

Equality Coalition Formal Submission on Consultation of Equality Commission
“Revised Policy and Procedures for Complaints and Investigations Draft”
(Revised Policy)

Executive Summary

Background

- The Equality Coalition (Co-convened by CAJ and UNISON) is the representative network of civil society organisations working across equality issues in NI;
- The Equality Commission for NI (ECNI) is the statutory equality body, and the enforcement agency for the statutory equality duty in Section 75 of the Northern Ireland Act 1998 (and Schedule 9) through powers of investigation;
- Case law has also relatively recently expanded the potential for Judicial Review of failures to comply with the Section 75 duties, although the process with the ECNI usually should have been first followed;
- Research from both the ECNI and Coalition has found significant concerns regarding patterns of non-compliance by many public authorities with the Section 75 Duties. Coalition research also raised significant concerns regarding the manner in which the ECNI was exercising its s75 powers, including issues of prolonged delays;
- The ECNI has a statutory duty to keep under review the effectiveness of the Section 75 duties, and at the time of the Coalition research had committed to a review of its powers of investigation to enforce Section 75;
- In 2018 a complaint by CAJ to the NI Public Services Ombudsman in relation to the ECNI handling of an investigation request where there had been a prolonged delay, led to a remedy whereby the ECNI, as well as reviewing its procedures, would also set clear timeframes for the whole investigation process;
- Ten months on from the resolution with the Ombudsman the ECNI issued draft revised Investigations Procedures for the present Consultation which is active until June 2019;

Response to the consultation document

- **Overall:** whilst welcoming the consultation process the Coalition has a number of significant concerns about the proposals that would appear to reduce legal certainty over when the powers will be exercised, and make it more difficult to make complaints, and create circumstances where ‘own initiative’ investigations by the ECNI are likely to cease entirely. This calls into question the ECNI’s commitment to effective exercise of the powers;

- **Timeframes:** Despite being part of the remedy agreed with the Ombudsman, there are no timeframes in the proposed policy for an investigation, the only timeframe for the ECNI, is an extraordinary 16 weeks to decide whether or not to investigate. Such a length of time is likely to often render any exercise of the powers ineffective as decisions will have progressed. It is also likely to preclude any enforcement through judicial review. There is no justification for further institutionalising such lengthy delays, particularly in matters that are ‘not terribly complex’;
- **Timeframes amendments:** We advocate significant changes to the timeframes in the procedures to ensure the powers are used effectively. This includes looking at a complaints form/template; increasing SDIC (decision making committee) meetings to monthly; strict timeframes for initial assessments and for the actual investigation (we recommend one month, with a view to this being extended in complex cases by a further month;) and timeframes for report publication;
- **Procedural amendments complaints:** we recommend provisions to allow complainants a face to face or telephone engagement with the ECNI; the publication of decisions to or not to investigate;
- **Factors in deciding a complaint:** we urge greater legal certainty over the factors considered when a decision is taken to launch an investigation, including the presentation of same as a factors for and against list and the narrowing of discretion;
- **Paragraph 11 complaints:** the procedures appear to seek to narrow the potential for third parties to seek the use of the ECNI powers to investigate without a complaint, which may have the effect of the powers not being used at all, we urge reconsideration;
- **Amendment provision:** The provision in the draft policy that the ECNI can summarily amend or change its draft policy at any time for any reason should be removed or amended to reflect technical changes;
- **We also raise a range of other issues in relation to:** clarity of the roles of the Commission per se and the SDIC; the requirement that a complaint to the ECNI must be the same as to the PA; the lack of clarity over the definition of a legal person;
- **Consultation Process:** Unusually there is no formal consultation document, rather the consultation is based upon the set of draft revised procedures itself and a questionnaire. This means the rationale for each proposed change is unclear. On request from the Coalition the ECNI did make available a ‘rationale for revisions’ document, however this document is very brief and does not set out the rationale for any of the changes;

This is a formal submission to the Equality Commission on Northern Ireland (ECNI) Consultation on their investigative procedures, on behalf of the Equality Coalition. The Equality Coalition is jointly co-convened by UNISON and the Committee on the Administration of Justice (CAJ). Cumulatively, the member organisations in the Equality Coalition work across all nine equality categories covered by Section 75 of the Northern Ireland Act 1998, as well as on other recognised protected equality grounds, including (but not limited to) socio-economic status, language, citizenship, irrelevant criminal record and immigration status. There are several pressing issues with the draft investigative procedures that we strongly urge the ECNI to modify.

