in November 2013 and completed it in August 2014. The report presents a confused situation with the University first contending it did not need to screen re-structuring decisions as it had already screened its redundancy policy, but it subsequently transpiring that policies resulting from re-structuring had in fact been screened making the investigation into the matter redundant. The investigation concludes the Equality Scheme had therefore not been breached: *ECNI, Final Report of Commission Investigation Under Paragraph 11 of Schedule 9 of The Northern Ireland Act 1998 Statutory Duty Investigations Committee University of Ulster EC/14/07/09, August 2014.*

[147] This related to funding decisions by the Department of Communities regarding the Community Halls Pilot Programme and the Líofa Gaeltacht Bursary Scheme with the former having been requested by CAJ, who had identified 19 breaches of the Equality Scheme in relation to the Community Halls fund.

[148] *Investigations Procedure, paragraph 1.3.*

[149] Investigations Procedure, paragraph 5.2.

[150] Investigations Procedure, paragraph 5.4.

domain, this will not always be apparent.[151] In summary the eight published reports are as follows:

Public Authority and Subject	Alleged failure and Source
Belfast Education and Library Board, closure of facility in 2001 for pupils with 'emotional and behavioural difficulties.'	Failure to consult on screening of policy decision. No indication in report (2004) of how matter came to Commission's attention;
Department of Social Development, selection criteria for areas to receive regeneration support from EU peace funds (report 2006)	Failure to screen the policy decision with the public authority contending it was not a policy decision; Undertaken on foot of a request by Sinn Féin.
Northern Ireland Office, Anti-Social Behaviour Order (ASBO) legislation (Report 2006)	Failure to adequately consult. Undertaken following request by Children's and Young Peoples Commissioner (NICCY).
Department of Finance and Personnel, legislative position on 'reasonable chastisement of minors' (report 2007)	Failure to consult in relation to equality screening and failure to conduct an EQIA. Issue had been raised by children's rights groups.
Lisburn City Council in relation to one off decision to use d'Hondt to establish political composition of transitional committees (report 2009)	Failure to take into account an EQIA Not clear how brought to ECNI attention;
Department of Regional Development cessation of funding for Easibus service in Bangor and Londonderry (report 2012)	Failure to screen policy decision with public authority contending it was not a policy decision. Matter brought to ECNI attention by Omnibus Partnership representing disability and older persons groups.
Newry and Mourne District Council renaming of council owned playpark after IRA hunger striker Raymond McCreesh (report in 2014)	Failure to abide by substantive equality and good relations duties. On foot of complaints by the Orange Order and William Irwin MLA
Department of Social Development strategic housing policy (November 2015)	Failure to screen policy decisions Requested by CAJ.

In correspondence to an MLA in July 2014 who had asked an Assembly question regarding 'Own -Initiative' investigations the ECNI set out that it had considered six investigations since April 2012. All of these are listed above, save two requests to investigate OFMDFM,

[151] Comments of ECNI on a draft of this report.

neither of which resulted in agreement for an investigation. The first was a request from the Child Poverty Alliance in 2014 regarding the adequacy of a consultation on the Delivering Social Change for Children and Young People Strategy. The second was from CAJ in 2013 and is listed as being in relation to failures to screen and equality impact assesses aspects of the Social Investments Fund (SIF). Of the six requests the ECNI lists two as having been 'ECNI-generated', however these are the aforementioned Ulster University investigation (in which there had been the involvement of the University and College Union), and the Raymond McCreesh Park investigation (which took place in the context of complaints from the Orange Order and a DUP MLA).[152]

On the one hand this issue does show that the ECNI is receptive to considering requests from a diverse range of external organisations, as provided for in its investigations procedure. However, it also is indicative of the ECNI not strategically using its Own-Initiative investigation powers to tackle persistent and significant breaches of Equality Schemes on the basis of self identification and awareness of the issues within the Commission itself. This takes place in a context where the ECNI appears to agree that there are persistent and systemic problems with Equality Schemes compliance. There was a view expressed from Equality Coalition members that some significant breaches on key issues appear to go unnoticed in the Commission, where intervention would be expected. This included the range of policy decisions with major equalities impacts listed in the previous chapter, which had not been subject to equality screening at all.

Other examples included the *Social Investment Fund* (SIF) a fund ultimately of over £100m which was operated by the TEO and involved monies being distributed to groups without any open application process. This significant departure during the 2011-2015 mandate from key equality principles of open and transparent application processes, would be one where it would be expected the ECNI would intervene. Coalition members were therefore surprised to be told by the ECNI at one of our quarterly engagement meetings that the ECNI itself had not taken forward any work on SIF. (At the time of writing SIF is being scrutinised by the NI Audit Office.)[153] The ECNI did receive a request from CAJ to launch an Own-Initiative' investigation into the reported decision in the TEO by the then First Minister to block the allocation of monies to different SIF zones on the basis of objective need. The ECNI did not authorise an investigation into this or other aspects of SIF, and did not formally respond to the CAJ request or give reasons for not investigating. Albeit in the context of the adverse publicity over the blockage a political agreement had subsequently been reached on allocations that had allowed the release of SIF monies.

