



CAJ

**Committee on the
Administration of Justice**

*CAJ's response to the
consultation on*

The Report on the Consultative Group on the Past

September 2009

Submission No. S.240

Submission No. S.240

Promoting Justice / Protecting Rights

45/47 Donegall Street, Belfast,

BT1 2BR

www.caj.org.uk

Tel: (028) 90961122

Fax: (028) 90246706

Email: info@caj.org.uk



The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Committee on the Administration of Justice (CAJ) Ltd

45/47 Donegall Street, BELFAST BT1 2BR
Northern Ireland

Tel: (00 44 (0) 28 9096 1122 Fax: (00 44 (0) 28 9024 6706
Email: info@caj.org.uk Web: www.caj.org.uk

Promoting Justice / Protecting Rights

Winner of the Council of Europe Human Rights Prize



Submission from CAJ to the government consultation on:

“Dealing with the Past in Northern Ireland: The recommendations of the Consultative Group on the Past”

September 2009

1. Introductory remarks

The Committee on the Administration of Justice (CAJ) is an independent non-governmental human rights organisation that was established in 1981. CAJ's areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. Its activities include publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

CAJ's members, like the rest of the community in Northern Ireland, have very different views on the Eames/Bradley proposals. Some believe that, without public scrutiny, legal representation for all sides, the full cross-examination of witnesses, and the power to compel both witness statements and documents, no honest process of truth recovery can possibly succeed. Those with this view do not believe the current proposals have any real chance of providing either bereaved families or society as a whole with the truth. They believe that the state and its agents, in particular, will do all they can to prevent the truth being told and will frustrate the legitimate rights of families to hear the truth.

Others, however, believe that these proposals are a start and can be built upon. From this point onwards, this submission detailing CAJ's response is their view.

By way of introduction, this submission will provide some general comments before responding in more detail to particular issues raised in the consultation document. As a human rights organisation that seeks to hold the government to account for its obligations under international human rights law, CAJ's focus is primarily on the state and its agents who are bound by these obligations. As such, some of the issues raised in the consultation document are less appropriate for us to comment upon. We have been guided in this response by the basic principles for a truth process drawn up by CAJ in 2003 (attached in Appendix 1).

1.1 The need for political generosity

The Report of the Consultative Group on the Past has been generally recognised as a genuine attempt to wrestle with the difficult collection of issues related to law, justice, truth, accountability and societal reconciliation that arise in the context of post-conflict transition. However, the key to moving forward and whether or how to implement the recommendations depends to a large degree on the extent to which the relevant protagonists trust each other and the degree to which such processes conform to the requirements of international law.

Here, the key is the extent to which an atmosphere of political generosity can be inculcated in the process. This, we would suggest, rests significantly on the willingness of the UK government and the Northern Ireland Office to allow the requisite levels of scrutiny of and accountability for their own actions to operate in any mechanisms that are established.

Independent scrutiny of the state's role in the conflict is a key requirement of this process. Impunity is the most dangerous legacy. If the state and its agents feel that they can get away with violations of human rights, then any attempt to deal with the past will fail, with the associated danger that the mistakes of the past will then recur.

1.2 A process to deal with the hard issues as well

The process of the Consultative Group has, in our view and despite our initial scepticism, been positive overall. However, the response to the Report, particularly in relation to the recognition payment, has operated to politicise the debate and to make it a controversial topic. CAJ believes that this negative reception should not frame the remainder of the debate. Remedy and reparation have been a key aspect of many truth recovery processes, and it is in this context that we address the issue

of recognition payments. It is unfortunate that the government has seen fit to rule out this recommendation prior to consultation. We are convinced that the Consultative Group would not have included that proposal were it not an intrinsic part of a balanced overall package. It would be important that the proposal is considered on its merits.

The temptation arising from this consultation will be to develop a process that selects the easy proposals which have most support, such as story-telling and discussion *fora* of various kinds. In fact, the process must deal with the hard issues. As the government with ultimate responsibility for this jurisdiction throughout the conflict, the UK government – with the Irish government – needs to address the difficult issues as well as the easy ones, not least by establishing an independent commission with sufficient powers and clear mandate.

The state is bound not only by its international human rights treaty obligations, but also by customary law obligations, both of which have purchase and relevance to the issues addressed by the Consultative Group. CAJ would point out that there are a number of United Nations soft law standards that would assist in clarifying the best way to deal with the difficult issues at the heart of the Report's recommendations. Included among them are:

- UN Principles for the Protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1 – 8 February 2005)
- UN Rule-of-law tools for post-conflict states (HR/PUB/06/1 – 6)

These are an indication that the difficult range of issues at the heart of the Consultative Group's Report is routinely addressed in other jurisdictions. The key to addressing them is a commitment to ensuring maximum truth with maximum independent oversight.

1.3 Leadership Responsibility of the UK Government

It appears to us that there are real and significant human rights arguments which can be deployed in order to make the legal compromises in the Report impossible to agree. The only way in which these hurdles may be overcome is if the UK government, as a state with obligations under international human rights law, and as the key decision-maker and a powerful participant in the conflict, maximises its willingness to give a full accounting for its role and the role of its agents during the

conflict. In CAJ's view, this is the surest way to bring about the atmosphere of political generosity required for initiatives such as those envisaged by the Consultative Group on the Past.