The CAJ complaint to the Ombudsman

The context for the ECNI's decision to change and consult on their investigative procedures is important in understanding the issues that the Equality Coalition has with the current draft. Facing a review of a CAJ complaint by the NI Public Service Ombudsman, the ECNI decided to proceed with the recommendations that CAJ set forth rather than have the Ombudsman conduct an investigation of the complaint. A summary of the recommendations are as follows:

“On 21 June 2018 the Ombudsman notified us that the ECNI had agreed to offer a remedy as an alternative to the investigation proceeding. The CAJ had requested by way of remedy that ECNI:

- *Revisit its original request for an investigation in to the alleged breach of the TEO Equality Scheme;*
- *Review its complaint handling procedure; and*
- *Set clear timeframes for its investigation process including waiting time for responses from Public Authorities and a timeframe for ECNI decisions.*

ECNI has agreed to all of the above although it asserted that it was already undertaking a review of its complaint handling process and its investigation process.”

It is notable that the commitment to clear timeframes for the whole investigation process 'includes' (but is not limited to) waiting times for responses from public authorities. One element of the CAJ complaint (which related to the ECNI taking around a year to take a decision not to investigate a matter on a disputed technicality) related to delay whereby the ECNI had taken almost four months from receiving the request to write to the public authority, and four months after this stated it had not made a decision as the public authority had not yet responded. No explanation was given as to why the ECNI had waited for four months, without pursuing the matter with the public authority (or drawing inference from the lack of a response) on what was a pressing issue (the public authority was ultimately held to have acted unlawfully on the decision on separate grounds.)

Ten months on from the Ombudsman resolution the ECNI has created the Revised Policy paper for consultation. The ECNI should transparently state that they have been reviewing their complaint and investigative procedure as part of a remedy agreed with the Ombudsman, and that this included commitments to set clear timeframes for the investigation process – as otherwise other consultees are unsighted as to this commitment when responding to the consultation exercise. The main comments from the Coalition are set out below:

1. Timelines and process for the ECNI investigation process

The commitments made to the Ombudsman to “set clear timeframes” for the investigation process have not been complied with. No strict timeframes apply to the ECNI at any stage of the process. At some stages of the process aspirational timeframes apply to the ECNI, at other stages – including the time frame for the actual investigation – they are not set at all. This is summarised in the table below:

Timeframes in proposed policy once complaints to ECNI lodged/investigations requested

Responsible body	Process	Timeframe Set [para]
ECNI	General timeframes for process	“a number of months” but depends on circumstances 1.10
ECNI	Assessment of Complaints by ECNI decision-making Committee (SDIC)	“timely manner” – “aims” to be “within 16 weeks” of receipt of complaint AND consent from complainant [9.4-5]
Public Authority	Time given to respond to ECNI on matters raised in a complaint	“reasonable time” “normally 20 working days”
Complainant/ public authority	Appeal (review) of an ECNI decision to or not to investigate	Strictly 20 working days from decision [9.16].
ECNI	Decision of the Appeal (review request)	No timeframe set – beyond “timely manner” [9.19]
Public Authority	ECNI seeks response from public authority when raising concerns that may lead to an ‘own initiative’ investigation	20 Working Days [10.4]
ECNI	Decisions as to whether to launch own initiative (Paragraph 11) investigations	No timeframe set [section 10]
ECNI	Timeframe for actual investigation to take place	No timeframe set [section 10]
ECNI	Assessment of evidence for an investigation	“timely manner” [11.5]
ECNI	Approval of draft Investigation reports	No timeframe Set [section 11]
Public Authority / complainant	Comments on draft reports (re accuracy, further evidence or on findings)	“reasonable time” [11.9]
ECNI	Approval of final report following comments on draft	No Timeframe Set (but Committee will only meet five times a year [6.3])
ECNI	Publication of approved reports	No Timeframe Set [11.10]
ECNI	Whether action recommended in an investigation was undertaken by a Public Authority	[“reasonable time” 1.9/11.18]

Pre-complaint timeframes

In addition to the above there is also the question as to how long a complainant should wait for a response from a public authority (PA) (to an initial complaint) before being entitled to

submit an admissible complaint to the ECNI. At 8.14, the review states, “*The public authority’s timescales for this should be set out in the section of its Equality Scheme that deals with complaints. The Commission advises that one month should normally be sufficient, that is 20 working days.*” It then states that “*8.15 If the [PA] does not respond within the timescales set out, the complainant should contact the [PA] in the first instance.*” Only after contacting the PA a second time does the Commission say that the complainant can contact the ECNI. The second contact requirement does not have an indicative timeframe. ECNI should clarify that, whilst a complainant may chase a PA, that complaints will be admissible after the initial 20-day period has expired.