Other examples included the PSNI *'rehiring scandal'*. This involved the rehiring, as civilian agency workers, of over 1,000 former RUC officers many of whom had taken retirement severance packages as part of the Patten Commission reforms to policing. There were highly critical reports and interventions from other accountability bodies including the Audit Office, Public Accounts Committee and Northern Ireland Policing Board, that led to the PSNI ultimately taking a policy decision to entirely discontinue the practice.[154] The practice had

[152] ECNI Correspondence to Bronwyn McGahan MLA, 24 July 2014 (referencing Assembly Question AQW 31991/11-15).
[153] https://www.niauditoffice.gov.uk/publications/executive-office-social-investment-fund
[154] See for example https://www.niauditoffice.gov.uk/publication/police-service-northern-ireland-use-agency-staff or http://www.thedetail.tv/articles/rehiring-in-the-police-the-full-story

significant equality implications in a context where remedying a differential in the composition of the police service had been the subject of Northern Ireland's only peace process 'temporary special measure' which provided for 50:50 police recruitment to increase the number of Catholic police officers. There had also been steps to increase representation on other underrepresented groups, including women. The rehiring practice put this trend into reverse, as most of the rehired officers were Protestant males. Had the positions been filled from within the PSNI support staff, more significant numbers of Protestant women may have availed of opportunities and countered the gender imbalance in the police. Had there been open recruitment differentials on religion, gender and other grounds could have been better addressed. This situation would seem almost designed for an Equality Impact Assessment to lead to consideration of alternative policies which would better promote equality of opportunity. Compelling compliance with the PSNI equality scheme through the use of enforcement powers may have prevented the practice much earlier (it was not ultimately dealt with until 2012). However, there was no use of investigation powers by the ECNI in this matter.

A more recent and current example is the introduction of the '*Two Child Rule'* into Social Security and Tax policy. This UK-wide policy which has not been Equality Screened involves capping support mostly through Child Tax Credit and Universal Credit to the first two children in a family, and not providing payments to a third or other subsequent children. The policy was commenced in April 2016 for Child Tax Credits and its rollout was initiated into Universal Credit in Northern Ireland in September 2017. The two child rule will significantly drive up levels of child poverty and adversely affect children, women, and persons with dependents. It will also have a greater impact in Northern Ireland than in Great Britain due to larger family sizes. For the same reason it will also have greater impact on Catholic families in NI. There are therefore major adverse impacts across a number of Section 75 categories. The Commission were very receptive to the Equality Coalition in meeting and advising on request in relation to the application of the duties. However, given the gravity of the policy it is an issue that the Commission could reasonably have been expected to have engaged in on its own initiative.

Notwithstanding that 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. In relation to the process around decisions on 'Own-Initiative' investigations there were two main issues that were a source of contention for Equality Coalition members, where it was felt that powers could be exercised more effectively. These were namely:

- Excessive and unjustifiable delays in dealing with requests and taking forward Own-Initiative investigations that could render any remedies emerging from them 'too late';

- The concerns regarding the manner in which discretion had been exercised not to proceed with an Own-Initiative investigation;

In considering these matters it is important to first set out the process the ECNI uses to consider the authorisation of an investigation. At first, proposed Own-Initiative investigations are to be processed by the Investigations Team, who will raise the issue with

the public authority, consider their response and decide whether to refer the matter to the SDIC. In doing so investigators are to consider (in addition to whether there is an arguable case a breach of scheme may have occurred) whether it has significantly impacted on equality/good relations addressing questions including as to whether the issue is of substance and strategic importance, and if there is potential to change policies/practices or attitudes in public authorities. An assessment is given as to whether the matter is 'sufficiently strategic' to merit an Own-Initiative investigation and the SDIC discretion is then qualified in that if it concludes that there is an arguable case and the potential failure to "comply is a strategic matter that merits the initiation of an ECNI-generated investigation," then it will recommend an investigation to the full Commission.[155]

The following case studies provide examples of both delays and issues regarding the exercise of discretion in initiating an investigation:

CAJ request for Investigation of the Executive Office (TEO) into a failure to screen and a substantive breach of the statutory Equality Scheme regarding the First Minister's decision (and reasons for it) not to authorise the funding bid for Legacy Inquest Unit (October 2016)

The policy area: The Lord Chief Justice moved to establish within the courts service, further to a Judge-led review, the Legacy Inquest Unit in order to meet international obligations under the ECHR to deal with the backlog of legacy inquests relating to around 95 conflict-related deaths. The Department of Justice had sought approval for a funding bid for the unit from the NI Executive.

Equality issues: whilst the inquests relate to victims from a range of backgrounds they are mainly 'state involvement' cases involving the actions of state actors who were either directly responsible for deaths or where there is alleged collusion, where victims were predominantly men from the Catholic/nationalist community. There is an existing inequality, which the proposal would address, in that these cases tend to be those that have not previously been subjected to an effective investigation.

The policy decision: the policy decision in question relates to the urgent clearance procedure vested within the functions of the Executive Office (TEO), whereby TEO Ministers are asked to approve, or not approve, urgent matters put forward by Ministers. In this instance the First Minister had reportedly, initially in May 2016 and also reportedly in September 2016, blocked the clearance of the funding bid.

Alleged equality breaches: procedurally no equality screening had taken place of the decision, but also investigation was sought into a potential substantive breach of the duties as the First Minister had publicly linked her decision to block the funding bid to the types of victims involved.[156]

[155] Investigations Procedure, paragraph 5.5-5.8.