In our view, there is a need for a genuine and transparent process which addresses the conflicting myths of the past. Otherwise, the danger is that these myths about the conflict will clash in another generation or two. History suggests that without resolution, conflict re-emerges after fifteen years.

1.4 Human Rights deficits in the Report

In general, CAJ is of the view that there is too little acknowledgement of the centrality of human rights in the Consultative Group's Report overall and there appears to have been little consideration of anything other than European human rights law. While compliance with Article 2 (of the European Convention on Human Rights and Fundamental Freedoms) is identified in the Report as necessary, CAJ believes this is a minimalistic and overly narrow approach to the human rights obligations that pertain. We would point out that even within the European system, for example, other Articles of the ECHR (such as Article 3 on the prohibition of torture) are applicable.

The UK government has also ratified and is therefore bound by the International Covenant on Civil and Political Rights and the UN Convention Against Torture. In addition, there are numerous other applicable UN declarations and principles (such as those mentioned above). Consideration of international humanitarian law obligations may also be of benefit. The Inter-American system of human rights and the extensive jurisprudence of other jurisdictions are also valuable reference points. The International Criminal Court and the impact of emerging legal standards and norms around criminal accountability are also relevant.

Furthermore, human rights obligations also require the promotion of human rights. This should be included within the objectives and work of the Legacy Commission and the various other elements of the Group's proposals. The promotion of human rights is an obligation on the UK and Irish governments and indeed the Northern Ireland Executive. All of these should be seeking to ensure that mechanisms established to deal with the legacy of the conflict, sectarianism and reconciliation also promote awareness of and respect for human rights.

1.5 Focus of the Legacy Commission solely on deaths

While it is entirely appropriate that deaths arising from the conflict should be a major feature of any investigative and information recovery elements of a Legacy Commission, there are wider phenomena of conflict than fatalities which need to be considered from a human rights point of view. The learning from other transitional settings is that a wider lens is needed. In particular, we would point to the following:

1. The scale of injuries in number and seriousness can give a truer impression of the impact of the conflict. Many of those injured have had their lives impacted hugely in terms of the ongoing suffering and economic hardship. A true accounting would seek to address this aspect of the conflict.
2. There is a strong sense that the Report is a missed opportunity in terms of assessing the gendered impact of the conflict. As such, any terms of reference for a Legacy Commission should include an analysis of the conflict in terms of its multi-faceted impact on women.
3. Torture and ill-treatment were recurring aspects of the conflict, including allegations of ill-treatment during internment and persistently during police custody. The prohibition against torture is the simplest piece of international human rights law in terms of its obligation on states. In our view, this is another aspect of unresolved violation that requires to be addressed.
4. Finally, although there is reference (on p79) to the socio-economic impact of the conflict, there is little assessment of how exactly this should be addressed. It is clear that the impact of the conflict was felt most keenly in areas of highest deprivation. Accordingly, a genuine effort to deal with the legacy of conflict will seek to ensure that there is a real attempt to address the inequality that was associated with the conflict. CAJ has long been of the view that equality and reconciliation are interrelated and interdependent - genuinely addressing the inequalities that exist in this society, many of which stem from the conflict, will lead to greater reconciliation. As such, it is frustrating and disappointing that sectarianism and reconciliation are identified as separate from and more strongly than the inequality that was part of the origin of the conflict, fuelled the conflict and remains a substantial legacy of the conflict.

2. Response to recommendations

Recommendation 1: The establishment of a Legacy Commission combining reconciliation, justice and information recovery

CAJ has more to say about justice and information recovery below. However, the wider mandate of reconciliation is something that has been sought in recent truth commissions internationally. It is clear that with a proper human rights compliant approach to other issues, reconciliation can be an outcome of the process, and it is questionable if genuine reconciliation is at all possible without a human-rights based approach. The important issue will therefore be to ensure that human rights are central to the remit and operating style of the Commission and its various units.

Furthermore, if reconciliation is to be an outcome of the work of the Legacy Commission, a clear and agreed definition of reconciliation should be arrived at from the start. The South African experience is that an inchoate and undefined aspiration towards reconciliation served to undermine the potential for reconciliation in the way the Commission operated there. Commissioners appeared to wish to push victims unreasonably towards forgiveness and a relationship with those who victimised them. In the long run, this appears to have damaged the hope for deeper reconciliation.

It follows therefore that the key is to get the mechanisms operating in a human rights compliant way, providing maximum disclosure so that victims get the truth as is their right, with reconciliation as an outcome flowing from this.

Recommendation 2: A Reconciliation Forum

Very little is said in the CGP Report about what the Reconciliation Forum would do; how it would operate or its what its aims are. The danger in this proposal is that an element of confusion may emerge from the plethora of groups who already have a mandate in this area. While there is merit in seeking to clarify the connections between groups who have some overlapping responsibilities, getting these groups to "buy in" to a new arrangement may be difficult to achieve. Reconciliation is a complex process and it is not clear to us that the three groups mentioned are the only ones who have a legitimate role. We question, for example, why the Human Rights

Commission and the Equality Commission have not been given a role? The involvement of the two Commissions - which were, after all, established as part of the peace-building enterprise - would emphasise that the objective of reconciliation must include respect for equality and human rights.