Timeframes for the ECNI

There is no set timeframe for actual investigations (which have previously been subject to significant delays) in the proposed policy. The policy also provides that the Committee (SDIC) will only aim to meet five times a year – this itself will lead to significant delays on decisions to investigate. Also, the SDIC must approve draft reports and subsequent final reports. Despite PA’s / complainants only having 20 working days to respond to drafts a further month at least will then pass before approval.

The only timescale in the Review that applies to the ECNI is in section 9.4-9.5.

*“9.4 Written complaints to the Commission will be assessed by the Committee **in a timely manner...***

*9.5 The Commission **aims** to present complaints to the Committee within **16 weeks** of receipt of the written complaint **and consent from the complainant.**” [emphasis added]*

However this aspirational commitment is itself subject to a provision, at paragraph 7.1 that the ECNI may “at any time and at its own discretion, vary or amend this policy and procedure.” The proposed policy therefore does not set clear timeframes across the investigation process.

We can see no justification whatsoever for a period of almost *four months* to decide whether to investigate a complaint or not. This timeframe would stifle effective enforcement by the ECNI (as PA decisions may have long been taken). Furthermore, the four month waiting period may prevent a complainant from being able to proceed to judicial review if they are not satisfied with the result of the ECNI investigation (an application for leave for judicial review must usually be filed no later than three months from the date when the grounds for the application first arose).

The sixteen weeks will only commence once a complaint is submitted and subsequent consent is obtained from the complainant in writing – which further will delay the start of the process, it is not clear why this cannot be done concurrently as part of, for example a complaints form/template.

The ECNI has not presented any evidence which justifies the need for sixteen weeks to prepare the complaint to the SDIC. Previous independent reviews of the ECNI powers (Dickson and Harvey report) explicitly criticizes the lengthy time delays pointing to the “the

matters being investigated” not being “not terribly complex as to always warrant such a protracted process.”¹ Most failures to comply with equality schemes are fairly straightforward matters which are often immediately apparent, for example failures to Equality Screen or consult on a policy decision at all, or the completion of an Equality Screening Report so bad it clearly has not involved an assessment of the potential impacts on equality of each Section 75 category (for example, when a PA has simply copied and pasted the same sentence into all of the boxes). We would advocate for monthly meetings of the SDIC and a request being considered at the next available meeting. We do not consider it unreasonable for an initial assessment of a complaint to be done usually within two weeks, with a public authority being given ten working days to respond, and potential for that timeframe to be extended if the complaint is particularly complex.

In relation to the conducting of an investigation we believe a period of one month would suffice in most straightforward cases, this could be a period subject to extension by a further month in more complex cases. This would allow complaints and investigations, particularly into straightforward matters, to be completed within three of months (including time to gather comments on a draft).

Procedural

We consider other additions should be made to the ECNI procedures in order to facilitate compliance with the above timeframes. This includes a complaints form/template that would concurrently seek consent.

It is notable there is no process beyond receipt of the written complaint for any further dialogue with the complainant, at either the pre-investigation or investigation phase (the distinction between these phases is discussed later in the document). There are no provisions for either a face to face meeting or even telephone contact, this appears to only happen with the PA. Our experience of lodging complaints to the ECNI (including the CAJ complaint that was ultimately sent to the Ombudsman) was that misunderstandings or queries could have been sorted out much sooner had such a process been in place. We would urge that such processes are incorporated.

In relation to the pre-investigation phase, we advocate this should incorporate provisions for staff to assist complainants with filing valid (admissible) complaints, if necessary separately to those presenting the complaints to the SDIC. At the pre-investigation phase the role of ECNI staff should be to receive the complaint, gather any further information needed from the complainant, seek a response from the PA (and seek or gather any further information from them, e.g. screening forms could be readily available) before presentation to the next SDIC. This would mean at most six weeks would normally be the maximum for a decision (depending on how close to an SDIC meeting the complaint is submitted). The admissibility and merits of decisions could then be considered, and a decision taken on an investigation or not, with reasons given.

