

# Submission from the Committee on the Administration of Justice (CAJ) to the United Nations Human Rights Committee on the UK's 7<sup>th</sup> Periodic Report under the International Covenant on Civil and Political Rights (ICCPR) (CAJ S.444)

June 2015

## Introduction

1. The Committee on the Administration of Justice (CAJ) is an independent human rights NGO with cross community membership in Northern Ireland and beyond. It was established in 1981 and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its international human rights obligations.
2. CAJ focuses this shadow report on the following matters which are included in the Committee's List of Issues (LoI) for the UK (CCPR/C/GBR/Q/7, 20 November 2014) and previous Concluding Observations (CO) (CCPR/C/GBR/CO/6 30 July 2008):
  - **The planned repeal of the Human Rights Act 1998 and the Northern Ireland Bill of Rights** (Art. 2, LoI [2] CO para. 6);
  - **Northern Ireland Stop and Search powers** (Arts. 2, 12, 17, LoI [8]);
  - **Dealing with the legacy of the Northern Ireland conflict** (Arts. 2, 6, 7, LoI [13 and 15], CO para. 9);
  - **Abortion law in Northern Ireland** (Art. 2,3,7, LoI [14]);
  - **The use of Plastic Bullets - Attenuating Energy Projectiles (AEPs)** (Art. 6, 7 LoI [15], CO para. 11);
  - **Torture and ill-treatment of detainees by British forces** (Art. 2, 7, 9, LoI [16], CO para.14).

## **The planned repeal of the Human Rights Act 1998 and the Northern Ireland Bill of Rights (Art 2, Lol [2] CO para. [6])**

3. The Committee's List of Issues (paragraph 2) seeks information on the plans to repeal the Human Rights Act (HRA) 1998 and on the Northern Ireland Bill of Rights. The Human Rights Act 1998 was the UK-wide vehicle for commitments to incorporate the European Convention on Human Rights (ECHR), and hence many but not all Covenant Rights, into domestic law.
4. The Conservative Party, who became a majority UK government following the elections on 7 May 2015, included a pledge in their election manifesto to repeal the Human Rights Act within 100 days of taking office and replace it with a 'British Bill of Rights.' The latter would clearly not incorporate the ECHR but is designed only to take forward the 'principles' of the ECHR, and allow domestic courts to ignore Strasbourg case-law.
5. Immediately following the appointment of the new cabinet CAJ wrote to the Secretary of State for Northern Ireland to seek urgent clarification of the government's intentions. This was in the context of any repeal of the HRA 1998, in so far as it has effect in Northern Ireland (unless its provisions were simultaneously re-introduced for this jurisdiction), constituting a flagrant breach of the 1998 Belfast/Good Friday Agreement.
6. The bilateral (UK-Ireland) Belfast/Good Friday Agreement, in addition to being approved by referendum, was incorporated as a treaty between the UK and Ireland and lodged with the UN (UK Treaty Series no. 50 Cm 4705). Article 2 of the treaty binds the UK to implement provisions of the annexed Multi-Party Agreement which correspond to its competency. Paragraph 2 of the Rights, Safeguards and Equality of Opportunity section of this Agreement states:

*'The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.'*
7. This commitment was given legislative effect through the HRA 1998. The Agreement also commits to safeguards to ensure that the Northern Ireland Assembly or public authorities cannot infringe the ECHR. In

relation to other provisions of the peace settlement the HRA 1998 is, for example, also key to the framework for the human rights compliance of policing in Northern Ireland. One of the important functions of the Northern Ireland Policing Board, as set out in s3(3)(b)(ii) of the Policing (Northern Ireland) Act 1998, is to monitor compliance with the Human Rights Act 1998. The Police Service of Northern Ireland (PSNI) Code of Ethics, provided for under s52 of the same Act is also designed around the framework of the ECHR as provided for by the HRA 1998. In short the HRA is fundamental to the peace settlement.

8. The planned repeal of the HRA breaching the peace treaty subsequently received widespread media coverage, and there was an intervention by the Irish Government insisting the UK comply with its obligations under the treaty.<sup>1</sup>
9. The UK government set out its legislative programme for the coming year in the Queen's Speech on the 27 May 2015. This did not include legislation to repeal the HRA but did announce that the Government would consult on proposals to replace the HRA with a British Bill of Rights.

**The Committee may wish to seek assurances that the UK will now not repeal the HRA and make clear its present alternative proposals would not constitute the incorporation of the ECHR.**

10. The Committee also seeks a report as to the progress on the implementation of a Bill of Rights for Northern Ireland which was also committed to under Belfast/Good Friday Agreement. This process was to incorporate further rights in addition to those within the ECHR.
11. In accordance with its mandate under the Agreement the Northern Ireland Human Rights Commission (an 'A' status NHRI) delivered its final advice to the UK government on the 10 December 2008. However, to date the Bill of Rights for Northern Ireland, which the Agreement explicitly stated would be introduced in the UK Parliament, has not been legislated for. The principal reason given by government for not discharging its treaty-based commitment is that there is political opposition from the unionist<sup>2</sup> parties in Northern Ireland to the Bill of Rights and that government will not legislate until this changes and

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<sup>1</sup> See for example *Scrapping Human Rights Act 'would breach Good Friday agreement'* The Guardian 12 May 2015; and *Government concern about UK plan to scrap Human Rights Act* Irish Times 14 May 2015

<sup>2</sup> Political parties supporting the Union with Great Britain

there is political consensus on the content of a Bill of Rights between unionist and nationalist<sup>3</sup> political parties.<sup>4</sup> However, no such pre-condition is included within the Belfast/Good Friday Agreement. The Agreement, in common with other provisions such as police reform, explicitly deferred advice on the Bill of Rights for Northern Ireland to an independent body, the NHRI, in the specific context that there would not be unionist-nationalist consensus. The December 2014 Stormont House Agreement, which covers a number of outstanding issues relating to the peace process, contains no commitment to legislate for the Bill of Rights for Northern Ireland.

12. Under the previous 2010-2015 mandate the UK government, then composed of Conservatives and Liberal Democrats, committed to the establishment of a Commission to investigate the creation of a 'British Bill of Rights' that would continue to incorporate and build on obligations under the ECHR. This Commission was set up in March 2011 to investigate the creation of a 'UK Bill of Rights' and delivered its final report (in two volumes) '*A UK Bill of Rights: The Choice Before Us*' to the UK Government on December 2012. This report stated:

'We are acutely conscious of the sensitivities attached to discussion of a UK Bill of Rights in the context of Northern Ireland. In particular we recognize the distinctive Northern Ireland Bill of Rights process and its importance to the peace process in Northern Ireland. We do not wish to interfere with that process in any way nor for any of the conclusions that we reach to be interpreted or used in such a way as to interfere in, or delay, the Northern Ireland Bill of Rights process.'<sup>5</sup>

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<sup>3</sup> Political parties supporting a united Ireland