Recommendation 3: The £100,000 Bursary to tackle societal issues

Our comment on this issue relates to the need for sufficient and appropriate resources for the whole of the Legacy Commission's work, notwithstanding the current pressure on finances. The issues that are being addressed are significant and difficult and this would be a long overdue attempt to resolve them. However, the amount cannot be estimated until one knows precisely what is intended and required.

CAJ is concerned that some of the issues arising from the legacy of conflict, such as healthcare for example, would be 'parked' in a discretionary and limited bursary rather than being mainstreamed in public budgets. We cannot see why, for example, the care of someone injured during the conflict should be given financial support only on the basis of an application to such a bursary. The government is already obliged to address need where it arises, and this should not be sidelined.

The key to an effective funding scheme is an agreed overall vision. More generally, we are concerned at the lack of consideration of reparations. Internationally, it is expected practice for a program of individual and societal reparations to take place as part of a process such as this, yet the report of the Consultative Group fails to adequately grapple with this important area. It may be that the Legacy Commission, as it develops its work, will identify its own priority areas. One of the comments concerning the recognition payments, for example, was that the payments might be more appropriate at the end of the Legacy Commission's work and arising from its findings. There are arguments for and against such an approach, but the principle should be to develop a comprehensive funding scheme.

If the existing proposal is to stand, however, in line with our comments above, we would wish to see a focus on the promotion of human rights and equality in the issues to be funded.

Recommendation 4: The Recognition payment

The issue of victims has been deeply divisive. The recommendation of the Consultative Group on this issue has served to highlight how it continues to divide people. However, we believe that by saying very clearly that there should be no hierarchy of victims, the Consultative Group has done a service to the community. They have decided that the only way forward is to recognise (rather than accept or condone) the suffering that has affected all sides. Our strong view is that this recommendation should be followed.

CAJ finds it regrettable that government took a position on this recommendation before consulting more widely. This was a reaction to media hype and political over-reaction; the very antithesis of how these issues should be addressed. Very often, the people with the loudest voices do not reflect the thoughtfulness of the majority. We urge the government to rethink its approach. Consideration of how a similar scheme was operated by the Irish government - and indeed in other jurisdictions - would assist in dispelling any notion that this cannot be done in a respectful and sensitive way.

If people do not want to participate, they cannot be forced to apply for the recognition payment. However, we have heard many stories of hardship and need from victims of all hues who would be assisted by such a one-off payment. In this regard, it is worth remembering that the conflict impacted most in areas of highest economic and social deprivation. It is accordingly likely that the relatives of those killed and injured will be from lower socio-economic backgrounds and would consequently have greater benefit from such a recognition payment.

The consultation paper also asks how the suffering of victims could be recognised in a better way. In fact, the primary recognition for all those affected by the conflict is to establish a proper human rights compliant and widely agreed truth recovery process. It is clear that there is a wide appetite for a process and establishing it according to the best possible standards, with maximum transparency, and to seek the maximum truth possible, will be the best way of acknowledging the suffering of victims.

Recommendation 5: Role of CVSNI

The state has an obligation to respond to the needs of victims. This emerges again and again in UN principles on transitional processes. CAJ agrees that the CVSNI

should have a role here. However, all state agencies and departments should have this as a consideration. Perhaps the role of the CVSNI could be to develop guidelines for other state agencies in relation to their interaction with and responsibilities to victims.

It is worth pointing out that the OFM/DFM is supposed to have issued a Victims' Strategy, but it is deadlocked and cannot reach agreement on the contents of such a strategy. This is an indication of the continuing controversy surrounding victims' issues. The CVSNI itself has been controversial in its establishment and make-up. It may be that establishing an independent Legacy Commission with an overarching remit will provide an external perspective that will resolve some of the controversy.

As stated above, CAJ is concerned that there is a sole focus on deaths during the conflict. Other human rights violations have produced victims. In particular, victims of Article 3 (prohibition on torture) violations should not be forgotten. Also, a significant number of people were injured throughout the conflict and still suffer the consequences of those injuries. Likewise, gender and socio-economic impact should be considered as part of this process.

Recommendation 6: The Reconciliation Forum and healthcare issues

While CAJ welcomes this recommendation, we feel it is too limited, particularly by taking a very medical and healthcare-focussed approach to the harms that have been caused by the conflict. These harms extend beyond the response or responsibilities of the health service. The Forum should be given a role to proof all areas of government policy to ensure that victims' needs are addressed. In order to do this effectively, a wider definition of victimhood should be adduced, as outlined above. Thus, for example, the Forum should be able to recommend on investment policy as it relates to the socio-economic impact of the conflict. There will be inter-generational effects of the conflict which should also be considered.

Recommendation 7: An international Chair for the Legacy Commission

CAJ agrees in principle that an international figure can bring a freshness of approach and an independence of spirit to this important task. We also believe that independence will be a key requirement for the Commissioners tasked with overseeing the various units and, particularly, the Thematic Investigation Unit.

Perhaps the crucial element in selecting the individual will be the process of appointment, which should as a minimum be in line with equality and public appointment obligations. Input into the consultation about the panel of candidates and in the selection would be beneficial in respect of broad community ownership of the eventual successful candidate. We would also suggest that independent and civil society input should be included in the interview process.