¹ The Equality Coalition ‘*Equal to the Task? Investigative powers and effective enforcement of the ‘Section 75’ Uequality duty*’ (January, 2018), page 24.

We also consider there should be provision for Complainants to be able to present their case directly to the SDIC Committee. This would reduce potential misunderstandings, as well as provide the SDIC an opportunity to ask the complainant questions directly.

All SDIC decisions, anonymised where necessary, should be published accessibly by the ECNI on their website, in the same section as investigations reports, this would better reflect the level of work undertaken by the ECNI. This will also help to shift the current culture of PA non-compliance with Section 75 duties, and will provide guidance and support to claimants. The proposed policy does codify and clarify the process for the review (appeal) of a decision.

At the moment it could be characterised that there are currently two investigations happening: 1. Investigations that are authorised by the SDIC, and 2. De facto “pre-investigations” undertaken prior to the complaint being presented to the SDIC. The issue is that the vast majority of complaints appear to be “pre-investigated” by the ECNI prior to an investigation determination by the SDIC. In the “pre-investigation” either a remedy understanding is reached with the PA, or the ECNI determines that the complaint should not be investigated on its merits. It appears that the ECNI presents their finding and decision about the complaint from the “pre-investigation” to the SDIC for approval. The risk with this is that the ECNI preliminary investigation is not transparent, recorded or published. Furthermore, the “settlement” reached with the PA (typically where they agree to remedy an alleged failure) is not enforceable or published to assist future complainants and/or PAs. There is also no clear recourse available for a complainant if the PA does not comply with the agreed remedy. We therefore recommend the above changes.

Recommendations regarding timeframes and process:

- The ECNI should consider a complaints template / form that includes seeking necessary consent from the complainant at the time of the complaint being lodged in order to prevent an unnecessary delay in commencing the process;
- The SDIC should meet once a month to make decisions on investigations as well as considering draft & final reports; (if necessary the size of this committee should be reconsidered)
- The ECNI should set a time frame for an initial assessment of a complaint to go to the SDIC within two weeks of receipt (or the next available meeting) factoring in a ten day period for initial PA response; this could be extended to four weeks in particularly complex cases;
- Timeframes should be introduced for the actual investigation. We recommend one month, with a view to this being extended in complex cases by a further month;
- We recommend that draft reports are then sent to the next SDIC committee, final reports to a subsequent SDIC committee and that reports are published as soon as possible thereafter;
- In relation to process we recommend provisions are inserted allowing complainants a face to face or telephone engagement with the ECNI investigating official at the initial and other stages of the process whereby clarification or further information could be gathered;

- Explicit provisions for the ECNI to assist complainants in filing admissible complaints should be added to the procedure;
- All SDIC decisions, anonymised where necessary, should be published accessibly by the ECNI on their website, in the same section as investigations reports, this would better reflect the level of work undertaken by the ECNI;
- We welcome a codified process for a review (appeal) of a decision be included in the procedures;

2. The factors for determining whether to investigate a complaint

Beyond admissibility, paragraph 9.10 of the proposed policy sets out a non-exhaustive list of factors that determine whether to investigate a complaint. The predecessor policy (2010, revised 2014 to reflect changes in the ECNI structure), at paragraph 4.4 contained a non-exhaustive list of reasons for NOT investigating a complaint including some of the above.

In general, we would urge that the list is separated into criteria to be considered for and against initiating an investigation, in a similar matter to the Code for Prosecutors. This is because a number of factors could otherwise have an ambiguous interpretation.

The following table provides a comparator.

Factor in revised draft policy	Comment
<ul style="list-style-type: none"> The public authority has committed to action to remedy the matters complained of, in line with its Equality Scheme commitments. 	<p>As alluded to above if a decision is taken not to investigate on these grounds the agreed remedial action should be published on the ECNI website. This should include whether the remedy was agreeable to the complainant. We also consider the ECNI should include a review procedure when invoking this factor to monitor whether the PA has complied with its commitments to remedial action within a reasonable stipulated timeframe set down by the ECNI. If not, the procedure should provide for consultation with the complainant and reconsideration of the decision not to investigate.</p>
<ul style="list-style-type: none"> The matters alleged in the complaint relate more to policy goals or policy outcomes sought by the public authority than its Equality Scheme commitments. 	<p>We cannot see how this factor sufficiently differs from the following factor that there is not an arguable case the scheme has not been complied with, and suggest it is deleted.</p> <p>In doing so the ECNI should bear in mind the initial process of advising a complainant, which may lead to initial contacts better tailoring complaints to actual breaches of scheme;</p>
<ul style="list-style-type: none"> There is not an arguable case that a failure to comply with the approved Equality Scheme has occurred. 	<p>We concur that this should be the primary factor for not investigating. Again in the context of this outcome being published.</p>
<ul style="list-style-type: none"> The Complainant is not co-operating with Commission staff. 	<p>It is unclear under the present proposals how this issue could possibly arise – there is currently no role for the complainant once the complaint is submitted beyond awaiting the outcome – there is nothing not to cooperate with. If the procedures are revised the ECNI should have a clear policy as to what such a circumstance would entail, including a written warning process for complainants if they intend</p>