[156] See, for example, the Belfast Telegraph article of the 5 May 2016 entitled *"DUP leader Arlene Foster: Why I blocked plans to speed up Troubles probes." This* sets out the First Minister's reasons for her policy decision as relating to the categories of victims covered and not covered by current outstanding legacy inquests. The

> *Request to the ECNI* – in early October 2016 CAJ issued a request to the ECNI to launch an Own- Initiative investigation into the matter. Despite reminders and the need for quick intervention over six months passed without response until CAJ sought the intervention of the Chief Commissioner in April 2017 to update on the process. It transpired that the ECNI had not written to the public authority until the 19 January 2017, over three months after the request, and four months on, had not further progressed the matter since as the Commission was still awaiting a response to this letter. The ECNI formally responded declining the request to investigate in October 2017 a year after the request. The reasons given did not relate to the TEO policy decision the investigation had been sought on. Rather the decision, whilst confusing, relied upon the Northern Ireland Executive not being subject to Section 75 and made reference to other decisions by the Department of Justice that were not relevant to the matter on which the investigation had been sought;

The above example therefore records over three months passing before correspondence is issued to the public authority under the procedure, and that the Commission were prepared to allow a public authority not to respond for at least four months. The standard correspondence response target from a public authority is 10 days, and the Commission itself considers a month a reasonably sufficient time for a public authority to respond to a complainant before a Complaint-Driven investigation can be launched. It is not clear why the ECNI did not proactively chase a response or proceed to make a decision drawing inference from the failure to respond. Furthermore the Commission's decision, whilst not entirely clear, is then grounded in arguing Section 75 was not engaged in the TEO decision. If this was the Commission's position, rather than the decision being related to the substance of the complaint, it is not clear how it took the Commission a whole year to reach that conclusion. Such long delays on such pressing issues without any seemingly justifiable reason are not an effective manner in which to exercise powers.

> **Equality Coalition (along with Trade Union movement) request for Investigation of the Department of Social Development over the Welfare Reform bill**
>
> *The policy area*: The Welfare Reform Bill was designed to implement in Northern Ireland widespread changes brought about in Great Britain through the Welfare Reform Act 2012.
>
> *Equality issues*: welfare 'reform' involved significant cuts in social security provision with a range of impacts on vulnerable and low income groups, which would overlap with a number of Section 75 categories. There were also specific impacts on groups such as persons with disabilities. The Commission took the position that the legislation had the "potential to impact severely on some of the most vulnerable members of society." In relation to the draft EQIA the Commission stated "that the

article is subtitled that 'inquests are skewed towards killings by the state'. The First Minister is quoted as implying inquests do not deal with 'innocent victims', as is her party colleague Nigel Dodds MP.

data considered by the DSD were extremely limited and that minimal analysis of the potential impact of the proposals had been done."[157]

The policy decision: decisions were taken to implement the provisions of the bill – although subsequently some issues, further to the Fresh Start Agreement, were subject to a mitigations package effectively temporarily delaying them in NI; an EQIA was conducted.

Alleged equality scheme breaches: an EQIA was produced. In a context whereby the Minister had generally been a supporter of welfare reform the EQIA was very detailed, but was clearly highly flawed, most notably missing out analysis on four of the nine Section 75 groups (political opinion, religious belief, racial group and sexual orientation). This lack of analysis on these categories had the purpose or effect of disguising the adverse impacts of Welfare Reform on Catholics/nationalists and ethnic minorities – which can be deduced from the markedly higher levels of poverty within these groups, as well as disguising any specific impacts on persons of minority sexual orientation.

The Commission had shared 'considerable concerns' about the draft EQIA, and did not consider these had been fully addressed in the final EQIA of May 2012, noting outstanding concerns including "the limitations of data considered...proper analysis of the impact of proposals, identification of adverse impacts and adequate consideration of alternative policies and mitigating measures".[158]

Request to the ECNI –following the EQIA in May 2012 representations were made to the ECNI by the Equality Coalition, ICTU Welfare Reform Group and NGO Welfare Reform Group regarding the inadequacies in the EQIA and the use of the ECNI Investigation powers, prompting lengthy exchanges of correspondence with the ECNI. In December 2012 ICTU were informed the SDIC would make a decision in January and the Coalition were told in early January a decision was imminent. A decision was however not communicated until 4 March 2013 which said that while SDIC had felt the test of a 'required belief' the Scheme may have been breached had been met it had decided to 'defer' any investigation in light of a commitment by DSD to the ECNI that it would produce an updated EQIA by the end of that month (March 2013). This was ultimately provided by DSD in mid April 2013. The SDIC considered this Section 75 update as making some improvements but remained concerned about 'the full extent of compliance' with the Equality Scheme. Nevertheless the SDIC took the decision, in May 2013 not to initiate an investigation, noting that DSD were planning to take further actions.[159] The Equality Coalition wrote to the ECNI to express 'serious concern and dismay' at the decision not to use enforcement powers. The Coalition raised concerns that the decision provided a precedent for a public authority to simply continuously claim that a defective EQIA was a 'live document' and evade enforcement by committing to 'updating' it at a later stage. Further

[157] http://www.equalityni.org/Delivering-Equality/Addressing-inequality/Welfare-Reform/Policy-responses/Policy-position-on-Welfare-Reform
[158] ECNI Potential Investigation Under Paragraph 11, DSD, February 2013, EC 13/2/5.
[159] ECNI CEO Correspondence to DSD Permanent Secretary 13 May 2013.

