



**Submission from the Equality Coalition to the  
Ad Hoc Committee on Conformity with Equality Requirements  
In relation to Proposals for Welfare Reform Bill**

## **1. Introduction**

The Equality Coalition is a broad alliance of non-governmental organisations whose members cover all the categories listed in section 75 of the Northern Ireland Act 1998 ('s75'), as well as other equality strands. It was founded in 1996 and was instrumental in putting equality at the forefront of the agenda at that time, specifically in relation to the Belfast/Good Friday Agreement and ultimately the public sector duty in s75.

The Equality Coalition now has over 80 members, many of which are umbrella organisations. It is co-convened by the Committee on the Administration of Justice and UNISON. The Equality Coalition continues to provide a forum for unity between all sectors when working for equality, through recognising multiple identities, mutual support between members and respect for the diversity of its members' work and views. We welcome this opportunity to submit evidence to the ad hoc committee on conformity with equality requirements ('the Ad Hoc Committee') in relation to the Department for Social Development's ('DSD') current proposals for a welfare reform bill ('the Welfare Reform Bill').

This submission will focus on the scope and application of s75; it will highlight deficiencies in the application of s75 to the Welfare Reform Bill and make recommendations on how to conform to these equality requirements. This submission will not provide detailed information on the equality impacts of each aspect of the Welfare Reform Bill or on each equality group named in s75. Several members of the Equality Coalition have submitted evidence in this regard, which we commend to the Ad Hoc Committee.

## **2. Understanding the Scope and Application of s75**

### 2.1 Background

Given the enduring inequalities in our society,<sup>1</sup> s75 was introduced to ensure that public policy was developed and implemented in a manner that helps promote

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<sup>1</sup> Evidence of the many inequalities in our society is included in the audits of inequalities carried out over the last two years by public authorities designated under s75.

equality of opportunity and mitigate any adverse impacts<sup>2</sup> on the nine named equality groups (relating to religious belief, political opinion, racial group, age, marital status, sexual orientation, gender, disability and dependants). Disadvantaged groups already suffer barriers to accessing public services and to enjoying full participation in society. It is therefore crucial to consider the impacts of policies on these groups and use policy development and implementation to promote equality of opportunity.

The existence of s75 is well known, but the requirements for fulfilling the duty in practice are often misunderstood. S75 requires that a designated public authority, such as DSD, shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity between the nine equality groups. In order to fulfil this duty, public authorities must comply with both:

- the definition of 'due regard'; and
- the requirements of Schedule 9 Northern Ireland Act 1998 ('Schedule 9').

Each of these provide more detailed information to inform public authorities how to apply s75.

## 2.2 Definition of 'Due Regard'

'Due regard' is considered by the Equality Commission for Northern Ireland ('ECNI') to mean that 'the weight given by a public authority to the need to promote equality of opportunity is proportionate to the relevance of the particular duty to any function of the public authority.'<sup>3</sup> For a similar public sector race equality duty in Great Britain,<sup>4</sup> Dyson LJ defined due regard as:

*the regard that is appropriate in all the circumstances. These include on the one hand the importance of the areas of life of the members of the disadvantaged racial group that are affected by the inequality of opportunity and the extent of the inequality; and on the other hand, such countervailing factors as are relevant to the function which the decision-maker is performing.*<sup>5</sup>

The above definition has also been applied to the meaning of 'due regard' in s75 by our local High Court in 2011.<sup>6</sup> In that case, the Lord Chief Justice Sir Declan Morgan, referred to other caselaw<sup>7</sup> which summarised some key principles for having 'due regard'. These principles were confirmed and added to by the English Court of Appeal,<sup>8</sup> as follows:

- the duty must be fulfilled before and at the time of the decision, not as justification after the fact;

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<sup>2</sup> Namely, discriminatory detriment.

<sup>3</sup> ECNI, S75: A Guide for Public Authorities, April 2010, page 27.

<sup>4</sup> S71 Race Relations Act 1976, as amended; now superseded by s149 Equality Act 2010.

<sup>5</sup> Baker [2008] EWCA Civ 141.

<sup>6</sup> 'Tasers', JR1 Application [2011] NIQB 5.

<sup>7</sup> Brown [2008] EWHC 3158.

<sup>8</sup> Domb [2009] EWCA Civ 941.

- the duty is to have due regard, not to achieve results or to refer in terms to the duty (although it is good practice to keep an adequate record);
- the test of whether a decision maker has had due regard is a test of the substance of the matter, not of mere form or box-ticking,
- the duty must be performed with vigour and with an open mind;
- it is a continuing duty; and
- it is a non-delegable duty.