	to halt or dismiss a complaint investigation due to non-cooperation. There also needs to be a set policy with consequences for PA non-cooperation. We are concerned that non-compliance with undue 'confidentiality' restrictions should not be considered as a reason for ending an investigation. There is also no provision to discontinue or not investigate if a complaint is withdrawn.
<ul style="list-style-type: none"> The alleged failure to comply with the approved Equality Scheme is already subject to Commission investigation. 	Whilst we understand this consideration, there may be circumstances where it is more effective and fair to join or augment a complaint to an existing investigation. This could be the case whereby an additional complaint either provides additional insight or information into an on-going investigation, or contains additional grounds (breaches) to the ongoing investigation;
<ul style="list-style-type: none"> Investigation of the matters alleged would be disproportionate in terms of its impact in the public authority fulfilling its Section 75 duties. 	We respond to these factors jointly as they seem to significantly overlap. We would prefer to see a category whereby the consideration is given in favour of investigation as to whether there are potential significant impacts on equality of opportunity in relation to the policy in question.
<ul style="list-style-type: none"> The extent to which the likely resources required for an investigation is commensurate with the benefits to be gained. 	
<ul style="list-style-type: none"> The Commission has investigated similar matters alleged within the preceding two business years. 	This is new to the policy and deeply ambiguous – if it is a factor in favour of an investigation – to target ongoing and recurring breaches, this makes sense. If it is a factor against it would provide a way out of being investigated by PAs who recur;
<ul style="list-style-type: none"> Any other relevant consideration 	We would suggest this is replaced not only by the above measure of the policy potentially adversely impacting on equality but also, by tying a factor in favour of investigation to a strategic enforcement strategy of the ECNI and identified persistent areas of non-compliance with Section 75. We would also suggest likely 'substantive' breaches of the equality duty (in breach of commitments to comply with the general duty in schemes) would particularly favour an investigation.
FACTORS removed from previous policy	Comment

<ul style="list-style-type: none"> • The policy/matter could property be considered to be affirmative action to correct disadvantage or combat inequalities. 	<p>We strongly recommend that this remain in the current Investigation policy, as it is still very relevant and necessary.</p>
<ul style="list-style-type: none"> • The public authority has agreed to submit the matter to Equality Impact Assessment or, if already doing so, has agreed to consider the particular issue and consult about it as part of that Assessment. • The action taken by the public authority when the complaint was brought to its notice was sufficient to remedy any potential failure by it to comply with its approved Equality Scheme • The policy/matter under consideration is due to be reviewed, discontinued or superseded. 	<p>These appear to have been superseded by the above factor on committing to action in line with equality scheme;</p>
<ul style="list-style-type: none"> • The nature of the complaint is such that the individual or person affected by it will not derive any benefit from investigation. 	<p>The Coalition and independent reviews had criticised this factor and we welcome its removal;</p>
<ul style="list-style-type: none"> • A more appropriate form of redress is provided by anti-discrimination legislation. 	<p>We agree there is no need to retain this, as it is not either or.</p>

Overall we would urge changes to introduce legal certainty into the decision making process as to when the SDIC is likely or not to approve an investigation. We would seek the above changes plus the insertion of a provision, as is in the existing procedures in relation to paragraph 11 investigations, whereby when the factors in favour outweigh those against an investigation the SDIC will commit to instigating an investigation. We believe the goal should be for the ECNI to be investigating a substantive majority of admissible complaints, and that the criteria should be drawn up and discretion narrowed to this end.