> correspondence followed noting that the Commission had confirmed to the Coalition that both criteria in the investigations procedure (the required belief and that the issue in question had been 'sufficiently strategic' enough to warrant an investigation) had been met, and in this circumstance the procedure did not provide discretion to defer or not initiate an investigation. The Commission responded stating it did have discretion.[160]

It should be noted that the equalities impacts of the Welfare Reform Bill caused a political crisis that led to the near collapse of the devolved institutions when the nationalist and green parties declined to give consent to the legislation in the Northern Ireland Assembly in the context of the severe impacts it would have. The UK government imposed economic sanctions on the Executive for not implementing the Welfare reform bill that would rise to £114 million in 2015/16. At one stage the Executive passed a 'fantasy budget' that involved budgeting as if the sanctions had not been applied and a series of crisis talks led to the Stormont House Agreement and then, on the collapse of its implementation due to differences again over taking forward welfare 'reform', the *Fresh Start* agreement. The ultimate outworking of this was a package of Mitigation Measures of around £500 million to alleviate some of the most serious equalities impacts of welfare reform in the period 2017-2020. [161] This process however had not been prompted or required as it should have been, by the full application of the DSD Equality Scheme. Compliance would have identified adverse impacts that would have required consideration of alternative policies and mitigating measures that could in itself have prompted a much earlier resolution.

The decision not to use the ECNI enforcement powers when there was such a blatant breach in not considering four of the nine categories not only prevented the due consideration of mitigating measures but also led to recurrence. In subsequent Equality Screening on the 'Bedroom Tax' the Department also felt confident enough to continue its practice of missing out analysis on the same four of the nine equality categories, again with the argument that there was 'no data' on these categories. This decision, as alluded to earlier, was then challenged through a review request by CAJ, leading to the department considering alternative sources of data.

4.5 Patterns and precedents in ECNI investigations

This section considers the patterns and precedents in ECNI investigations report – encompassing both 'Complaint-Driven' and 'Own-Initiative' investigations. Whist such patterns are not 'case law' *per se* there is an onus on the ECNI to act consistently and the reports do essentially provide clarification as to how the ECNI interprets particular aspects of compliance with the duties.

Duties to screen, consult and conduct an EQIA:

Two early investigations into the Fire Service held that a failure to screen a policy (in these cases a mandatory retirement policy and a policy on 'standby/call-out' areas for flexible

[160] ECNI-EC correspondence January to September 2013.
[161] Welfare Reform Mitigations, Working Group Report, January 2016

duty officers') constituted a failure to comply with the Equality Scheme (Paragraph 10 complaints by James Beattie and John Allen respectively). Also in the area of human resources policy a complaint against Queens University for not screening an 'acting up' policy was also held to be a breach of the Equality Scheme (*Lesley Steer v QUB*). In an investigation further to a complaint by the Children's Law Centre against the Northern Ireland Office relating to Anti-Social Behaviour Order (ASBO) policy the investigation again held that there had been a failure to comply for not screening a policy. However this investigation took its finding further by going on to hold that the NIO had failed in its due regard duty to promote equality of opportunity by not consequently carrying out an EQIA into the policy stating that 'there must be an evidential threshold beyond which an assessment is required unless the public authority has good reasons not to do so' (*CLC v NIO*, p8). A failure to consult on the policy was also held, and the Commission mandated an EQIA as remedial action. **These investigations therefore establish the straightforward position that evading screening is a breach of an Equality Scheme but also that doing so in a circumstance whereby there is evidence of adverse impacts but no EQIA is conducted also constitutes a failure to comply with the duty.**

A Paragraph 11 investigation into DSD over failures to screen high level housing policy and pilot regeneration programmes also found that the equality scheme had been breached (ECNI v DSD, 2014). **This helped establish the position that 'high level' policy decisions and decisions labelled as 'pilots' are policy decisions that require equality screening**.

Another 'Own-Initiative' investigation found that decisions to cut funding can be policy decisions for the purposes of Section 75. This related to a decision to the 'cessation of funding for the Easibus service in Bangor and Londonderry', which had a particular impact on persons with disabilities and had not been screened. The Department contended that the policy decision in question was not a policy decision and therefore there was no need to screen. The Investigation found otherwise, holding that there was an obligation to screen, and given the equality impacts, conduct an EQIA (ECNI v DRD, 2012).

An Own-Initiative investigation also dealt with the length of a consultation period. This related to the NIO consultation over ASBO legislation for four and then five weeks when the equality scheme indicated a minimum time of eight weeks. The Investigation held there had been no breach however as the scheme did not have an 'unequivocal' commitment to eight weeks at each stage of policy development (*ECNI v NIO* -2006).