### 2.3 Requirements of Schedule 9

In addition to the need to have 'due regard', Schedule 9 provides more detailed information on how s75 is applied. It provides that an equality 'scheme shall show how the public authority proposes to fulfil the duties imposed by s75.'<sup>9</sup> It specifies that each equality scheme must contain (among others):

- arrangements for assessing and consulting on the impact on equality of opportunity of policies adopted or proposed;
- arrangements for monitoring and publishing any adverse impact of such policies;
- arrangements for publishing the results of the assessments of equality impacts, including:
  - measures which might mitigate any adverse impact; and
  - alternative policies which might better achieve the promotion of equality of opportunity; and
- arrangements for ensuring and assessing public access to information and services.

Schedule 9 also requires that, in making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account the assessment and consultation carried out in relation to equality impacts. It sets out procedures for complaints and investigations to ensure that public authorities do not breach any of the commitments included in their equality schemes.

In addition, Schedule 9 sets out that the equality schemes must conform to any guidelines as to form or content which are issued by ECNI with the approval of the Secretary of State ('Guidelines'). The ECNI's 2010 guide<sup>10</sup> on s75 also contains information on how to assess a policy's impact on equality of opportunity, namely through screening and systematic analysis in equality impact assessments ('EQIA'). DSD commits to using screening and EQIAs to assess the impacts of its policies on equality in both its 2001 equality scheme<sup>11</sup> (currently in force) and its 2011 draft equality scheme (awaiting approval by the ECNI).

<sup>9</sup> Para 4(1) Schedule 9 Northern Ireland Act 1998.

<sup>10</sup> See <http://www.equalityni.org/archive/pdf/S75GuideforPublicAuthoritiesApril2010.pdf>.

<sup>11</sup> See [http://www.dsdni.gov.uk/dsd\\_equality\\_scheme.pdf](http://www.dsdni.gov.uk/dsd_equality_scheme.pdf).

The ECNI has released practical guidance on EQIAs.<sup>12</sup> This guidance sets out the steps required to carry out an EQIA and underlines the importance of:

- the consideration of available data and research;
- the use of that information to decide whether there is (likely to be) a differential impact on a relevant group;
- consideration of measures which might mitigate any adverse impact and alternative policies which might better achieve the promotion of equality of opportunity; and
- taking into account all of the above when making a decision with respect to the proposed policy.

DSD states in its equality scheme that it will carry out EQIAs in accordance with the procedures set out in this ECNI guidance.<sup>13</sup>

This submission will now set out three key areas where DSD has failed to comply with the above requirements in relation to the Welfare Reform Bill, which is therefore not in conformity with equality requirements.

### **3. Applying s75 to the Proposals for Welfare Reform**

We appreciate that DSD endeavoured to carry out a full EQIA on the Welfare Reform Bill. The draft EQIA was released for consultation in September 2011 and the final EQIA was published in April 2012. However, the Equality Coalition maintains that DSD has not fully complied with s75, due to three key deficiencies in the EQIA process.

#### **3.1 Insufficient Consideration of Data and Research**

The need for a public authority to consider fully the available data and research when applying s75 is clear from Schedule 9 and its associated guides, and also from case law on the meaning of 'due regard'. DSD did not consider all, or sufficient, data for its 2011/2012 EQIA and so has failed to comply with the equality requirements of s75.

In order for a public authority to have 'due regard' within the meaning of s75, it must consider available data. Otherwise, it would merely be guessing as to what impacts a proposed policy might have on the nine equality groups. It is clear from Schedule 9 that a public authority must 'assess' (not guess) the impacts, and so sufficient data must be required. Furthermore, the DSD equality scheme recognises that, without sufficient information, it is not possible to conduct meaningful analysis of the impact of its policies on all of the nine categories.<sup>14</sup>

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<sup>12</sup> See <http://www.equalityni.org/archive/pdf/PracticalGuidanceEQIA0205.pdf>.

<sup>13</sup> See para 3.6 of DSD's 2001 equality scheme.

<sup>14</sup> See para 5.2 of DSD's 2001 equality scheme.

In its practical guidance on EQIAs, the ECNI states that ‘relevant, reliable and up to date information is essential’ to carrying out an EQIA.<sup>15</sup> It specifies the need to ‘[c]ollect and analyse existing quantitative data by relevant equality category as a minimum base from which to judge outcomes’ and also ‘[u]se qualitative or evaluative research or information gathered by government and bodies such as voluntary, community and trade union organizations.’<sup>16</sup>

The caselaw on ‘due regard’ also makes clear that sufficient information is necessary in order to fulfil the equality duty. Several judgments have underlined the need for the statutory equality duty to be carried out in substance and with vigour,<sup>17</sup> which is not possible without recourse to the underlying data. Indeed, not only must sufficient and relevant data be considered, but a public authority could err in not taking the correct approach to the data available, which could lead to an incorrect appreciation of the impacts arising.<sup>18</sup>