<sup>4</sup> Whilst the commitment is not dependent on the same, it is also worth noting that public opinion polls have consistently demonstrated high levels of support for a Bill of Rights in Northern Ireland in Protestant and Catholic communities and beyond. A Market Research Northern Ireland opinion survey published by the Northern Ireland Human Rights Commission in 2004 found that a large majority of respondents (87 %) would support a proposed Bill of Rights. Both, Protestants (87 %) and Catholics (85 %) were in agreement with the concept of having a Bill of Rights that reflects the particular circumstances of Northern Ireland (Progressing a Bill of Rights for Northern Ireland: An Update, Belfast: 2004); in July 2011 a poll of 1000 persons conducted by Ipsos MORI found 80%+ of respondents thought a Bill of Rights for Northern Ireland was important among supporters of all the main political parties (SF 88%, SDLP 86%, DUP 84%, UUP 83%, Alliance 81%) (in Human Rights Consortium 'Bill of Rights for Northern Ireland, Overdue' Belfast, 2011, page 3)

<sup>5</sup> *The Commission on a Bill of Rights report– A UK Bill of Rights? - The Choice Before Us - Volume 1* 18 December 2012, paragraph 75

**The Committee may wish to call on the UK to fulfil its treaty based commitment to a Bill of Rights for Northern Ireland, inclusive of matters protected by the Covenant.**

### **Northern Ireland Stop and Search powers (Arts 2, 12, 17, Lol [8])**

13. The Committee seeks information on measures taken to monitor and evaluate the use of the stop and search/question powers within the Justice and Security (Northern Ireland) Act 2007 (JSA 2007). The powers apply only in Northern Ireland and are similar to the now repealed powers under 'section 44' of the Terrorism Act (TACT) 2000 in that the powers can be used without individual reasonable suspicion. This is the usual threshold test for use of stop and search powers in the ordinary law. The JSA power is drafted explicitly as a power to search for munitions and transmitters, and to question mainly over identity and movements.
14. The widespread and arbitrary use of the Section 44 power was found to be unlawful by the European Court of Human Rights in 2010 in the case of *Gillan & Quinton v UK*<sup>6</sup> on the grounds it was 'neither sufficiently circumscribed nor subject to adequate legal safeguards against Abuse.' The UK government responded by suspending section 44, and the Police Service of Northern Ireland (PSNI) shifted instead to rely on the power in JSA 2007. Section 44 was ultimately repealed by the Protection of Freedoms Act 2012 which introduced a replacement 'non-suspicion power' under what is now sections 47A-47AE of TACT 2000. This latter power has yet to be used in Great Britain, but was briefly used in Northern Ireland during a period when the powers under JSA 2007 were themselves suspended due to the courts finding they failed the legal certainty test. The Protection of Freedoms Act 2012 amended the JSA powers to introduce an additional requirement that a senior police officer issue a general authorisation, which is both time and geographically bound, to allow their use. Whilst this was set out as an essential safeguard, information has subsequently emerged in the courts that there had in fact been continuous authorisations in place for the whole of Northern Ireland since the requirement was introduced.<sup>7</sup>
15. A significant outstanding issue with these powers is that unlike every stop and search power in Great Britain, there is no requirement for

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<sup>6</sup> [2010] ECHR 28 (28 June 2010)

<sup>7</sup> *In the matter of an application by Stephen Ramsey for judicial review* (Summary of Judgment), 2014 NIQB 59

ethnic monitoring. In the context of Northern Ireland such ethnic monitoring would need to be inclusive of 'community background' (i.e. Protestant/Catholic and other indicators of the two main ethnic groups in Northern Ireland.)<sup>8</sup>

16. The following recommendation made by the Northern Ireland Policing Board in a thematic review of stop and search in 2013 remains unimplemented:

'PSNI should as soon as reasonably practicable but in any event within 3 months ... consider how to include within its recording form the community background of all persons stopped and searched under sections 43, 43A or 47A of the Terrorism Act 2000 and all persons stopped and searched or questioned under section 21 and 24 of the Justice and Security (Northern Ireland) Act 2007.'<sup>9</sup>

17. Unlike other stop and search powers the JSA powers were operated without a regulatory 'Code of Practice' for five years. Following CAJ research on the issue a Code of Practice was consulted upon and ultimately adopted through an urgent procedure in May 2013 after the courts found that exercising the powers in its absence was not compatible with the ECHR.<sup>10</sup> Uniquely the Code of Practice for the exercise of powers under the JSA 2007 in Northern Ireland does not have binding ethnic monitoring requirements which oblige record keeping of self identified or perceived ethnic background. This contrasts

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<sup>8</sup> Despite monitoring on such grounds having been commonplace within employment and other fields for many years, and hence a 'tick box' self-identification form being a simple method of gathering the data, there has been significant official resistance to such monitoring in relation to stop and search. It is reasonable to deduce that the reason for this is official concern that statistics which indicate a differential will be used as 'propaganda' by 'dissident' groups. However, that others may misuse the data is not in our view a legitimate reason for not gathering the statistics which are an essential tool in monitoring usage and preventing discrimination. Whilst in one case the courts have commented that it would be intrusive for the police to 'direct' questions as to a person's community background, this has not been proposed and the court did go on to note there was no reason why '*if there is to be effective monitoring, that details of the perceived religion/political opinion should be omitted or not recorded especially as in many cases the exercise of powers will be intelligence driven and the perceived religion/political opinion is likely to be known by the police.*' (In the matter of an application by Stephen Ramsey for Judicial Review, 2014 NIQB 59). This judgment did not hold there had been an unlawful use of the powers and the applicant has appealed

<sup>9</sup> Report of the Northern Ireland Policing Board: Human Rights Thematic Review on the use of police powers to stop and search and stop and question under the Terrorism Act 2000 and the Justice and Security (NI) Act 2007, 15 October 2013

<sup>10</sup> In the matter of an application by Fox, McNulty and Canning for judicial review [2013] NICA 19

with every Code of Practice in Great Britain which contains such binding requirements.<sup>11</sup>

18. In March 2015 a question to the PSNI Chief Constable from the Northern Ireland Policing Board confirmed that there was no legislation preventing the PSNI from monitoring community background but that, despite a number of commitments to take the recommendation forward, no monitoring had yet taken place, even on a pilot basis.<sup>12</sup>

**The Committee may wish to ask the State party what measures it is taking to introduce changes to ensure that there is mandatory ethnic monitoring (inclusive of community background) provided for under the Code of Practice of the Justice and Security (NI) Act 2007.**

### **Dealing with the legacy of the Northern Ireland conflict (Arts 2, 6, 7, Lol [13], CO para. 9)**

19. CAJ notes the Committee's previous concluding observations in 2008 which expressed concern that:

'...a considerable time after murders (including of human rights defenders) in Northern Ireland have occurred, several inquiries into these murders have still not been established or concluded, and that those responsible for these deaths have not yet been prosecuted. ...the Committee is concerned that Instead of being under the control of an independent judge, several of these inquiries are conducted under the Inquiries Act 2005 which allows the Government minister who is responsible for establishing an inquiry to control important aspects of that inquiry.'