Consultation on Screening

An early 'Own-Initiative' investigation also established that a failure to consult on screening can constitute a breach of the equality scheme. This related to the decision by Belfast Education and Library Board to close a facility for pupils with 'emotional and behavioural' difficulties. The complaint contended there had been an initial failure to screen (a screening exercise was conducted retrospectively) and a failure to consult on screening with the Board contending it did not have to consult on screening. The investigation found that the Board should have engaged in consultation on screening as this was required by the terms of its equality scheme, but did not make any remedial recommendations (BELB, 2004).

By contrast an 'Own-Initiative' investigation into the Department of Finance and Personnel (DFP) in relation to policy on reforming the legislative position on reasonable chastisement

of minors found that DFP had not breached its scheme by not consulting on the outcome of equality screening as this was not a requirement of the DFP scheme (*ECNI v DFP*, 2007).

There is no provision in the current ECNI Model Scheme that explicitly requires consultation on screening. The Model Scheme, where followed, requires screening on EQIAs. It also requires consultation on "other matters relevant to the Section 75 duties."[162] This is not usually interpreted in practice as including screening.

Duties to take into account consultation and EQIA findings

A complaint brought by Cllr Paul Butler against Lisburn Council for a decision in 2005 to fly the Union Flag from six locations 365 days a year, considered the duties under schemes *to take into account consultation and EQIA findings* on new policies. In this instance the Commission did find a failure to comply with the equality scheme as the policy decision conflicted with the finding of both an earlier EQIA, and an EQIA in 2006 which rejected the permanent flying of the Union Flag. The Commission recommended the council revert to a policy determined in 2003 as a result of an EQIA.

Another complaint – by Jim Allister MEP alleged that DCAL had not seriously considered opposition to its proposals for an Irish Language Act. Whilst the investigation held there were shortcomings in the consultation, a third consultation process by DCAL had sufficiently demonstrated engagement with those opposed to the proposals and consequently a failure to comply with the scheme was not established.

These investigations therefore establish that a Scheme can be breached when there is a failure to take into account consultation and EQIA findings when reaching a decision; however, if due consideration is given to opposing views, and a policy decision to the contrary is nevertheless taken, the duties have been complied with.

Items placed on the property of a public authority

Some of the investigations have had to consider matters which generally fall within a public authority's 'function' but that do not relate to the development of a written policy or proposals, of particular significance is the *Gerald Marshall & Omagh District Council* investigation completed by the Commission completed in 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.

This particular investigation which was triggered by a complaint by a Dromore resident against Omagh District Council in relation to the presence of a memorial to the 1981 IRA hunger strikers in the town's Old Church Grounds and graveyard. The memorial had been constructed by a third party in 2001 but this land was owned by the Council who had not removed it. The Council argued there was no duty to screen as there was no policy established. The Investigation rejected this, finding among other matters that whilst the Council were not responsible for the initial placement of the memorial the Council had

[162] ECNI Model Scheme 2010, paragraph 3.1 states "We recognise the importance of consultation in all aspects of the implementation of our statutory equality duties. We will consult on our equality scheme, action measures, equality impact assessments and other matters relevant to the Section 75 statutory duties."

adopted a *de facto* policy of allowing it to stay, and should have conducted a screening exercise and a consequent EQIA on the policy. The Investigation therefore held the Council had failed to comply with its equality scheme and should conduct an EQIA.

Does this mean equality schemes compliance is engaged by any item placed by a third party and allowed to remain on the property of a public authority? The decision implies that such actions are a 'policy decision' that do require screening. It then holds that an EQIA would only be required when there are 'significant implications for equality of opportunity,'

In reaching the conclusion that allowing the memorial to remain constitute a policy the ECNI noted that the concept 'policy' in the Equality Scheme and guidance includes both written and unwritten policies. The ECNI also alludes to the definition of policy citied in its guides to the statutory duties as including "a course of action adopted or proposed…" The ECNI holds that the item being placed by a third party does not negate the matter falling within the Council's functions, and that the Council was responsible for the subsequent action in relation to the memorial.[163]

The conclusion that an EQIA is required is rightly codified in the report to those situations where there are 'significant implications for equality of opportunity.' The ECNI elaborates that the purpose of screening (in its guidance and reflected in the Council's scheme) is to identify policies with significant impacts on equality of opportunity and that the guide emphasises such policies must be subject to an EQIA. Significantly the ECNI then determines that there will therefore be circumstances where the duty to consider an EQIA is one to actually conduct an EQIA. Such circumstances are when the policy in question has significant implications for equality of opportunity.[164]

The reasoning in the report however for how this threshold was determined to have been met in this instance is less clear. The key passage in the investigation finding is as follows:

> The Commission takes the view that the political nature of the Memorial, and its high level of visibility on a site that is synonymous with Dromore, may have the effect of marking the village out as being Nationalist or Republican, and may not be conducive to good relations, and therefore the matter did have sufficient equality implications to be fully considered by way of an equality impact assessment.[165]

This reasoning is somewhat confused given as it refers to actions not conducive to the good relations limb of the duty triggering equality (rather than good relations) implications that warrant an EQIA.