In the end, however, the mandate and remit of the Legacy Commission will be key. Operating investigations that conform to the highest human rights requirements and working towards a widely-agreed definition of reconciliation will be fundamental if an international figure is to be able to operate independently. Cooperation of the UK and Irish governments, as well as the paramilitaries, is essential.

In relation to other skills and attributes for the Commissioners, CAJ is concerned by the lack of any judicial aspect to the recommendations of the Consultative Group. Many of the tasks proposed for the Legacy Commission emerge from the field of law. It would be important that legal knowledge and judicial decision-making experience is available to the Commission. We therefore recommend that at least one of the Commissioners should have an international judicial background. We would further argue that knowledge and expertise on human rights should be one of the criteria.

Recommendation 8: The Four strands of work of the Legacy Commission – reconciliation, review and investigation, information recovery and thematic investigation

Traditionally, these are the types of activities undertaken by transitional mechanisms. We see no reason why these are inappropriate for the Legacy Commission. However, we would reiterate that a clear and concise definition of reconciliation is needed which should reflect respect for human rights and the achievement of equality.

The important issues are whether the Commission is given sufficient powers; has a wide enough mandate; and can carry out its functions in a comprehensive and independent manner. Fundamentally, it needs to be able to promote human rights,

equality and respect for the rule of law. This will be impossible if it does not operate in a human rights compliant manner.

Similarly, the work of the Legacy Commission will fail if wide political agreement is not supportive of the Commission. Its independence and capacity to get to the truth will indicate its likely success. As we have indicated in our introductory remarks, we believe that the UK government has a major role in building an atmosphere of political generosity in this regard. If the UK government indicates that it wishes to allow maximum disclosure and allow for the testing of evidence through the processes of the Legacy Commission, this is more likely to provide a better impetus for the difficult work that is to be undertaken.

Recommendation 9: A fixed mandate of 5 years

While CAJ can see merit in having a timeframe to work to, we do not believe it should be set in stone, as arbitrary cut-off points can run the risk of important issues not being addressed. However, as long as there is clear progress towards a distinct end point, and flexibility at the end to ensure every issue is addressed, a 5 year period appears workable.

We would however recommend that the 5 year period should not include the set up period. The example of the Bill of Rights Forum indicates that set up and agreement of terms of reference and working methods can take significantly longer than anticipated. This should not eat into the timeframe of the real work of the Commission.

Recommendation 10: OFM/DFM, Irish and UK government to implement the Commission

Given the architecture of the Belfast/Good Friday Agreement, and the role of the UK and Irish governments as primary guarantors of the peace process, it seems appropriate that they are the principal authorities. We are not convinced that these contentious issues can be taken forward by the devolved administration at such an early stage in its being.

We are concerned, however, that the implementation role of the UK government in particular should not impact on the accountability of that government to, and the

independence of, the Legacy Commission. Many of the issues and themes that will be addressed by the Commission are issues that the government will have to account for. It is for this reason that agreed and secure budgets will have to be negotiated at the start of the mandate. The UN “Paris Principles” on the independence of national human rights institutions may also provide some useful guidance in this regard.

Recommendations 11 - 14: The need to tackle a variety of societal issues

The Legacy Commission's key role is in dealing with the legacy of conflict. However, it is vital to reflect on the multi-faceted impacts of conflict. We are very much of the view that a key issue in relation to the legacy of conflict is the uneven impact of economic and social development. It is widely accepted that inequality and deprivation have been instrumental in causing and sustaining the conflict. Additionally, many studies have shown the way in which areas of greatest conflict and multiple deprivation overlap. It follows that investment should be targeted to assist those areas of highest need that have been impacted most greatly by the conflict. This is the surest way of cementing peace and preventing further conflict in the next generation.

Recommendation 15: A challenge to the churches

We agree with this recommendation, however we feel it should go beyond “reviewing and rethinking their contribution to a non-sectarian future” and extend to a more detailed exploration of their role during the conflict. The South African Truth and Reconciliation Commission developed the innovative mechanism of societal hearings as a way of challenging a variety of institutions to give an account of their role during the apartheid era (including one on the churches).

As such, we feel that other institutions beyond the churches should also be challenged. These include the media, the judiciary, the legal profession, elements of the criminal justice system (including the prosecution service), the Prison Service, NGOs, trade unions, the private sector and so on. All these should be asked to consider their role during the conflict and consider whether they have a particular role to play in working for a non-sectarian future. It is only by exploring the role of institutions such as these that the macro truth or bigger picture of the conflict can be pieced together.

Finally, while Northern Ireland has traditionally been a Christian society, recognition should be given to the fact that we are now a more diverse society. Other religions and faiths - including the fact that this is a more secular society - should be given their due in imagining a future which is non-sectarian and in which human rights and equality are fully respected.

Recommendation 16: Conflict-related convictions

CAJ agrees with the need to statutorily prevent discrimination against those with conflict-related convictions . It has been made more urgent by the House of Lords ruling in the case of *McConkey & Marks v. the Simon Community (McConkey v Simon Community Northern Ireland; [2009] UKHL 24; [2009] WLR (D) 161)*. In that ruling, the House of Lords has widened the scope for discrimination against the large numbers of individuals in Northern Ireland who have conflict-related convictions, or even those who are suspected of having supported the use of violence in the past. The redefining or scrapping of Article 2(4) of the Fair Employment and Treatment (NI) Order will also be required.