Several submissions to DSD’s original EQIA, to the DSD Committee and to the Ad Hoc Committee have outlined the deficiencies in evidence used by DSD in its 2011/12 EQIA.<sup>19</sup> We will not duplicate the detail of these submissions but, in overview, the data used was both incomplete and out of date.<sup>20</sup> The data did not include information on most of the s75 categories or on all the policy areas covered by the Welfare Reform Bill. It also did not include the data from the Department for Work and Pension’s policy simulation model. Critically, only aspects of this data were added to the final EQIA and none of this data was included in the draft EQIA (which precluded stakeholder comment on likely impacts).<sup>21</sup>

Therefore, DSD did not use all data available in carrying out its EQIA, as required by statute, case law and administrative commitments. Several stakeholders have provided relevant data and evidence of impacts, both in response to the EQIA and since that time, which have not been taken into account by DSD. It is therefore necessary for DSD to reconsider its EQIA and reassess equality impacts of the Welfare Reform Bill, using all available data and research, in order to comply fully with s75 and so be in conformity with equality requirements.

### 3.2 Insufficient Consideration of Alternative Policies

The need for a public authority to consider alternative policies to better promote equality of opportunity when applying s75 is clear from Schedule 9 and its associated guides, and also from case law on the meaning of ‘due regard’. DSD did

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<sup>15</sup> ECNI practical guidance on EQIAs 2005, at page 11.

<sup>16</sup> As above. See also pages 12 – 21.

<sup>17</sup> Several High Court cases, confirmed by the Court of Appeal in *Domb* (case reference above).

<sup>18</sup> *R (Kaur and Shah) v London Borough of Ealing* 2008] EWHC 2062 (Admin), paras 45 – 47.

<sup>19</sup> See, for example, submissions of Welfare Reform Group, NICEM, Disability Action and Mencap.

<sup>20</sup> This also conflicts with Schedule 9’s requirement for public access to information, see para 4(2)(f).

<sup>21</sup> This data has still not been published in full, which also conflicts with Schedule 9’s requirement for public access to information, see para 4(2)(f).

not consider alternative policies to better promote equality of opportunity in its 2011/2012 EQIA and so has failed to comply with the equality requirements of s75.

Schedule 9 states that a public authority must publish details of any consideration given to 'alternative policies which might better achieve the promotion of equality of opportunity.'<sup>22</sup> This requirement is repeated in the ECNI Guidelines on s75<sup>23</sup> and in DSD's equality scheme.<sup>24</sup> In addition, the ECNI practical guidance on EQIAs states that '[t]he consideration of mitigating measures and alternative policies is at the heart of the EQIA process. Different options must be developed which reflect different ways of delivering the policy aims.'<sup>25</sup>

The caselaw also supports the need to consider alternative policies in order to have 'due regard'. In a recent case on the similar statutory equality duty in Great Britain,<sup>26</sup> the High Court found that a Council's decision on a social care policy was unlawful as (among other reasons) 'there was a failure in the material prepared for consideration... to address the questions which arose when considering whether the impact... was so serious that an alternative which was not so draconian should be identified and funded to the extent necessary by savings elsewhere.'<sup>27</sup>

In its 2011/2012 EQIA on the Welfare Reform Bill, DSD did not publish any consideration of alternative policies that could better promote equality of opportunity. It noted some mitigation to adverse impacts in its draft EQIA, but this is not sufficient to better promote equality of opportunity. We recognise that DSD is constrained to some extent by the parity principle, but this constraint is not absolute and should not prevent the full consideration of alternative policies, including regard to impacts on equality and other countervailing factors.

It is therefore necessary for DSD to reconsider its EQIA, including consideration of alternative policies that might better promote equality of opportunity for the nine named groups, in order to comply fully with s75 and so be in conformity with equality requirements.

### 3.3 Insufficient Account taken of Impacts and Consultation

The need for a public authority to take into account the assessment of equality impacts and consultation in making a decision on policy is clear from Schedule 9 and its associated guides, and also from case law on the meaning of 'due regard'. DSD did not sufficiently take into account the equality impacts and consultation stemming

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<sup>22</sup> Para 9(1)(b) Schedule 9.

<sup>23</sup> At page 34.

<sup>24</sup> At para 6.2.

<sup>25</sup> At page 29.

<sup>26</sup> R (W) v Birmingham City Council [2011] EWHC 1147 (Admin).

<sup>27</sup> As above, Mr Justice Walker at para 183.

from its 2011/2012 EQIA and so has failed to comply with the equality requirements of s75.