We note that the Committee urged the UK to conduct:

'as a matter of particular urgency given the passage of time, independent and impartial inquiries in order to ensure a full,

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<sup>11</sup> The TACT Code of Practice in Great Britain and the PACE legislation in Great Britain both contain recording provisions which ensure "[A] note of the self defined ethnicity, and, if different, the ethnicity as perceived by the officer making the search, of the person searched or the person in charge of the vehicle searched (as the case may be)..." see 'Terrorism Act 2000, Code of Practice (England, Wales and Scotland) for the Authorisation and Exercise of Stop and Search Powers relating to Section 47A of Schedule 6B to the Terrorism Act 2000' Home Office, 2011, paragraph 5.4.1; 'Police and Criminal Evidence Act 1984 Code A Code of Practice for Exercise by Police Officers of Statutory Powers of Stop and Search' Home Office 2010, paragraph 4.3(a)

<sup>12</sup> Policing Board, Monitoring Stop and Search by Community Background (Caitriona Ruane), Question to Chief Constable, March 2015

transparent and credible account of the circumstances surrounding violations of the right to life in Northern Ireland.<sup>13</sup>

20. Since the last Concluding Observations there have been further detrimental developments. The existing mechanisms for dealing with the past since the Belfast/Good Friday Agreement have not resulted in a single conviction for any members of the security forces. It has emerged that mechanisms such as the police Historical Enquiries Team did not refer one single 'state involvement' case for full investigation.
21. In its List of Issues the Committee has asked the State Party to report on the measures taken to address the absence of a comprehensive framework for dealing with conflict-related deaths in Northern Ireland as well as police and political interference in the work of the Police Ombudsman for Northern Ireland, delays in the Coroner's courts, the retention of the Inquiries Act 2005 powers to subordinate the inquiry process to government ministerial control at every stage and information on the investigation into the murder of Pat Finucane.
22. Five years on from the 2009 Eames-Bradley proposals<sup>14</sup> the 2013 Haass O'Sullivan Proposed Agreement envisaged a single investigative mechanism, the Historical Investigations Unit (HIU), to investigate unresolved deaths.<sup>15</sup> Following crisis talks in 2013 and then 2014 the UK and Irish governments and the political parties in the Northern Ireland Executive produced the December 2014 Stormont House Agreement (SHA) which commits to a new set of institutions to deal with the past, including a Historical Investigations Unit, whilst maintaining coronial inquests.<sup>16</sup>
23. CAJ is lobbying on the content of legislation designed to implement the SHA but its future is uncertain. Meanwhile, CAJ is concerned that Northern Ireland is witnessing such a level of official obstruction of legacy investigations that a concerted effort to cover up human rights violations is taking place. To date there has been no overarching legacy commission or transitional justice mechanism to deal with the legacy of the Northern Ireland conflict. Instead a number of criminal justice-system mechanisms examine unresolved conflict-related deaths. Such mechanisms were prompted by a series of Article 2 (right to life)

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<sup>13</sup> CCPR/C/GBR/CO/6, 30 July 2008 (Concluding Observations on UK), paragraph 9

<sup>14</sup> *The Report of the Consultative Group on the Past in Northern Ireland*, 23 January 2009

<sup>15</sup> 'Factsheet' 6 January 2014 [available at: <http://panelofpartiesnie.com/> accessed June 2015]

<sup>16</sup> 'The Stormont House Agreement', 23 December 2014 [available at: <https://www.gov.uk/government/publications/the-stormont-house-agreement> accessed June 2015]



European Convention on Human Rights cases before the European Court of Human Rights between 2001- 2003 in which CAJ represented a number of the applicants. The Court found the UK to be in breach of its procedural obligations to carry out effective and independent investigations which led to the State party adopting a 'package of measures' it argued would meet its human rights obligations.

24. The package included changes to the inquest and prosecution systems. It also included reference to public inquiries, the PSNI Historical Enquiries Team (HET) and the Police Ombudsman's role in investigating the past. Serious limitations however have become apparent in relation to these mechanisms which have militated against their capacity to provide accountability for human rights violations. Elements of the package have either been shown not to have the necessary independence, effectiveness or impartiality to investigate state actors. Even those mechanisms which have been independent have faced limitations on their powers, delay or obstruction in undertaking their work.
25. A number of the above concerns have also been articulated within the Council of Europe human rights system and the UN Committee Against Torture:

'The [UN] Committee [Against Torture]...notes however, reports of apparent inconsistencies in the investigation processes where military officials are involved, which delayed or suspended investigations, thus curtailing the ability of competent bodies to provide prompt and impartial investigations of human rights violations and to conduct a thorough examination of the systemic nature or patterns of the violations and abuses that occurred in order to secure accountability and provide effective remedy. In addition, the Committee is concerned about the State party's decision not to hold a public inquiry into the death of Patrick Finucane'.<sup>17</sup>

26. CAJ views accountability for human rights violations, including the right to life, as essential for ensuring non-recurrence of security force practices which operated outside of the law during the conflict.
27. At the beginning of 2015 CAJ, in cooperation with Queen's University Belfast, published a comprehensive report entitled the 'Apparatus of

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<sup>17</sup> Committee Against Torture, Concluding Observations on UK, May 2013

Impunity?’<sup>18</sup> providing a narrative and critiquing the limitations and obstruction which faced all the mechanisms tasked with investigating the past in Northern Ireland since the Belfast/Good Friday 1998 Agreement. The Summary of Main Findings is included as an appendix to this submission. The following is further summary information on the issues the Committee raises:

28. **The ‘lowering of independence’ and suspension of the Police Ombudsman’s Office role in dealing with conflict-related cases.**  
The Police Ombudsman’s office is a powerful independent body with powers to investigate police involvement in human rights violations, including killings, during the conflict. However during the tenure of the second police ombudsman the office was undermined following police and political interference in its work. The resignation of the Chief Executive and critical reports in 2011 from CAJ and subsequently the official Criminal Justice Inspector, which among other matters found that investigation reports into conflict-related cases were altered or rewritten to exclude criticism of the police without explanation, were followed by the suspension of the historic caseload and the resignation of the Police Ombudsman. A successor was appointed and a process of internal reform took place which has re-established the credentials of the office which, following a favourable report from the Criminal Justice Inspector, has been able to resume historic investigations. However, legislative amendments to address gaps in the Ombudsman’s powers have not been implemented. The Ombudsman had to initiate judicial review proceedings against the police to compel the disclosure of withheld intelligence documents and the Office. Having seen off other challenges, the Office then suffered serious cuts to its budget from the Department of Justice, despite there being an acknowledgement that this itself would particularly affect legacy work.
  
29. **The suspension and standing down of the PSNI ‘Historical Enquiries Team’ (HET) following an official inspection finding that cases where agents of the state were involved in killings had been given such preferential treatment that the HET had been operating unlawfully.** The HET was established as a unit of the Police Service of Northern Ireland (PSNI) to review unresolved killings attributed to the conflict. With the exception of cases in which a police officer was directly responsible for a death this includes ‘state involvement cases’

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<sup>18</sup>‘The Apparatus of Impunity? – Human rights violations and the Northern Ireland conflict: a narrative of official limitations on post-Agreement investigative mechanisms’, CAJ, January 2015

involving the armed forces or agents and informants working for the police or security services. Critical academic reports and concerns from NGOs led to the Northern Ireland Policing Board calling in Her Majesty's Inspector of Constabulary to conduct a review of the HET. This inspection reported in July 2013<sup>19</sup> and found that the approach to state involvement cases had been incompatible with legal duties under the ECHR and contrary to domestic law. The work of the HET on such cases and in issuing reports was subsequently suspended and the unit was disbanded in December 2014.