Having subjective and discretionary criteria for not investigating a valid complaint erodes public trust in the ECNI and leaves the investigation decision open to allegations of potential bias. We advocate that such changes would make the use of the enforcement powers finally effective.

Paragraph 11 complaints

The procedures for determining a paragraph 11 investigation (i.e. an investigation at the ECNI's own initiative without a complaint) are set out in section 10 of the document.

In relation to how a paragraph 11 investigation may be triggered the procedure remains quite vague, stating that the ECNI assesses information 'from a range of sources' to identify evidence that may present concerns about a public authority complying with its scheme. However there is nothing beyond this tying such matters to ECNI assessments of consultations on policy proposals, or priorities in a strategic enforcement strategy or other

mechanisms. The 'Equal to the Task' report noted that few, if any, ECNI paragraph 11 investigations had actually been initiated at the ECNI's own initiative, rather than on foot of being raised by a third party. Yet the current policy document proposes no changes to this.

There is also no process set out for a third party to raise concerns with the Commission and to seek the ECNI to use its powers of own initiative investigation; despite this being the basis of almost all Paragraph 11 investigations to date. The review (appeal) process for such decisions is also limited to the Public Authority and not any complainant.

Overall it appears the ECNI is seeking to preclude third parties from advocating for the ECNI to use its own initiative powers, and in the context of the ECNI having rarely, if ever, otherwise used such powers, could spell the end of their usage entirely.

The factors to determine whether the ECNI will use its own initiative powers are set out as follows in paragraph 10.7:

- 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?"

In relation to these criteria we would urge:

- Greater correlation with the factors and proposed 'for and against' format for Paragraph 10 (complaint-driven) investigations;
- The first criteria (substance/strategic importance) should be further elaborated upon to include factors relating to where there are significant adverse impacts on equality of opportunity; or recurring systemic issues; 'strategic' importance could also be tied to an enforcement strategy.
- The perceived failure not otherwise being pursued is an important factor that could be clarified to in particular include circumstances where it would be difficult for a directly affected person to take a complaint. (for example if a child is directly affected by a PA failure, or an organisation dependant on a PA for funding is directly affected).

3. Confusing chain of command between the Committee and the ECNI:

The stated purpose of the document is to set out the procedures for complaints and investigations, however there are some ambiguities. Take section 6 on the respective roles of the SDIC and Commission:

“6.1 The commission has delegated responsibility for its duties on complaints, and investigation of those complaints [under paragraph 10 and 11]... to a Committee of its Commissioners. The Committee is known as the Statutory Duty Investigations Committee.

*6.2. **The Committee will make recommendations** that the Commission should form a belief that a public authority may have failed to comply with its approved Equality Scheme and investigate... **The Commission decides whether to investigate.**” [emphasis added]*

However, Section 9 “Equality Commission action on a Written Complaint” contains multiple references to the Committee having the authority to decide whether or not to investigate a complaint.

*“9.7 The Committee will decide if [the complaint] is made **in accordance with the criteria set out in Paragraph 10***

9.10 The Committee will give consideration to a range of factors in order to reach its decision on whether to investigate a complaint or not.

*9.11 If the Committee decides **to investigate** the complaint made, the Commission notifies **both parties** that the complaint will be investigated.*

*9.12 If the Committee **decides not to investigate the complaint** made, the Commission must give reasons for this to the complainant. The Commission will notify both the complainant and the public authority of the reasons.”*

Section 10 actually states that the Committee can authorise the Commission to investigate a complaint.

*“10.6 Where the Committee believes that the public authority may have failed to comply with its approved Equality Scheme, and where it considers there is merit in conducting an investigation into the potential failure, **it will recommend authorisation of an investigation to the Commission.**” [emphasis added].*

This process to the request for a review of a complaint decision then further highlights the contradictions in the document.

It is unclear whether or not all complaints are assessed by the Committee. In the Review, section 9.4 states that written complaints to the Commission will be assessed by the Committee who consider a range of factors. However, section 9.6 contradicts this and states that an assessment of the complaint is presented by the Commission to the Committee.

Given the contradictions this may just be a drafting problem – however if not, an SDIC committee that plans to meet only five times a year, having to have its decisions endorsed by a full Commission is a further recipe for delay.

In general, the responsibilities between the Committee and the Commission should be clearly delineated and explained. If the Committee is ultimately responsible for deciding whether or not a complaint shall be investigated (which we recommend), this should be clearly stated. If the Committee is purely advisory and the ultimate authority for investigation decisions must reside with the Commission, this should also be clearly stated, but sequenced to avoid delay.