The ECNI also references in support of the above conclusion the subsequent screening decision of the Council regarding selling off the land prompted an EQIA. This makes reference to complaints received by the Council from the Orange Order that the memorial

[163] *Gerald Marshall & Omagh District Council* Investigation finding 1: page 10-11; this also makes reference to the Council's decision to screen and EQIA a decision to subsequently sell the land in question to the Dromore Memorial Committee as further evidence that the original course of action constituted a policy.
[164] *Gerald Marshall & Omagh District Council Investigation* Finding 2 page 12:
[165] As above, page 12-13.

was 'sectarian and intimidatory', the 'Republican nature of the Memorial' and that the memorial could be being perceived as inhibiting use of the area by all of the local community. The screening also made reference to the opportunity existing to better promote good relations by altering the policy. An earlier legal opinion (generally on land law) is also cited in the report has having noted that the "The Memorial is regarded by some as being of a sectarian and offensive nature." The Complainant had also described the memorial as divisive and sectarian. There is no specific inquiry into these matters and their engagement with the equality duty in the report, rather perceptions articulated by complainants appear to be a sufficient evidence base to trigger the EQIA. (A number of these issues are picked up upon in the ECNI 2014 McCreesh Park investigation which is analysed below).

Whilst questions of perception and context are not uncommon in for example questions of compliance with FETO, the requirement of an EQIA if purely based on perceptions does leave a public authority open to some curious and potentially vexatious challenges. This is particularly the case if subjective concepts such as 'offence' are used. One recent example is a complaint to Mid Ulster Council from the 'British Truth Forum' seeking the removal of a town centre Christmas Tree in Magherafelt as it had not undergone an EQIA. The group argued that there were 'Muslims in the town and a lot of non Christians' who might be offended by the tree. The British Truth Forum made this complaint in the context of the Council having previously removed an unauthorised flag pole with a Union Flag from the same town centre site, the Forum contending that if the Council were saying that the Union Flag had offended people then so had the Christmas tree.[166]

The Dromore Memorial investigation therefore established that allowing the presence of an item, placed by a third party on the property of a public authority, which had equality implications, was a policy decision which required screening and an EQIA. This decision sets a precedent for the placement of items such as flags in similar contexts on the property of a public authority.

Scope of functions and decision making

On some occasions investigations have found the matter to be beyond the scope of the functions of a public authority. In a complaint against the Department of Environment's Planning Service adoption of a Planning Policy Statement (which had been screened) the Commission held that the Equality Scheme had been complied with as the complaint in part related to houses of multiple occupation (HMOs) in the Holylands area of Belfast, before HMOs had been subject to planning permission in 2004 (*Tony McGuinness v DoE*, 2008).

Another investigation related to a complaint that a Council had not screened a decision to sell off a sports pitch to a GGA club when there was also interest from a soccer club. The investigation found that the decision should have been screened and that would have led to a full EQIA, and there hence had been a failure to comply. The Council accepted that its policy in relation to the disposal of land should have been screened (Aaron Hempton v Strabane Council).

[166] See Young, Connla 'Loyalists demand removal of Christmas tree from town centre' Irish News 24 November 2017, p11.

Investigations have dealt with the issues of how the composition of Transitional Council Committees have been determined. One complaint against Limavady District Council, in relation to the use of d'Hondt to select committee members alleged that the system favoured an increase in nationalist participation, and should have been subject to screening and an EQIA. Despite there having been originally no screening of the decision to use this method the Investigation held that there had been no breach of the scheme as the Council had consistently always used d'Hondt to ensure minority representation (*Leslie Cubitt v Limavady Council*).

By contrast in a Paragraph 11 investigation into Lisburn Council on a decision to use d'Hondt for the transitional committee a breach of the equality scheme was found. The difference in this instance however was a Council Committee had voted to switch to the d'Hondt system as a one off to populate a Transitional Committee with the purpose and/or effect of replacing a seat that would have gone to the SDLP with one for the DUP. In this instance the Council had conducted an EQIA in 2003 that had determined in the council area d'Hondt should be avoided as it would not assure sufficient minority representation. The Investigation determined the Scheme had been breached therefore as the results of a previous EQIA on a policy had not been taken into account (Lisburn City Council, 2009).

One investigation examined a change in policy by DSD in relation to selection criteria for areas to receive regeneration support from EU Peace II funds, which had not been screened. The complainant, Sinn Féin, had contended that the most deprived urban wards on official statistics were 70% Catholic and 30% Protestant and that objective need criteria would have proportionately reflected this allocation but that instead, DSD had introduced a population size criteria excluding areas of over 5000 persons with the purpose or effect of a more 'parity' based allocation (56% Catholic, 44% Protestant). Somewhat surprisingly in this instance the Commission Investigation determined that this decision to change policy had not been a policy decision under the terms of the Equality scheme but rather had been 'a definitional tool.' In potential conflict with the Equality of Opportunity duty the Commission concurred with DSD that objective need deprivation was not the sole criteria for area selection. (*ECNI v DSD,* 2006).

Poor Screening

A complaint against the Department for Regional Development (DRD) in relation to policy on 'Restricted Zone Access Permits' and their enforcement, considered the adequacy of screening. The ECNI determined that the original policy restricting parking by disabled people and the increased enforcement of the rules was 'inconsistent with the proactive duty to promote equality of opportunity when applied to persons with severe disability'. The screening exercise was carried out in respect of the policy, but it had not sufficiently considered the adverse impact of the policy on disabled people. The Commission consequently recommended the DRD carry out an EQIA to specifically discern the practical effects of the policy on disabled people, and explore mitigating options. **A screening exercise of insufficient quality can therefore constitute the breach of a scheme.**

An early investigation also dealt with the *quality* of an EQIA by the DRD, ultimately concluding that a failure to comply had not been established in this instance (Anne Finlay v

DRD). On another occasion a complaint against a Larne Council decision not to enter into social partnership arrangements in relation to Carnfunnock Country Park, was held to raise equality issued but not to be a breach in that the screening decision had been 'reasonable' (David Hunter, director of AEL, v Larne Council.)