**30. The role of PSNI Legacy Investigations Branch (LIB)**

In 2015 the HET was replaced with a smaller Legacy Investigations Branch (LIB) in the PSNI. CAJ is concerned that the LIB, which we submit does not meet the independence requirements of Article 6 in relation to state involvement cases, is carrying out investigations into conflict-related deaths in Northern Ireland pending the establishment of the proposed Historical Investigations Unit (HIU) under the Stormont House Agreement. The concern that the LIB does not meet independence requirements in relation to state involvement cases has also been raised by the legislature. The Joint Committee on Human Rights of the UK Parliament concluded:

'...the Legacy Investigations Branch cannot itself satisfy the requirements of Article 2 ECHR because of its lack of independence from the police service.'<sup>20</sup>

31. There is also controversy regarding the categories of cases the LIB is currently dealing with and how it is prioritising them. The LIB was initially announced as a 'much smaller' unit than the HET which would only take on cases where the PSNI had legal obligations.<sup>21</sup> However, the LIB has taken on a broad range of cases including all outstanding HET cases as the PSNI has claimed that it, rather than the State, has a legal obligation to re-investigate such a range of legacy cases. From correspondence however it appears that PSNI themselves are not clear

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<sup>19</sup> 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013 [available at: <https://www.justiceinspectorates.gov.uk/hmic/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf> accessed June 2015]

<sup>20</sup> JCHR Human Rights Judgments Seventh Report of Session 2014–15, HL Paper 130 HC 1088, 11 March 2015, paragraph 3.7

<sup>21</sup> CAJ and other NGOs were told by the PSNI in January 2015 that the LIB workload could only presently encompass three major follow up inquiries. This was however not correct and it has subsequently transpired that the LIB has taken on a broad range of cases including all outstanding HET cases

or in agreement as to what their investigative obligations are.<sup>22</sup>

Ultimately CAJ is concerned that the LIB, which lacks independence, may seek to open and close cases, particularly those involving alleged collusion, before the planned independent Historical Investigations Unit (HIU) is established.

32. **The UK reneging on its commitment to hold an independent public inquiry into the murder of human rights lawyer Pat Finucane in 1989** . This decision was taken despite the Committee's Concluding Observations and the UK having committed to the inquiry in a (UK-Ireland) international agreement (Weston Park Agreement 2001). Instead the UK Prime Minister appointed a senior lawyer to conduct a more limited review of the papers.<sup>23</sup> This policy move was contrary to the following advice it now transpires was given to the Prime Minister by the UK's most senior official:

'Does the PM seriously think that is right to renege on the previous Govt's clear commitment to hold a full judicial inquiry? This was a dark moment in the country's history – far worse than anything that was alleged in Iraq/Afghan(istan). I cannot really think of any argument to defend not having a proper inquiry.....'<sup>24</sup>

The decision has been the subject of judicial review proceedings taken by the wife of Mr Finucane which were heard in the High Court Northern Ireland in May 2015 and in which judgment has been reserved.<sup>25</sup>

33. **The Inquiries Act 2005 has retained its powers permitting ministerial interference despite the Committee's concerns**. A 2014 House of Lords Select Committee report into the operation of the Inquiries Act 2005 did recommend circumscribing some of the ministerial powers to intervene in the inquiry but not any major overhaul of the Act per se.<sup>26</sup>

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<sup>22</sup> CAJ Exchange of Correspondence with the Chief Constable and Assistant Chief Constable, 26 February 2015 and 23 March 2015

<sup>23</sup> 'The Report of the Pat Finucane Review'. The RT Hon Desmond De Silva December 2012 [available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/246867/0802.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/246867/0802.pdf) accessed June 2015]

<sup>24</sup> Jeremy Heywood, 9 July 2011 (now Sir Jeremy Heywood, Cabinet Secretary and Head of the Home Civil Service): raised *In the matter of an application by Geraldine Finucane for judicial review*, Court Reference:11/145642

<sup>25</sup> Ibid

<sup>26</sup> Select Committee on the Inquiries Act 2005 Report of Session 2013–14 'The Inquiries Act 2005: post-legislative scrutiny' HL Paper 143, chapter six

34. **Protracted delays and limitations in the Inquests system in relation to conflict related killings.** CAJ continues to express concern at the ability of the inquest system, as it is functioning at present, to provide effective investigations into conflict related deaths in compliance with the Covenant. There are currently 53 legacy inquests involving 86 deaths pending before the Coroners Courts which have been opened but not completed, primarily due to a lack of resources and delays in the state disclosing information.

35. There have been both recent domestic and European Court of Human Rights (ECtHR) decisions which have found the UK to be in breach of its human rights obligations in relation to legacy inquests. A recent concurring judgment stated:

‘The absence of any plausible explanation for the failure to collect key evidence at the time when this was possible, and for attempts to even obstruct this process, should be treated with particular vigilance. In fact the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under [ECHR] Articles 2 and 3 seem as a matter of principle to make it possible for at least some agents of the State to benefit from virtual impunity as a result of the passage of time.’<sup>27</sup>

36. In May 2014 the High Court in Northern Ireland awarded compensation to a number of families with costs ordered against the PSNI for the unlawful delays in the inquests into their next of kin which are typical of many before the Coroner’s court and the Court noted the feelings of frustration, distress and anxiety suffered.<sup>28</sup>

37. The Northern Ireland Policing Board subsequently issued a statement addressing concerns it had raised with the PSNI on issues relating to the PSNI Legacy Support Unit (LSU). The LSU is a unit of the police service which is responsible for locating, deciding the relevance of, redacting and supplying police records to the coroner for the purposes of inquests. The Board stated:

‘Whilst it is acknowledged that in some cases the disclosure process can be lengthy and complex, Board Members have

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<sup>27</sup> Concurring Opinion of Judge Kalaydjieva in *McCaughey & Others v the UK and Hemsworth v the UK*, 16 July 2013

<sup>28</sup> *Jordan and five other applications* [2014] NIQB 71, 20 May 2014

expressed serious concern about the continued delays in the provision of material and the impact for the families involved'.<sup>29</sup>

CAJ has concerns about the capability of the LSU, in particular in relation to its independence, in its role of providing disclosure in legacy inquests. These proceedings have been plagued by problems of delayed disclosure and over redaction of material. The staffing of the LSU has been controversial due to the involvement of former RUC Special Branch Officers and members of the Northern Ireland Retired Police Officers Association, and the questions this raises regarding conflicts of interest. Many legacy inquests and investigations will relate to the actions of the RUC, in particular in covert operations. The employment status of the LSU staff, both as agency workers and now as non-designated PSNI civilian support staff, means that these LSU personnel are not accountable to the Police Ombudsman nor are bound by the PSNI Code of Ethics, which contains provisions regarding conflicts of interest in investigations.