Recommendation 17: A Review and Investigation Unit

Our introductory remarks on the need for political generosity are particularly appropriate to the recommendations concerning the establishment of a Review and Investigation Unit. It is in relation to the activities of the UK government and its agents that most transparency and accountability is required from a human rights perspective. This is in the context that it is the government which has freely signed up to human rights obligations and that is required to act accordingly.

The resistance there has been to investigate cases adequately, to disclose information and to hold public inquiries, particularly where clandestine agencies have been involved, has boosted the scepticism of many as to the UK government's intentions and commitment to uncovering the truth.

While the recommendation does not allow for legal representation, it is safe to assume that governments and their agencies will have the benefit of legal advice in relation to all their contacts with the Legacy Commission and its various units. It could also be assumed that government agencies have the most documentation and

therefore the most to cover up, should they seek to do so. We remain to be convinced that the proposals as currently formulated will address this.

For all of these reasons, there is a responsibility on the UK and Irish governments to set the tone for processes of truth, justice and information recovery. They should indicate their willingness to co-operate fully with any mechanisms established, establish them with requisite powers and resources to enable them to carry out their functions effectively and independently, ensure equality of arms in relation to victims' access to the mechanisms, and ensure recourse to independent and judicial oversight of their decision-making.

In this way, some of the suspicion and scepticism may dissolve and a better atmosphere may be created for the Legacy Commission's work.

In response to the question as to whether the proposed unit will be an improvement on current arrangements, this will only happen if there is sufficiently wide consensus on it. As outlined above, the UK government's attitude will be a key determinant. It should remember that it has human rights obligations to provide the widest accounting of its role in the conflict. The extent to which it is committed to doing this and thus building the confidence of other players will determine how effectively any subsequent arrangements work.

A further question asked is how cases are selected for review. In principle all cases should go through the same process, and we would recommend this as a starting point. However, we recognise that the Historical Enquiries Team (HET) in particular has already dealt with quite a number of cases. In our view, the opinions of families should be taken into consideration. Some may be content with what information they have received through the HET (or Office of the Police Ombudsman - OPONI) investigations or may not want to know certain information. Others may not be happy with either the investigation or information generated therefrom. Consultation with each family should therefore be undertaken.

Recommendation 18: This unit to take over the work of HET and OPONI on historical cases

CAJ can see that the merging of the work of HET and OPONI into a separate independent investigative unit may be one way of addressing some of the Article 2

compliance concerns that we and a number of families have had in relation to HET and OPONI. In considering such a merger, we would wish to see some of the learning from the operation of each of these bodies to date to be taken into account. There is too much of this to go into detail here, but we would refer, for example, to CAJ's Commentary on the Police Ombudsman (June 2005), and the recent work by Patricia Lundy on the HET.¹ A number of specific examples are:

- ❖ It has been a feature of the HET that it has had to be educated about the perceptions of the conflict from different community perspectives. A police culture brings a particular approach to the narrative of conflict. Only when the HET began to engage more with families directly and NGOs, did the HET reports become more realistic and credible. This needs to be borne in mind for recruitment to the new unit.
- ❖ As Patricia Lundy's research into the Historical Enquiries Team showed, the involvement of NGOs assisting families can improve the experience of families in their contact with HET and OPONI. It follows then that such support for families should also be part of this process.
- ❖ In CAJ's view, there have been significant problems in relation to disclosure by OPONI and its liaison with families and their representatives. HET, on the other hand, has taken a more open and "victim centred approach" which we believe should be emulated.

This unit is envisaged as basically a police investigation unit. In our view, truth recovery processes are an opportunity for a richer view of the past than simply a police-style investigation. The key is the establishment of a good database which collects information and statistics that can provide wider information about the causes, trends and nature of the conflict. From this point of view, the unit needs to have a wider range of skills than simply police investigators.

We have indicated earlier that the human rights violations that are investigated should not be limited simply to deaths. Significant violations such as torture should be amenable to investigation by the unit.

¹ Dr Patricia Lundy, "Can the past be policed? Lessons from the Historical Enquiries Team Northern

In relation to the work already completed by the HET and OPONI, as indicated earlier, each of the families should be consulted about how they wish to proceed. Some will be content with the report they have already received. Others will wish for a further review. It may also be the case that in the context of a deeper commitment by the UK government and other parties to the conflict to transparency under the Legacy Commission, further information and documentation may be available.

Certainly, we believe that protocols which have been drawn up between HET and OPONI and Special Branch, MI5 and other clandestine state groupings, should be reviewed in light of the new unit and its mandate to ensure they are fit for purpose and allow for the greatest possible transparency and accountability.

Finally, CAJ is concerned that decision-making regarding prosecution will remain with the former Director of Public Prosecutions (now known as the Public Prosecution Service). Many families and NGOs, including ourselves, have had difficulty over the years with the quality and transparency of decision-making of the then Director of Public Prosecutions (DPP). Indeed, we have indicated elsewhere in this response that we feel that the DPP/PPS should be held to account by the Legacy Commission for its role during the conflict. We believe rather that a special prosecution unit should be established as part of the Review and Investigation process of the Legacy Commission in order to take forward any prosecutions that do emerge.