Substantive breaches of the 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. Given the significance of this it merits some detailed consideration. 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. This investigation held that there had been substantive breaches of both the equality and good relations limbs of the Section 75 duties.[167]

Prior to *McCreesh* the ECNI investigation *Paul Butler and Lisburn Council*, had given some indication of the threshold for a *substantive* breach of an Equality Scheme.[168] This was a complaints-driven investigation at the instigation of Paul Butler, then a Sinn Féin councillor in Lisburn, after the Mayor had participated in the lighting of an 11th night bonfire beacon in Stoneyford with Councillor Butler's election posters on top of it. The Commission assessed whether events related to the burning of the posters in this way constituted a failure to fulfil the Section 75 duties to pay due regard to equality and regard to good relations duties. The ECNI indicated 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, somewhat surprisingly, the Commission decided on the merits of the case that the Equality Scheme had not been breached.[169] Both investigations also establish that the actions of Mayors or decisions by other elected representatives in Councils engage compliance with equality schemes. The ECNI's position in relation to the actions of devolved Ministers has been more complicated.

A further example of where the ECNI has held the equality scheme is engaged in relation to the actions of Mayors relates to an incident where a Sinn Féin Mayor of Belfast was presenting Duke of Edinburgh awards to young persons in his official capacity. The Mayor had presented awards to others but declined to present an award to a teenage British Army Cadet at the ceremony causing public controversy. Whilst this was not the subject of an investigation the ECNI did issue a statement which held that the actions of the Mayor did engage compliance with the Council's Equality Scheme, and stated that the scheme would not be complied with if there had been less favourable treatment on grounds of 'political

[167] Equality Commission for Northern Ireland, Investigation under Paragraph 11, Section 9, Northern Ireland Act 1998, Newry and Mourne District Council Final Investigation Report, March 2014.
[168] Equality Commission for Northern Ireland, Final Report of Commission Investigation under Paragraph 10 of Schedule 9 of the Northern Ireland Act 1998, PAUL BUTLER & LISBURN CITY COUNCIL, October 2009.
[169] *Paul Butler v Lisburn Council* Page 7.

opinion'.[170] There is some ambiguity to the extent that this Section 75 category can be interpreted to encompass armed forces membership within its scope.[171]

In 2014 in the *McCreesh* Investigation, the ECNI was able to draw on the developments in case law in Great Britain in relation to the interpretation of 'due regard' and the Brown Principles.[172] The *McCreesh* decision does not reference there being an 'adverse impact' on equality of opportunity in reaching its decision. 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."[173] 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 issue of a chill factor could of course be considered an objective 'adverse impact' on a Section 75 group. In essence persons would not have equal access to Council leisure facilities as they are deterred from using them due to 'significant chill factors.' This has quite significant implications for public authorities who run facilities in a manner which may constitute a significant chill factor to a protected group under Section 75. One obvious example would be Councils who fly the Union Flag from leisure facilities. The principles established in the *McCreesh* investigation imply that this may constitute a breach of the equality scheme.[174] The decision also states that "The naming of public buildings, roads or facilities has the potential to be controversial and destabilising."[175] *McCreesh* does not directly place a value judgement on the individual in question but rather makes reference in to him being a 'controversial figure'.[176] The decision has the potential to place significant parameters on how public authorities can name facilities without breaching their equality

[170] "Belfast City Council, like all public authorities in Northern Ireland, has, under its Equality Scheme, made a commitment to the promotion of equality of opportunity and the promotion of good relations on grounds which include religious belief and political opinion. If arrangements were made to ensure that she did not receive her award from the Lord Mayor, on political grounds, this would not be in keeping with these commitments." ECNI Press Release 12/01/2011 "ECNI comment on Duke of Edinburgh awards ceremony" http://www.equalityni.org/ECNI/media/ECNI/News%20and%20Press/Press%20Releases/2011/ECNI-comment-on-Duke-of-Edinburgh-awards-ceremony.pdf?ext=.pdf

[171] This ECNI statement in relation to the Mayors actions appears to consider membership of the armed forces falling within the protected ground of 'political opinion' for the purposes of Equality Schemes compliance. There is some ambiguity around this as the ECNI in evidence to the Northern Ireland Affairs Committee on the Armed Forces Covenant in 2013 advised that "being a member of the armed forces community is not specifically protected as an equality ground under equality legislation". But stated that preferential treatment for members of the armed forces (in for example, housing and health provision) could constitute indirect discrimination on grounds of race, gender or political opinion. See: http://www.equalityni.org/ECNI/media/ECNI/Publications/Corporate/Commission%20Meetings/2013/cmeeting270213/Armed-Forces-Covenant-Inquiry-EC_13_02_09.pdf

[172] "...the decision maker must be aware of the duty; the statutory goals must be taken into consideration; "due" regard means the amount that is appropriate in the circumstances of the case; it is NOT a duty to achieve a particular outcome or result; the duty must be fulfilled at the time the decision is being considered; it must be exercised in substance, with rigour and an open mind; it is non delegable; it is a continuing duty; and it is good practice to keep records" McCreesh Final Investigation Report, paragraph 4.9, emphasis in original.