**38. The growth of National Security doctrine and secret courts**

The UK has extended 'national security' exemptions to a range of accountability bodies with a role in Northern Ireland and has used the doctrine to restrict disclosure of official records. In addition the UK has also extended the potential for 'Closed Material Procedures' to all civil proceedings, meaning cases involving 'national security' information can now be held in secret. This includes cases whereby agents of the state may have been involved in human rights violations. This has already impacted on conflict related cases whereby victims' relatives have taken civil claims against the state.<sup>30</sup>

**39. Current proposals for dealing with conflict-related deaths**

At the end of 2014 the UK and Irish Governments and the five parties in the power-sharing Northern Ireland Executive reached and published a political agreement, **the Stormont House Agreement**,<sup>31</sup> which provides for a new set of mechanisms to deal with the past, namely:

- **An Historical Investigations Unit (HIU)** 'an independent body to take forward investigations into outstanding Troubles-related deaths' to take over the work of the HET and Police Ombudsman;

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<sup>29</sup> NI Policing board, Press Statement, dated 20 May 2014

<sup>30</sup> 'The Apparatus of Impunity?' Report, pages 38-39

<sup>31</sup> 'The Stormont House Agreement', 23 December 2014 [available at:

<https://www.gov.uk/government/publications/the-stormont-house-agreement> accessed June 2015]

- **An Independent Commission on Information Retrieval (ICIR)**, ‘to enable victims and survivors to seek and privately receive information about the deaths of their next of kin’
- **An Oral History Archive** ‘to provide a central place ...to share experiences and narratives related to the Troubles’
- **An Implementation and Reconciliation Group** ‘to oversee themes, archives, and information recovery’;

The proposed **HIU** has the potential to provide effective redress, yet the efficacy of such a mechanism will lie in the detail of how it operates. In light of the complexity of the provisions within the SHA, and the experience during the peace process of commitments in Agreements being lost when translated into legislation, CAJ in partnership with academics has been developing a shadow bill designed to implement the SHA in an ECHR compliant manner. The following issues are key:

40. **Independence**

The UK and the Stormont House Agreement (SHA) have made clear that the HIU will be independent yet there are a number of issues becoming apparent that threaten this independence:

41. The policies and actions of the RUC and military units will be under scrutiny in many of the investigations to be undertaken by the HIU. CAJ therefore believes that the Unit would only possess the requisite independence if former RUC and army officers are excluded from participation in any investigate process including the accessing and analysis of records of past activities. However, the UK proposals may well permit a ‘mixed staffing’ approach within the HIU allowing former RUC and army officers to take investigative posts but allowing other investigators to take on cases where the RUC or other security forces are implicated. The ‘mixed staffing’ approach would render the HIU less independent than the Police Ombudsman and conflict with other independent UK policing practices. The Ombudsman does not employ former RUC or military personnel within its legacy work, and has adopted a policy position ruling out the employment of such persons in this capacity outside exceptional circumstances. Particularly in the context of collusion it is clearly not possible to determine which cases are ‘state involvement’ cases until they have been investigated. A ‘mixed staffing’ approach was adopted by the HET and significantly contributed to its discrediting and downfall.

42. The UK may step outside the independence requirements of the Stormont House Agreement and seek to provide in legislation a veto for the Secretary of State over the onward disclosure of information by the HIU. This would allow the Secretary of State to redact HIU reports to families, other SHA legacy institutions, public statements and even HIU files forwarded to the Public Prosecution Service (PPS). CAJ is of the view that the HIU itself should make the decision on redacting any of its reports on the sole basis, explicitly provided for in the SHA, that the publication of such information would put an individual's life at risk.
43. The UK has made a very welcome commitment that all public authorities, including the police and security services, will make full disclosure to the HIU. However, there has been an indication that the mechanism for the PSNI to afford access to its police and intelligence records will not be through direct request from the HIU, as is the case with the Police Ombudsman which has its own confidential unit, but rather via the PSNI Legacy Support Unit (LSU). This is a matter of serious concern as the LSU is currently responsible for PSNI disclosure to the Coroner in relation to legacy inquests. As alluded to earlier this disclosure process has been plagued by over-redaction and systemic delays. Conflicts of interest concerns have also been raised with key positions within the LSU being held by rehired RUC Special Branch officers.
44. **Resourcing:**  
In relation to resourcing the state parties obligations to provide for independent and effective investigations into the conflict-related deaths, Within the Stormont House Agreement and its accompanying financial annex the UK has committed to 'contributing' up to £30 GBP million a year over five years to the institutions dealing with the legacy of the conflict. The following issues have arisen:
45. It remains unclear as to whether the UK government would expect the devolved institutions in Belfast to cover the shortfall in costs for the Historical Investigations Unit (HIU) and other institutions either during the first five years or beyond if its mandate is extended in light of ongoing obligations;
46. It also remains unclear as to whether there will be safeguards in relation to the control of the funding to ensure the independence of the HIU and other institutions. The shadow legislation developed by CAJ and others provides for monies to be provided through the 'Consolidated Fund' via the UK Parliament, to prevent Executive



interference in the running of the independent institutions through the control of their resources;

47. It is currently planned that the HIU and other bodies will be operational by April 2016. There have been discussions regarding resourcing existing mechanisms in the meantime but as of yet none of the SHA monies have been allocated. The two key areas would be using such monies to resource legacy inquests and the Police Ombudsman legacy functions, given the existing short falls. The Ombudsman increasing its capacity of investigators would also have a beneficial effect increasing the pool of independent investigators who could subsequently move to the HIU. Both the Ombudsman and coroner have been seeking resources for some time and it is unclear why government is withholding such monies;
48. It is a matter of concern that the UK government have stated that they may not implement the HIU and other bodies if the parties to the Northern Ireland Executive do not implement unrelated cuts to the welfare state that the UK government has been seeking. The two issues are not linked in the SHA and it would be of deep concern if victims are to be used as leverage to seek to secure welfare cuts in this way. We are conscious that the duties to take forward independent and effective investigations under Article 6 are obligations.

**The Committee may wish to seek clarification and assurances from the State Party:**

- **That the legislation will ensure the HIU meets the commitment of being genuinely independent, including through providing for a policy similar to the Police Ombudsman's precluding former RUC and other former security force personnel from employment in the HIU;**
- **That it is taking all steps necessary to develop a comprehensive framework for dealing with conflict related deaths and to also address the needs of those injured in accordance with Articles 6, 7;**
- **That sufficient resources are provided by the State Party to ensure that independent and effective investigations into conflict related deaths are carried out promptly;**
- **That the legislation will not grant the Secretary of State powers to control and redact onward disclosure by the HIU;**

- **That the legislation and structures will allow the HIU direct access to the archives of public authorities, rather than seeking to expand the role of the PSNI Legacy Support Unit;**
- **In relation to the categories of cases the LIB is currently investigating, and the extent to which they include collusion and other state involvement cases.**

## **Abortion legislation in Northern Ireland, (Arts. 2, 3, 7 Lol [14])**

49. The Committee asks the UK to indicate when legislation criminalising abortion in Northern Ireland will be amended to provide for exemptions in relation to fatal foetal abnormality and pregnancy resulting from rape and incest. The Committee also seeks information on the steps taken to ensure abortion legislation conforms to the principles of legal certainty.
50. In relation to the latter issue of the legislation conforming to the principles of legal certainty, effective guidance to supplement the legislation, which dates back to the 19<sup>th</sup> century, has still not been adopted in Northern Ireland. In 2004 the failure to issue guidance was successfully challenged in the courts by the *Family Planning Association (FPA)*. The Court of Appeal then instructed the health ministry (DHSSPS) to investigate the adequacy of termination pregnancy services and issue appropriate guidance.<sup>32</sup> After some delay the DHSSPS issued such guidance in March 2009 entitled '*Guidance on the Termination of Pregnancy: The Law and Clinical Practice in Northern Ireland*'. This itself was also subject to successful judicial review on the application of the Society for the Protection of the Unborn Child (SPUC).<sup>33</sup> The Court in this instance did not uphold six of the grounds of challenge but did uphold two grounds, namely that the sections on conscientious objection and counselling lacked the requisite clarity. The lack of legal certainty, and the issues raised in the judgment, could therefore be remedied by appropriate amendments to these two sections. Revised guidance was then consulted upon by DHSSPS from July to October 2010. This guidance was not however adopted and it was only following a further application for judicial review by the Family Planning Association that the DHSSPS put the current draft guidelines out for consultation in April 2013. The guidelines have

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<sup>32</sup> *Family Planning Association of Northern Ireland v Minister for Health Social Services and Public Safety* [2004] NICA 39 (08 October 2004)

<sup>33</sup> *Society for the Protection of the Unborn Childs (SPUC) application for Judicial Review* [2009] NIQB 92

now been renamed “*The Limited Circumstances for a Lawful Termination of Pregnancy in Northern Ireland: A Guidance document for health and social care professionals on law and clinical practice.*”

This guidance however did not simply provide amendments to the two aforementioned sections to ensure legal certainty but rather made substantive changes to other aspects of the 2009 guidance. In our view this made the document less likely to meet the requirements of legal certainty. Guidance has still not been adopted.