Recommendation 19: An Information Recovery Unit

We understand the logic of consecutive stages from investigation through to information recovery. However, information could be withheld or covered up at investigation stage, only to be revealed in the latter, more legally lenient, information recovery process. As such, this could be an easy way for the government, in particular, to manage the process and avoid its obligations to disclose information of relevance to families in relation to cases where its agents were involved in deaths.

CAJ would remind government again that human rights standards require transparency, accountability, judicial involvement and testing of evidence. The process envisaged for this unit avoids all of these. We cannot see why it should be impossible for families to have their interests represented in the discussions. We

would like to see whether a more open process can be created that respects the rights of those coming forward but also allows the rights of victims to be respected.

There may be a view that keeping legal representation out of this unit will be a way of avoiding the expense of legal fees. However, it is likely that government agents who assist this unit will have been legally advised at public expense. An equality of arms approach requires that those affected by the actions of the government agents should also have access to legal advisors at no additional cost to themselves, should they wish to.

It is a procedural requirement of Article 2 of the ECHR to involve families in processes that involve the death of their relative. In this context they should be entitled to the advice of their legal representatives.

In relation to the question of a separation between the work of the two units, we appreciate the logic of the separation. However, we do not believe that there should be no possibility of information being passed back to the Review and Investigation Unit if it is not part of a protected statement. Thus someone may give information (which will be protected in relation to her/him) that may name another individual. There seems no reason why the latter information cannot be passed to the Review and Investigation Unit as evidence-gathering in another case.

CAJ welcomes the dependence of transition from investigation to information recovery upon the consent of families. However, we are not certain that this is widely enough known. It will be important that other processes stay open as not all families seek similar outcomes.

With regard to the use of protected statements, this approach is not out of line with that used by other inquiries. However, unlike inquiries, CAJ is concerned that the only people who will test the evidence are the Commissioner responsible for information recovery and her/his staff. It is important that this individual and his/her staff to have a judicial/legal background.

We would also like to see some way that victims' families can have the statements tested from their perspective, while maintaining a level of flexibility. The potential for flexibility will depend on the level of goodwill that exists to support the work of the Legacy Commission as a whole. Again, the leadership shown by the governments in

their willingness to be transparent and co-operative will determine the atmosphere underpinning the work of the Commission.

The rights of persons providing information must, of course, be protected. However, we are not certain that the correct balance has been struck between securing information and protecting those who provide information. In this regard, as a human rights organisation, our focus has to be on the state and its agents. As such, the concern is that a former soldier, police officer or informer might provide information that would be self-serving and untested. The Legacy Commissioner and his/her staff will be able to question and follow up information. However, while it is likely that the statement will have had the benefit of legal advice, a victim's family will have no sight of documents or the possibility of legal advice to test the evidence. Further consideration should be given to this part of the recommendation to ensure that the family has a reasonable opportunity to test information, particularly if it is manifestly unreliable.

After all, the statement is protected, it will be made in private and will not be subject to cross examination. These are considerable compromises. In our view, the balance has to be reconsidered.

The consultation paper finally asks whether people would come forward to provide information under the proposed system. In our view, the only impetus would be goodwill. We believe that the current proposals may not provide enough reason for people to come forward, particularly if there is no way of reverting the case back to review and investigation.

Recommendation 20: A Thematic Investigation Unit

We believe that this unit has the capacity to be a powerful tool to provide reliable and realistic accounts of what took place during the conflict. There are indeed themes which could usefully be examined. We believe that the accounting would be strengthened if people could give testimony and evidence to this unit that contributed to a deeper sociological understanding of the truth. Other truth commissions have sought to enrich a legalistic evidential account by considering wider statistical and other analytical information to provide a richer account of the conflict. This unit in particular could benefit from this approach. Statistical analysis may draw attention to unexpected themes. In addition, were the government to make a strong commitment

at the outset to providing information to this unit, it would set a strong tone that would build confidence for the future.

However, we are concerned that the issue of collusion be dealt with this by this unit as currently proposed. Collusion concerns the state colluding to kill its own citizens. There can be no graver issue and in our view it is not acceptable under international law that issues be discussed in private and covered up.

It is proposed that hearings be held in private. We do not agree that there should be a presumption of private hearings, rather there should be a presumption for public hearings with the potential for applications for private hearings. The issues to be examined are so serious that the principles of transparency and accountability should be paramount. After all, at this stage, those giving evidence will be protected from prosecution. They should, accordingly, not automatically be protected from public scrutiny, accountability or questioning by affected victims.

We do agree that the unit should have powers to compel the production of documents and to compel witnesses to attend and give evidence.

As to whether the proposed arrangements protect the rights of persons compelled to give evidence, once again, we do not believe that the correct balance has been struck in this instance. All the protections and legal compromises are to the benefit of those giving evidence and not those who would seek to question that evidence.

If the individuals have not co-operated or volunteered information at the Information Recovery stage, it is clear that there has not been a willingness to come forward. There should therefore be a presumption that these individuals may not be forthcoming about their information. They should accordingly have to face cross-examination; there should be judicial consideration of any applications for privacy/anonymity and the presumption of a public hearing should apply.