Schedule 9 states that '[i]n making any decision with respect to a policy adopted or proposed to be adopted by it, a public authority shall take into account the assessment and consultation carried out' in relation to the policy's equality impacts.<sup>28</sup> This is repeated in the ECNI Guidelines on s75,<sup>29</sup> which also states that '[t]his is an important commitment and failure to comply with it could lead to complaints of failure to comply with a scheme'<sup>30</sup> The ECNI practical guidance on EQIAs also makes it clear that 'the public authority shall take into account any EQIA and consultation carried out in relation to the policy' and states that it is 'essential that the public authority fully complies with this commitment.'<sup>31</sup>

The practical guidance on EQIAs clarifies that '[i]t is not sufficient merely to take equality into account; it must be accorded considerable weight. That is, the need to promote equality of opportunity must be given due regard or weight in accordance with Section 75.'<sup>32</sup> 'At this point all available information should be combined in a decision or decisions on an existing or proposed policy or policies, together with the rationale for that decision. Decision-making documentation must show how the impact of alternative policies and mitigation, and that the implications for other policies associated with the EQIA were considered.'<sup>33</sup> These requirements are echoed in the many judgments that require the equality duty to be carried out 'with vigour and an open mind' in order for 'due regard' to be satisfied.<sup>34</sup>

Although DSD lists the consultees' responses to the Welfare Reform Bill in an annex to its final EQIA, it has not sufficiently taken into account the impacts or consultation responses received. This is clear, as DSD has not changed any aspects of the policies included in the Welfare Reform Bill from the draft to the final EQIA. This suggests that DSD did not apply s75 'with vigour and an open mind'. Moreover, the final EQIA does not show any additional consideration of alternative policies or mitigation based on the consultees' evidence of impacts in their consultation responses. In addition, the evidence available in April 2012 has now been superseded by more recent research, which requires further consideration by DSD.

Therefore, in order to comply with s75 and so be in conformity with equality requirements, it is necessary for DSD to reconsider its EQIA to take fully into account all available evidence and the assessment of equality impacts and consultation when making a decision on the Welfare Reform Bill.

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<sup>28</sup> Para 9(2) Schedule 9.

<sup>29</sup> At page 34.

<sup>30</sup> At page 45.

<sup>31</sup> At page 43.

<sup>32</sup> At para 6.1, page 43.

<sup>33</sup> At para 6.2, page 44.

<sup>34</sup> Several High Court cases, confirmed by the Court of Appeal in *Domb* (case reference above).

We understand that the Welfare Reform Bill is, in part, enabling legislation and that DSD intends to apply s75 to the future regulations on specific policies that stem from the bill.<sup>35</sup> However, any likely adverse impacts of the Welfare Reform Bill, and any possibilities to better promote equality of opportunity for the nine named groups, must be considered before the passing of the current bill. Several judgments have made clear that the duty must be fulfilled 'before and at the time of the decision.'<sup>36</sup>

In one case, the High Court quashed a borough council decision as, '[o]nce the [borough] had identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution. It erred in having recognised the problem whilst merely hoping to assess its extent after it had settled on its criteria.'<sup>37</sup> DSD must address the adverse impacts before legislating on the Welfare Reform Bill.

#### **4. Conclusion – Required Action**

The Ad Hoc Committee has been established to examine and report on whether the Welfare Reform Bill is in conformity with equality requirements. The Equality Coalition strongly maintains that the current Welfare Reform Bill is not in conformity with equality requirements, as DSD has not complied with s75.

In order for the Welfare Reform Bill to be in conformity with equality requirements, DSD must reconsider its EQIA and reassess the equality impacts of the Welfare Reform Bill, using all available data and research. It must consider mitigation of any adverse impacts found and also alternative policies that could better promote equality of opportunity. When taking its decision in relation to the contents of the Welfare Reform Bill, DSD must take fully into account the assessment of equality impacts and the evidence and consultation responses received from stakeholders.

We recognise that the Assembly is under time pressure to legislate on the Welfare Reform Bill but, given that DSD has not complied with s75, it is possible that further delay could be incurred through a complaint or investigation on these deficiencies. The Ad Hoc Committee cannot apply s75 on DSD's behalf, as it is not designated under s75 and the statutory equality duty is non-delegable.<sup>38</sup> We therefore call on the Ad Hoc Committee to request that DSD reconsiders its EQIA and reassesses the equality impacts of the Welfare Reform Bill, in order to comply with s75 and be in conformity with equality requirements.

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<sup>35</sup> We note that DSD only commits to screening some aspects of the derivative regulations and policies (see final EQIA). However, every policy (and regulation) stemming from the Welfare Reform Bill must be screened in order to comply with s75 and its associated ECNI guidance.

<sup>36</sup> Several High Court cases, confirmed by the Court of Appeal in *Domb* (case reference above).

<sup>37</sup> *Kaur and Shah*, reference above, at para 44.

<sup>38</sup> Several High Court cases, confirmed by the Court of Appeal in *Domb* (case reference above).