51. In relation to amending legislation the Department of Justice in Northern Ireland ran a *consultation on the criminal law on abortion, lethal foetal abnormality and sexual crime*, until January 2015. The consultation sought views on legislation to enable abortion in the cases of fatal foetal abnormality and the pregnancy is a result of rape or incest (sexual crime).
52. In April 2015 the Department of Justice published a summary of responses to the consultation. The Department indicated it would proceed to take forward legislation to allow abortion in the circumstances of fatal foetal abnormality but not in cases of rape or incest.<sup>34</sup> Since this time however it seems unlikely that even this proposal will gain sufficient support in the Northern Ireland Executive and Assembly to be legislated for.
53. The restrictive nature of abortion law in Northern Ireland is now the subject of a legal challenge by the Northern Ireland Human Rights Commission who are seeking a change in the law so that women and girls in Northern Ireland have the choice of accessing a termination of pregnancy in circumstances of serious malformation of the foetus, rape or incest.<sup>35</sup>

**The Committee may wish to ask the State Party how it will ensure Covenant rights are complied with in relation to abortion legislation in Northern Ireland.**

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<sup>34</sup> Justice Minister David Ford has said there is a substantial body of support to make limited changes to the law on abortion. Thursday, 16 April 2015

<sup>35</sup> Northern Ireland Human Rights Commission ‘Factsheet’ on Termination of Pregnancy [available at: <http://www.nihrc.org/news/fact-sheet-on-termination-of-pregnancy> accessed June 2015]

## Plastic Bullets (AEP's – Attenuated Energy Projectiles)<sup>36</sup> (Arts. 6, 7 [Lol 15], CO para. 11)

54. One of the long-term concerns CAJ has relates to the use of plastic bullets. Plastic bullets have killed 17 people in Northern Ireland, mostly children and young people. In the past CAJ has also pointed to plastic bullets being used disproportionately against the Catholic community.<sup>37</sup> The Committee asks the UK in its list of issues whether there are any plans to discontinue the use of plastic bullets (AEPs) in Northern Ireland (Lol paragraph 15).
55. The *Independent Commission on Policing for Northern Ireland*, established a key part of the *1998 Belfast/Good Friday Agreement*, recommended an immediate research programme to find an acceptable and less lethal alternative to the plastic bullet.<sup>38</sup> However the UK simply replaced the plastic baton rounds then being used, with another plastic bullet, the AEP.
56. Recent years have seen a drop in the use of plastic bullets. In the summer of 2011 over 350 rounds were fired, around 90 rounds were fired in summer 2013, no AEPs were discharged in Summer 2014, a round each was fired in March and April of that year.<sup>39</sup> Despite the test for firing an AEP being based on the test for using a firearm the weapon continues to be used<sup>40</sup>, almost always in public order situations.<sup>41</sup>
57. CAJ believes AEPs are inappropriate in public order situations and have never been used in such circumstances in Great Britain. The Committee Against Torture recommended as far back as 1998 'the

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<sup>36</sup> AEP means Attenuated Energy Projectile. Rubber bullets were used in Northern Ireland until 1975 when they replaced by plastic bullets, and the replaced again by another form of plastic bullet called AEP's in 2005

<sup>37</sup> The CAJ 'Misrule of Law' report into the policing of the events surrounding the 1996 Loyal Order parade in Drumcree, Portadown, County Armagh contrasted the 5,340 plastic bullets fired at mainly Catholic/nationalist protestors over three days of serious public disorder, with the 662 fired in three previous days of similar Protestant/ unionist disorder

<sup>38</sup> "A New Beginning: Policing in Northern Ireland" (The Patten Commission Report) September 1999, paragraphs 69 and 70

<sup>39</sup> Northern Ireland Policing Board *Human Rights 2014 Annual Report, 2015* Page 71

<sup>40</sup> "The Attenuated Energy Projectile may only be used if a police officer genuinely, honestly and reasonably believes it is absolutely necessary to do so to reduce a serious risk of loss of life or serious injury. Thus the test that must be met before AEP can be used is the same as for conventional firearms. As it is considered a less lethal option, it is preferred as an alternative to conventional firearms if it is available, the circumstances are appropriate and the test of absolute necessity has been met" As above page 67

<sup>41</sup> In all but three occasions since 2008 the weapon has been used in public order situations. As above Page 71

abolition of the use of plastic bullet rounds as a means of riot control'.<sup>42</sup> Similar concerns were raised in the last ICCPR monitoring round by the Committee in 2008.<sup>43</sup> In 2002 the Committee on the Rights of the Child expressed concern at the continued use of plastic bullets (baton rounds) as a means of riot control in Northern Ireland, on the basis that they cause injuries to children and may jeopardize their lives. The Committee urged that the use of plastic baton rounds as a means of riot control be abolished.<sup>44</sup>

In 2008 the Committee on the Rights of the Child welcomed the abolition of the use of plastic baton rounds, but expressed concern at their replacement with AEPs, whose less harmful nature has not been proved. The Committee recommended to the Government that it put an end to the use of all harmful devices on children.<sup>45</sup> Despite these clear recommendations it is an ongoing concern that the PSNI continue to use AEPs, including in public order situations, when children and young people are present.

**The Committee may wish to ask the State party what measures are being taken to replace the use of AEPs with less harmful methods of force.**

**58. Covert policing, informants and paramilitary activity**

The Committee asks the state party about measures taken to address the continued threat posed by paramilitary organisations in Northern Ireland (LoI 13). A long term area of concern in Northern Ireland, particularly during the conflict, has been the role of police and other security service informants within paramilitary organisations, and the rules governing their conduct. It is now known that during the conflict informants (now officially known as Covert Human Intelligence Sources or 'CHIS') were permitted, facilitated and even directed to take part in serious crime, including killings.<sup>46</sup>

59. The report of the independent commission on police reform established as part of the Belfast/Good Friday Agreement (the Patten Commission) recommended in its report that ECHR-compliant Codes of Practice on all aspects of policing, including covert law enforcement, be adopted and that the legal and ethical guidelines governing 'all aspects of police

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<sup>42</sup> CAT/C/44/Add.1 paragraph 76(g)

<sup>43</sup> <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/433/42/PDF/G0843342.pdf?OpenElement>

<sup>44</sup> United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/15/Add.188, 9<sup>th</sup> October 2002, paras. 27 – 28

<sup>45</sup> United Nations Committee on the Rights of the Child, Concluding Observations United Kingdom, CRC/C/GBR/CO/4, 20<sup>th</sup> October 2008, para. 30 - 31

<sup>46</sup> For detailed account see CAJ 'The Policing You Don't See' December 2012

work...including... the handling of informants' be publicly available.<sup>47</sup> To date no such document has setting out the ethical boundaries of informant conduct has been published.