Recommendation 21: No new public inquiries, including that already promised into the Pat Finucane case

We are completely opposed to the notion that the inquiry into the Pat Finucane case should be dropped. There has been a prolonged process of consideration and political negotiation around this case, with government having previously committed

to - and now dragging its feet on - establishing a public inquiry. This case goes to the heart of issues around collusion and must therefore be dealt with transparently. The approach of the UK government to date has been characterised by prevarication, obfuscation and avoidance. This approach has contributed greatly to a poisoning of the atmosphere in relation to the government's motives.

Rather than seeking to avoid its responsibilities with regard to this inquiry, in our view the UK government should proceed as quickly as possible to agreeing an inquiry with the family of Pat Finucane. A good faith effort in this regard will contribute to the atmosphere of political generosity to which we have alluded elsewhere. It would go a long way to enabling a more imaginative and creative atmosphere with regard to other recommendations in the report.

In relation to the potential for public inquiries into other historical cases, we would question how it would be possible for government to bind itself to ruling out public inquiries at all costs, particularly given the existence of both the Inquiries Act 2005 which (although deeply flawed) allows inquiries to be established, and the government's obligations under Article 2 of the ECHR. It is entirely possible that issues of such importance and gravity emerge with regard to individual or grouped cases that the only response can be to hold a public inquiry. It is too early, with no reports having yet issued, to assess the outcomes of ongoing inquiry processes. While it is unlikely that there will be a massive appetite for many more large-scale inquiries into individual cases, they should not and cannot be ruled out.

Recommendation 22: Inquests and the CCRC

The Consultative Group recommended that inquests should continue. CAJ agrees. As to whether the Legacy Commission should have a role in reviewing "the burden" of inquests and cases alleging miscarriage of justice, we would point out that "the burden" of inquests arises mainly because government agencies resist providing information so that the inquests can go forward.

While it might be appropriate for the Legacy Commission to comment on both mechanisms, we doubt whether it would ever be appropriate to abandon inquests.

In relation to the Criminal Cases Review Commission, given the recent rise in cases from Northern Ireland, consideration should be given to a dedicated Commission for this jurisdiction in the same way as exists in Scotland.

Recommendation 23: Amnesty

Human Rights NGOs cannot be in favour of a blanket amnesty, particularly for serious human rights violations. We recognise (as above) that individualised abrogation of prosecution can be possible and it appears to us that the protected statement mechanism outlined is an appropriate way to proceed in the meantime.

As to whether it will be possible to “draw a line” after 5 years, we refer to our comments above in relation to timeframe, and particularly the potential danger that important issues escape examination.

It makes sense to allow the Legacy Commission - in wider consultation - to reconsider the issue after it has nearly completed its work. There may be a new atmosphere with other possible proposals at that point.

Recommendations 24 - 29: Story telling, reflection and remembering

Dealing with the past entails weaving together rather than separating the various elements of the process. While there is potential for a reflection and remembrance process, it should be about more than simply telling stories, although that is invaluable. There may be evidential potential in accounts and as such a process of story telling should be linked in some way with the Review and Investigation, Information Recovery and Thematic Investigation Units.

In addition, stories and accounts entered into a good database could be useful in analysing what took place during the conflict and drawing lessons for the future. Again, the use of a Commission-wide database for collated information would be vital. As indicated earlier, such accounts can also provide important sociological data for drawing up a record of the past which has a richer feel in terms of wider truth.

Recommendation 30: Challenge and declarations

While we have no difficulty in principle with the idea of a declaration not to kill or injure others on political grounds, we are less certain of the value of seeking individual signature. This could develop into a campaign of individual vilification and potential witch-hunts, identifying people who have not yet signed up. We would urge considerable caution on this point.

Of more concern is that this recommendation refers only to a declaration by political parties and paramilitaries not to kill or injure others on political grounds. We would point out that the government and its agencies were similarly responsible for killing and injuring people, which also needs to be acknowledged. Further, the government has an added responsibility - which on occasion it has abdicated - to protect the lives of those under its jurisdiction.

One of the ways in which the government could commit to protecting the lives and rights of people here would be to finally deliver a comprehensive Bill of Rights for Northern Ireland. CAJ believes that one of the most concrete ways in which a peaceful and shared future in which the rights of all are protected could be cemented is by introducing such a comprehensive Bill of Rights. Such documents are commonplace in other regions and countries emerging from conflict, just as internationally human rights instruments have been devised following wars.

Delivering on a Bill of Rights in advance of this process being established would help guarantee the rights of all concerned, and would contribute greatly to dealing with the particular circumstances and impact of the conflict of the Northern Ireland in their widest sense. Such a move would also be indicative of the necessary political will and commitment by the government that has been noted elsewhere.

A surprising aspect of the Consultative Group's recommendation is that it did not provide for a final report from the Legacy Commission. This has been an important feature of other truth commissions. It should be part of the mandate of any commission that it should draw up a report of findings into the nature, causes and extent of the conflict. This would provide a mechanism for challenging the variety of myths that continue to exist and provide the basis for a potential common narrative of the conflict, something that remains worryingly absent up to this point. A final report could also include a series of recommendations to challenge society and the two governments on what needs to be put in place to ensure that conflict does not recur.