[173] McCreesh Final Investigation Report, paragraph 4.5.

[174] McCreesh makes clear that the facility in question is not exempt from the chill factor consideration merely because it is in an area predominantly used by one side of the community. McCreesh Final Investigation Report, paragraph 4.5.

[175] McCreesh Final Investigation Report, paragraph 4.5.

[176] McCreesh Final Investigation Report, paragraph 4.14.

duties. Notably the decision makes clear that it does not matter if the facility, like the play park, was named some time ago as the "duties are ongoing duties".[177]

A substantive obligation on public authorities to run their facilities and functions in a manner which does not unduly constitute a significant chill factor to a Section 75 group is clearly in keeping with the purposes of the statutory duties. However there have been some concerns raised that some caveats and parameters would need to be placed on such a framework, to avoid conflict with the purpose of the duties when objections are grounded in prejudice or mere association with the 'other side' or any issue which is deemed 'divisive'[178] An obvious example is Council involvement in a LGBT pride event being considered a 'chill factor' by a subset of the Section 75 category of religious belief.

The risk of subjective interpretation is greater when considering the precedents established in *McCreesh* in relation to the good relations limb of the duty. These appear to imply that any issue that is politically contentious - which would include a raft of equality and rights issues – engage the good relations duty.

The *McCreesh* investigation states that the good relations duty is 'certainly engaged' in the context of both a complaint by the Orange Order to the Council and that there has been 'much public discussion in the context of good relations and a shared future' which itself is seen as 'indicative of the potential for good relations to be damaged'.[179] The ECNI concludes that the 'good relations' duty has been breached by the decision to maintain the McCreesh park name but it is not entirely clear as to *how* and *what in particular* has breached the 'good relations' duty (beyond stating that both equality and good relations duties had been breached as they had not been "exercised in substance, with rigor and with an open mind.")[180] The Commission did cite case law that elected representatives should be impartial and not show bias in decision making, and the decision states "*In this particular case, the Council's decision appears to be based on Councillor's views on the wishes of one section of a divided community rather than on how this decision will impact on good relations*".[181]

Taking a step back from the specificities of the *McCreesh* decision this precedent does present a challenge for Councils and other public authorities when seeking to take a decision where different sections of a divided community, or their elected representatives, take different positions and a decision has to be taken one way or the other. This can be addressed procedurally by 'taking into account' the opposing view (as for example the ECNI

[177] McCreesh Final Investigation Report, paragraph 5.2.
[178] In relation to harmonious workplaces and services fair employment law provides protection against 'sectarian harassment' and discriminatory detriment, rather than outlawing any matter which is 'divisive' or associated with the other side. Notably the recent fair employment tribunal case of *Martin v DSD*, threw out a dignity at work complaint of an employee objecting to pictures of colleagues at a GAA charity match on the DSD intranet site. Employment Tribunal decision CASE REF: 39/13 FET: this dismissed the claim of a DSD employee who in part had alleged violation of the DSD Dignity at Work Policy when he, as a Protestant and Orangeman, had seen annotated pictures relating to a Charity GAA match on the Department's intranet site. The Tribunal considered those raising complaints against the same as 'ultra sensitive' finding it "surprising, to say the least, that any reasonable person could have considered it a violation of his dignity, or thought that it created an intimidating, hostile or offensive workplace environment."
[179] McCreesh Final Investigation Report, paragraph 4.5.
[180] McCreesh Final Investigation Report, paragraph 5.4.
[181] McCreesh Final Investigation Report, Paragraph 4.1.

held in the Complaint-Driven Investigation into DCAL). However, the current ECNI recommended framework that adopts equalities concepts such as 'adverse impact' into the good relations limb of the duty does risk any matter, including those that are rights based, deemed politically contentious being considered an 'adverse impact' on good relations and hence a potential breach of the equality scheme if not remedied accordingly by the consideration of alternative policies and mitigating measures.[182]

The final chapter of this research makes conclusions and recommendations in light of the learning set out in the substantive chapters.

[182] A number of Councils have now adopted an alternative methodology promoted by the Equality Coalition that focuses on the positive duties to promote good relations and harnessed the definition in Great Britain of good relations primarily focusing on tackling prejudice and promoting understanding. This methodology, in the Coalition's view, mitigates against the risk that the good relations duty essentially becoming a 'political veto' and focuses back on the duty as a positive obligation that can have a useful practical effect in promoting additional actions by public authorities in accordance with the original aim of the duty.

5. 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 interviews 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 considers the process for authorising Own-Initiative investigations as being 'rather convoluted' and are critical of the questions that are set out as criteria. Dickson and Harvey are critical of the length of time ECNI investigations can take, and whilst recognising the need for thoroughness point that the matters being investigated 'are not terribly complex' so as to always warrant such a protracted process. Noting that "in the interim the alleged failure to comply with the Equality Scheme in question could be impacting very adversely on individuals or organisations who are within one or more of the groups 'protected' by Section 75." 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' policies 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.

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