60. Following an investigation by the Police Ombudsman uncovering practices of collusion between the police Special Branch and loyalist<sup>48</sup> paramilitaries, the PSNI instigated a 'major review' of informants in 2003 which resulted in around a quarter of all informants being let go, half of them as they were deemed "too deeply involved in criminal activity".<sup>49</sup> The review also led to a system of Covert Deployment Authorisations, whereby a senior police officer would have to authorise the involvement of an informant in any criminal offence over and above membership or support of a paramilitary organisation.<sup>50</sup>
61. There remains controversy as to what types of criminal offences informants are allowed to participate in, and an inconsistent approach by the PSNI in clarifying policy. For example the PSNI have denied that they would ever tolerate drugs dealing in exchange for information.<sup>51</sup> However, following the PSNI themselves raising concerns that loyalist paramilitaries had been involved in violent racist attacks, members of the Policing Board sought an assurance that Covert Deployment Authorisations were not granted to allow informants to participate in racist incidents. The PSNI limited its response to stating it would not comment in relation to covert deployments.<sup>52</sup>
62. Despite the recommendation of the Independent Commission on Policing it therefore remains the case that there is no known policy document which prevents the issuing of authorisations which permit informants to be involved in crimes which would constitute breaches of Covenant rights.

**The Committee may wish to ask the UK to issue binding publicly-available guidance to assure that authorisations will never be issued to allow**

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<sup>47</sup> 'A New Beginning: Policing in Northern Ireland'. The Report of the Independent Commission on Policing in Northern Ireland' (Patten Report) September 1999, paragraphs 4.8 and 6.38 [Available at: <http://cain.ulst.ac.uk/issues/police/patten/recommend.htm> accessed June 2015]

<sup>48</sup> 'Loyalist' refers to loyalty to the British Crown

<sup>49</sup> 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007, Appendix A, paras 8-10

<sup>50</sup> As above, paras 14-15

<sup>51</sup> *Poots says police assure 'no untouchables' over drugs* BBC News Online, 2 July 2013

<sup>52</sup> Northern Ireland Policing Board, Questions to Chief Constable, Racist Crime (Pat Sheehan), September 2014

**informants to participate in activities which would constitute human rights violations.**

## **Torture and ill-treatment of detainees by British forces (Arts. 2, 7, 9 [Lol 16])**

63. The Committee has asked the State party to report on measures taken to ensure that independent, impartial, thorough and effective investigations are made into serious allegations of torture and ill-treatment, arbitrary detentions, enforced disappearances and renditions of individuals detained overseas, by British forces in the context of military interventions in Afghanistan and Iraq and counter-terrorism operations. CAJ wishes to draw to the Committee's attention developments that relate to Northern Ireland that are of particular relevance:
64. In 1978 the European Court of Human Rights in *Ireland v UK*<sup>53</sup> found that detainees in Northern Ireland in 1971 who had been subjected to 'in-depth interrogation' techniques<sup>54</sup> suffered inhuman and degrading treatment, but not torture. This has been interpreted by many governments, incorrectly, to justify actions which might otherwise be considered to come within the definition of 'torture' in international law including in Iraq, Afghanistan and around the world.
65. In December 2014 the Irish Government lodged an application before the European Court seeking a revision of this judgment. Fresh evidence has been discovered at the British National Archives which suggests that the UK government deliberately misled the Court when the case was first heard by it and which could have led to the Court finding that the treatment being considered in fact constituted torture<sup>55</sup> Domestic proceedings have also been issued on behalf of those subjected to 'in-depth interrogation' addressing the failure of the State party to carry out full independent and effective investigations into their treatment.
66. It has also emerged that despite an apparent prohibition of these techniques by the UK government a Public Inquiry into the death of an

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<sup>53</sup> 5310/71 (18/01/1978)

<sup>54</sup> Which included 'five techniques' of wall standing, hooding, being subjected to white noise' and sleep deprivation

<sup>55</sup> 'Ireland to clash with UK at human rights court over hooded men judgment', the guardian, 2 December 2014

Iraqi citizen in 2003 found that the Ministry of Defence used the banned interrogation methods in Iraq.<sup>56</sup>

**The Committee may wish to ask the State party what steps it is taking to investigate serious allegations of torture and ill-treatment and deprivation of liberty of those detained in Afghanistan and Iraq and counter-terrorism operations with reference also to the experiences in Northern Ireland.**

**Committee on the Administration of Justice (CAJ) Ltd, June 2015**

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<sup>56</sup> The Report of the Baha Mousa Inquiry, HC 1452-I, 8 September 2011



## SUMMARY OF MAIN FINDINGS

To date there has been no overarching legacy commission or transitional justice mechanism to deal with the legacy of the Northern Ireland conflict. Instead a number of criminal justice system mechanisms examine unresolved conflict-related deaths. Such mechanisms were largely prompted by a series of Article 2 ECHR 'right to life' judgments in the European Court of Human Rights against the UK. This led to Government adopting a 'package of measures' it argued would meet its human rights obligations for effective, independent investigations. The package included changes to the inquest and prosecution systems. It also included reference to public inquiries, the PSNI Historical Enquiries Team (HET) and the Police Ombudsman's role in investigating the past. Serious limitations however have become apparent in relation to these mechanisms which have militated against their capacity to provide accountability for human rights violations. Elements of the package have been shown not to have the necessary independence, effectiveness or impartiality to investigate state actors. Even those mechanisms which have been independent have faced limitations on their powers, delay or obstruction in undertaking their work.

Five years on from the 2009 Eames-Bradley proposals the 2013 Haass-O'Sullivan Proposed Agreement envisaged a single investigative mechanism, the Historical Investigations Unit (HIU), to investigate unresolved deaths. The December 2014 Stormont House Agreement committed to setting up the HIU as an independent body as well as other institutions to deal with the past. The proposed HIU has the potential to provide effective redress, yet the efficacy of such a mechanism will lie in the detail of how it operates. It is this which will determine whether it will succeed in conducting human rights compliant investigations and in achieving accountability. This report shines a light on how the current system of past investigation has been officially undermined and limited. In doing so it attempts to highlight which restrictions and practices would need to be addressed in the context of ensuring the proposed HIU and other mechanisms do not suffer similar flaws.

### **Controlling evidence, personnel and resources**

- Many investigations and court proceedings into pre-1998 human rights violations have faced recurrent problems of obstruction and non-cooperation from state agencies and former personnel. This has included concealment, non-cooperation, withholding and delaying the disclosure of records, with repeated examples of material being put beyond the reach of investigators, going 'missing', being destroyed, or being overly redacted.
- Despite the requirements of human rights law for persons and institutions involved in investigations to be independent from those potentially under investigation, there have been recurring questions of conflicts of interest regarding personnel in key positions in the investigative chain. This includes rehired RUC officers in key roles responsible for disclosure to external legacy investigations.
- Resources for legacy investigations are an obligation on the state. The control of resources can significantly determine whether and when legacy investigations can be conducted and completed, and there have been examples where resources have been withheld or withdrawn. Whilst a figure of £30 million per annum has been calculated as the combined costs of current legacy mechanisms, this figure has not been disaggregated between the level of resources which must be allocated to deal with the legacy caseload and costs caused by avoidable delays and costly obstruction by state entities themselves. Such practices are in turn used to argue investigations are too expensive.