Recommendation 31: A shared memorial

We have no human rights-based view on a physical memorial. However, we believe that a report providing a comprehensive account of the work of the Commission and its findings in terms of the investigations it has undertaken would be a powerful memorial of the conflict and a tool for learning and cautioning against reoccurrence.

Equality impact

Without detailed examination, there are a number of adverse impacts that we can immediately identify, not least the consequences of a lack of any gender dimension to the proposals. There is also a significantly high percentage of people in Northern Ireland who acquired a disability as a result of the conflict.

The consultation document also states (page 33) that *“If it emerges that a policy could have adverse implications for equality of opportunity for any of the section 75 equality categories, an Equality Impact Assessment will be carried out and ways of avoiding or mitigating the effect considered.”* We would point out that the statutory equality duty obliges the government not just to identify adverse impacts, but also to identify opportunities for the promotion of equality. Again, on a cursory examination we can identify numerous opportunities to promote equality for some of the most deprived and marginalised groups and communities that have been affected by the conflict.

CAJ is of the view that the best way of identifying in detail these adverse impacts and opportunities for the promotion of equality is to carry out an Equality Impact Assessment at the earliest opportunity.

Committee on the Administration of Justice (CAJ)

45-47 Donegall Street

Belfast

BT1 2BR

Tel: 02890 961122

Fax: 02890246706

E: info@caj.org.uk

Web: www.caj.org.uk

Appendix 1 : Basic Principles for a truth process in Northern Ireland (September 03)

The Good Friday Agreement, for a variety of reasons, focused on the future rather than on the past. The Agreement did not necessarily seek to ignore the past, but rather to affirm a better future to avoid a repetition of the past. The opening preamble makes it clear that it is precisely to honour those who have died, been injured, and their families, that we need to make a fresh start, and dedicate ourselves to a future of reconciliation, tolerance, and mutual trust, and to the protection and vindication of the rights of all. With hindsight, there is now some doubt as to whether it is desirable or indeed possible to fully commit to a shared and peaceful future, without some addressing of the legacy of the past.

There has been significant discussion recently regarding mechanisms to deal with the past. The Chief Constable has suggested that a Truth and Reconciliation Commission be established to examine the past and particularly 1800 unsolved killings. There have been references by government ministers to the possibility of establishing such a Commission. It may well be that a variety of processes will be needed properly to examine the past.

CAJ has worked for many years with families who have lost loved ones during the conflict in Northern Ireland. We have campaigned on individual cases, on improving the inquest system, and have successfully taken cases to the European Court of Human Rights on article 2 of the Convention. We believe that any new proposal to deal with the past needs to be measured against certain criteria to ensure that it will act in accordance with domestic and international human rights standards and that it will properly engage with the rights of victims and others.

While CAJ's mandate relates only to the actions of the state we believe that the issue of truth can only be addressed in the context of a full and informed examination of the past including the actions of all relevant actors.

Independence

Any process must be completely independent of all parties to the conflict including the state. Those who are charged with chairing the process must be persons of sufficient standing in the international human rights community to command respect across the community in Northern Ireland.

Transparency

Cooperation on the part of the state must include full disclosure of material including documents relevant to the conflict. Nothing should be exempted from this undertaking save information which would clearly put someone's life in danger. Any process must involve public hearings.

Accountability

The process should be primarily about ensuring that institutions and individuals are held accountable for their actions or inactions. This need not necessarily be about punishment or actual imprisonment. A range of accountability measures could be considered.

Procedures should be article 2 and 3 compliant

In the Jordan et al cases the European Court of Human Rights laid down a series of tests to ensure that any investigation into a violation of the right to life should be compliant with article 2 of the Convention. Any process suggested by the

government to examine past cases in Northern Ireland must comply with article 2. Similarly the European Court of Human Rights in a series of cases has laid down tests for article 3 investigations.

There can be no impunity or blanket amnesty

Truth processes which grant unqualified amnesty for those accused of serious violations are in violation of human rights law. There is a growing legal debate about what – short of a blanket amnesty – is an acceptable compromise when reconciliation and political stability are major concerns. In South Africa for instance, amnesty could only be obtained in return for a full and frank admission of one's activities.

The process should be voluntary

Families or victims should retain the option of pursuing their case through general legal processes and should not be forced to take part in a truth and reconciliation process.

Process of acknowledgement of wrong-doing

There must be acknowledgement from the state and all parties to the conflict that wrongs were committed and there must be undertakings by all parties to cooperate with a fair and impartial truth seeking mechanism.

Integrity of criminal justice process should be upheld

The conflict in Northern Ireland has warped the criminal justice system and undermined public confidence in it. We believe any truth process should not repeat this pattern. Indeed a crucial aspect of any process will be to try and restore confidence in the criminal justice system by making recommendations where appropriate about how to improve it.

Must comply with international human rights law

We have already highlighted our view that any truth and reconciliation process examining deaths or allegations of torture or ill-treatment should comply with articles 2 and 3 of the European Convention on Human Rights which of course is now part of domestic law. However, other relevant international human rights standards should be the parameters for any such process.

No hierarchy of victims

Victims of the conflict should be self-defined. There should be no discrimination as between different classes of victims.

Report should be produced and published

The process should culminate in a published report which, in addition to describing the work undertaken, will make recommendations to ensure that such violations do not recur. In addition the process should be capable of making reparations where appropriate.