4. Other Issues raised by Equality Coalition members:

4.1 Complaints being the same:

Paragraph 8.18 states:

*“The Complaint brought to the Commission **must** be the same as the complaint made to the public authority. A copy of the complaint made to the public authority and the response received from it should be included.”*

Equality Coalition members feel that this requirement is too rigid. It prevents a complaint to the ECNI that the PA has not complied with the provisions in its equality scheme regarding complaints for breach of the scheme, which by definition will not have been part of the initial complaint. In essence the above provision makes the ‘complaints’ section of an Equality Scheme unenforceable. It is also foreseeable that a complainant may choose to formalise their complaint to the Equality Commission or modify the format of the complaint. Does the ECNI mean that the Complaint brought to the Commission must address the same general issues addressed in the complaint made to the PA? If so, this should be clearly stated.

4.2 Definition of legal person:

The current draft lacks legal certainty over the definition of a ‘person’. The proposed policy states:

The complainant must be a “person”. In law, the word “person” has been clearly defined. For the purposes of a complaint, a person can be an individual and also, in some circumstances, a person can be an organisation or group [paragraph 8.7]

This sets out that a person can either be an individual or a legal person, i.e. an organisation or group – but only in ‘some circumstances’. It does not clarify what these circumstances are which leaves complainant organisations unaware as to whether they can make a complaint or not. The ECNI will have to make that decision however when a complaint is lodged and it should be clear in the process, we urge inclusion of all legal persons (i.e. all groups and organisations) within this definition.

4.3 Understanding of issues or events:

Step 3 of Making a Complaint addresses timing.

*“8.19 The written complaint **must** be sent to the Commission **within 12 months** of the date on which **the complainant first knew** about the issues or events (the matters alleged) that they are complaining about.*

*8.20 the matters alleged are the **issues or events** that the complainant is complaining about. This might not be the same as when the complainant first understood the matter to be a potential failure by the public authority to comply with its approved Equality Scheme.”*

This wording is vague and it is not clear exactly what the ECNI means by this. We recommend clarity and also recommend the ECNI adopt a broad interpretation of the “knew of the matters alleged” requirement in section 75 legislation. For example, a complainant may be directly affected by a failure for longer than 12 months without realising that they

have a remedy or without realizing the PA's obligations under Section 75. There should also be provision as regards when the breach remains on-going, in practice the ECNI has undertaken investigations many years after the policy decision in question.

4.4 Confidentiality

8. Paragraph 5.3 states:

“When the Commission receives a written complaint, it asks the complainant to maintain confidentiality while the complaint is being assessed and during any later investigation.”

As the wording implies the ECNI does not have the power to enforce any confidentiality requirement. It is unclear what this covers and in our experience is a significant chill factor on complainants. Given Equality Schemes will invariably cover policy issues rather than being restricted to e.g. individual acts of discrimination, it is invariable that the person raising the complaint (who will usually be either a campaigner or an organisation) will be in situations whereby they wish to discuss the policy issue publicly and should not be precluded from doing so. If the ECNI is referring to keeping confidential about the ECNI internal investigation process and e.g. their engagement with the ECNI, we can see some circumstances where this would be advisable, however at present the complainant is not provided with any information at all about the process which remains behind closed doors once they have submitted a complaint. There is currently therefore nothing to keep confidential under the current process and the provision is superfluous unless that changes.

We have a concern that not only at present does this provision constitute an unjustified interference in free expression, that a lack of compliance with the ECNI confidentiality request may be considered “non-compliance” with ECNI staff and potentially a factor in dismissing the complaint. In general, we recommend that the ECNI move from a culture of confidentiality in their investigation process to one of transparency (with due regard to anonymising personal data where necessary).

4.5 Paragraph 7.1 states:

“The Commission may, at any time and at its own discretion, vary or amend this policy/procedure.”

This factor should be removed or amended to be restricted to technical changes only (e.g. if the ECNI restructures). As stated previously with other factors, this erodes the public's trust in the ECNI, provides the ECNI with too much discretion and potential bias, and leaves the public with little to no legal certainty that their valid complaint will be investigated. If the ECNI is able to change any policy or procedure at any time and for any reason, the relevance of this current consultation process is significantly diminished. This runs against the principles best practice in exercising statutory duties and legal certainty that the ECNI is to itself promote.