### **Institutionalising impunity?**

- Along with many other states the UK does not define the term 'national security' yet has dramatically extended its scope in recent years. In its name significant powers of direction and concealment can and have been deployed in legacy investigations.
- The extension of 'Closed Material Procedures' (i.e. when court hearings can take place in secret on 'national security' grounds) to all civil proceedings in 2013 has already been used in Northern Ireland legacy cases relating to informants. The doctrine of 'Neither Confirm Nor Deny' (NCND) has also been used in informant cases.
- The definitions of 'collusion' and 'miscarriage of justice' have been officially changed in recent years to make findings of either much more difficult.

### **Beyond the peace process agreements:**

- The UK Government abandoned 2005 legislation which would have protected applicants from standard prosecutorial processes in relation to conflict-related charges. The legislation emerged from commitments in the Weston Park Agreement 2001 to resolve 'OTRs' (On The Runs) cases. After some deliberation Government had included state actors in the scope of the Bill.
- There has been speculation assurances have been given to other categories of persons beyond OTRs. No such system is provided for in legislation and any clandestine scheme would involve a complex set of arrangements with the buy in of key persons in a number of institutions. To date we have been able to locate cases of two loyalists, two republicans and no state actors who have been convicted by legacy investigations.

### **Inquiries**

- The UK had committed to holding a number of public inquiries into 'serious allegations of collusion by the security forces' if they were recommended to do so following collusion inquiry reports by an independent judge, Mr Justice Cory. When the inquiries were in fact recommended the UK rushed through the Inquiries Act 2005, which permitted Government ministers to interfere at practically every stage of the inquiry. The UK subsequently reneged on its commitment to hold an inquiry into the murder of human rights lawyer Pat Finucane, and have declined to open a number of other inquiries. Other 'Cory' inquiries did take place, with some limitations.
- The earlier established Saville Inquiry into the events of Bloody Sunday reported in 2010. It vindicated families and led to an official apology, yet to date has not been followed by prosecutions or other effective remedies.

### **The PSNI Historical Enquiries Team:**

- The HET was established within the PSNI with a remit of re-examining unresolved conflict related deaths. It ran for around a decade until being stood down in December 2014. Its remit for investigating British Army cases had been suspended following a report from HM Inspectorate of Constabulary in 2013 which held its approach in state involvement cases had afforded such preferential treatment that it was unlawful.
- The role of the HET has been controversial. On the one hand the HET has uncovered considerable and substantive information which would otherwise, in the absence of any other mechanism, not yet have come to light and some victims families have found a measure of resolution from HET reports. At the same time there is evidence of a consistent

pattern of official interventions in the work of the HET with the purpose or effect of limiting its role, impact and independence. This has been facilitated by the lack of any statutory basis for the HET.

- The HET has been replaced in 2015 by a smaller Legacy Investigations Branch (LIB) in the PSNI it is not clear how the LIB will avoid the same problems of a lack of independence in state involvement cases as the HET, including in cases involving collusion.

### **Police Ombudsman**

- The Police Ombudsman's Office is among one of the most powerful and independent police complaints bodies in the world. As such its legislation and structure are a potential starting point for the HIU. During the term of Office of the first Ombudsman, Nuala O'Loan, a number of hard hitting reports were produced leading to significant changes in policing practice, including in the area of covert policing, although there was at times virulent official resistance.
- Under the second Ombudsman, Al Hutchinson however, in a crisis over the handling of conflict related legacy cases which ultimately led to his resignation, the Office had become severely undermined following political and police interference in its work. The resignation of the Chief Executive and critical reports first from CAJ and subsequently from the Criminal Justice Inspection, which among other matters found that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation, led to the suspension of the Office's historic caseload.
- A programme of reform under the third Ombudsman, Michael Maguire, has re-established the credentials of the Office which, following a favourable report from the Criminal Justice Inspection, has been able to resume historic investigations. Following this however the Ombudsman has faced a number of external challenges, namely an attempt to judicially review the Office's powers by the NIRPOA, having to initiate its own judicial challenge against the PSNI over failure to disclose documents and a devastating budget cut from the Department of Justice impacting particularly on the historic cases function. Legislative amendments to address gaps in the powers of the Ombudsman's Office also remain unimplemented.

### **Inquests**

- Inquests can play an important role in ensuring effective investigations. Inquests in Northern Ireland have long been controversial and a significant number of the systemic failings identified in the Strasbourg 'right to life' cases relate to the inquest system.
- There are currently dozens of legacy inquests before the Coroners Court, yet the process has been obstructed by endemic delays, particularly in obtaining disclosure of information from state agencies. There are also significant structural issues which require redress. This has led to further damning rulings in the domestic and European Court in relation to the inquest process. There is now a commitment in the Stormont House Agreement for reform to ensure human rights compliant inquests.

### **Prosecutorial decisions**

- Decisions to prosecute, or not, are a key element of the criminal justice system. There is evidence that at times during the conflict a level of immunity was afforded to soldiers and informants who could otherwise have faced prosecution.

- Reforms to the system were prompted by the European Court of Human Rights judgments. At present none of the mechanisms dealing with the legacy of the conflict has the remit to scrutinise and remedy past-prosecutorial decisions.

## **Conclusions**

This report brings together relevant evidence about deficiencies in the current mechanisms tasked with uncovering the truth about human rights violations in Northern Ireland. An assessment of this evidence does not support a conclusion that a 'package of measures' is being deployed in good faith by the UK Government, only held back by the complexity of the issues, cost and lack of consensus among Northern Ireland politicians. Rather, the evidence points to a common purpose between the UK Government and elements within the security establishment to prevent access to the truth and maintain a cover of impunity for state agents. Examining each mechanism or phenomenon on its own may create an impression that obstructionist activities are institution specific or aberrational. Yet the emergence of patterns across a number of mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses coming to light and those who were responsible for such abuses (or for covering them up) being held accountable.

There are those who believe security force actions outside the law were justified and helped resolve the conflict. CAJ takes the opposite view and is concerned such actions fuelled conflict. Unless a state is held to account for human rights violations, there is a risk of recurrence. Whilst official and media discourses often point to the state 'only' being responsible for 10% of the deaths during the conflict, this figure does not include deaths attributable to 'collusion'. Only a proper truth recovery process is likely to provide a more accurate figure. What has become apparent is that whole areas of security policy were run outside of the law, yet very few of the tens of thousands of those imprisoned during the conflict were state actors. The UK Government has strongly opposed any amnesty, yet raises concerns that the current legacy mechanisms are too focused on the state. However, in this context, we have been unable to locate one single state actor who has to date been tried and convicted as a result of legacy investigations. The examples in this report show that often every piece of information about past misconduct by state agents has to be hard won.

The existing package of measures has not been able, or has not been permitted, to deliver accountability for human rights violations. The obligations of international human rights law require the dismantling of the various elements of the 'apparatus of impunity' detailed in this report. Remedies are required to ensure existing mechanisms and new institutions alike have the power, resources and structure they need to conduct human rights compliant investigations into the past without their independence being fettered. The state needs to address non-compliance with disclosure and cooperation obligations, conflicts of interest of personnel and to rescind doctrines of 'national security' that afford the opportunity to conceal human rights violations. The process of establishing new institutions needs to redress, rather than replicate and entrench, existing problems and gaps in powers. It is only full implementation of such requirements which will ensure accountability for the past and ensure non-recurrence in the future.