

CAJ's submission no. 266

**CAJ's Response to
Public Assemblies, Parades and Protests
Bill (Northern Ireland)**

July 2010

Promoting Justice /
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What is the CAJ?

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.

Consultation Response for Public Assemblies, Parades and Protests Bill (Northern Ireland)

Committee on the Administration of Justice ('CAJ')

July 2010

1. Introduction

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 works on a broad range of human rights issues and its membership is drawn from across the community. Its activities include - publishing reports, conducting research, holding conferences, monitoring, campaigning locally and internationally, individual casework and providing legal advice.

CAJ's areas of work are extensive and include policing, emergency laws, criminal justice, equality and the protection of rights. We also co-convene the Equality Coalition. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

We welcome this opportunity to respond to the consultation on the Public Assemblies, Parades and Protests Bill (Northern Ireland) ('the draft Bill'). Although we recognise the context surrounding the agreement of this piece of legislation, we believe that some aspects of the draft Bill create an unjustified restriction on the freedom of assembly and expression. In particular, we believe that the lengthy notice period and strict conditions should not be extended to public meetings.¹

2. Context

It is important, when considering this Bill, that it is recognised as part of the architecture of the Hillsborough Agreement that led directly to the confirmation of the devolved arrangements and the transfer of powers over policing and justice from Westminster to Stormont. This is a not inconsiderable matter and should be borne in mind as a contextual consideration. The draft Bill is, therefore, in essence an important element in a political agreement that has:

¹ This submission has been prepared without detailed scrutiny of the draft code of conduct, which has only recently been released.

facilitated movement towards a more settled political environment; allowed wider developments that have cemented the Stormont architecture; and developed wide and welcome alliances over matters that nearly brought the community to widespread social and political collapse only a few years ago.

A further contextual matter is that this is the first major piece of legislation emanating from the Assembly that touches on sensitive political issues and as such is quite a challenge. There were also time pressures in relation to the Hillsborough Agreement timeline that no doubt meant matters had to be completed more speedily than might have been ideal.

On the other hand, because this is the first major piece of legislation, there is an argument that it needs to be held to a high standard, as a testament to the new political arrangements. It is in this context that we provide our assessment of the draft Bill from a human rights perspective. We note that the consultation paper emphasises a desire that the proposals be based on human rights considerations.

3. Disproportionate Restrictions to Freedom of Assembly

The freedom of assembly is central to any democracy and is a recognised human right in several international human rights instruments, such as the Universal Declaration of Human Rights (article 21), the International Covenant on Civil and Political Rights (article 21), and the Charter of Fundamental Rights of the EU (Article 12),

Most importantly, it is protected in the European Convention on Human Rights ('ECHR') and consequently in the Human Rights Act 1998. Article 11(1) ECHR states that '*everyone has the right to freedom of peaceful assembly and to freedom of association with others*'.

While we recognise that freedom of assembly is not an absolute right, restrictions can only be applied in very limited circumstances. ECHR states that '*[n]o restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others*' (article 11 (2)).

The Westminster Joint Committee on Human Rights has stated that '*[g]iven the essential nature of freedom of assembly and its relationship with democracy, the burden is on the state to provide "convincing and compelling*

reasons to justify an interference with this right" [see European Court of Human Rights (ECtHR) judgment Makhmudov v Russia, App. No. 35082/04, 26 July 2007] and show that the interference was proportionate to the aim being pursued.²

It follows that any restriction to the freedom of assembly should have compelling justification and be proportionate and necessary, in the sense that they should be the least intrusive means of achieving the prescribed objective. Although we recognise the particular difficulties surrounding parades in Northern Ireland, CAJ believes that some of the draft Bill's restrictions to the freedom of assembly are not proportionate or necessary, and have not been justified within the consultation document. As such we question its compatibility with the ECHR, and thus the legislative competency of the Assembly in relation to those restrictions.

3.1 Inclusion of 'Public Meetings'

The current institutional and legal architecture in Northern Ireland has grown up in response to loyal order marches and protests against them over the years. It is these arrangements which formed the basis of the negotiation that led to this consultation document. However, the draft Bill applies not only to contentious parades and associated protests, but to all outdoor public assemblies, including static public meetings. CAJ must oppose this wide remit as being neither justified, necessary nor proportionate.

From the definition of public meeting (at s7), any open air gathering of 50 or more persons, even on private property, could be subject to a 37 day notice period and the other conditions of the draft Bill and Code of Conduct. This could apply to community groups and churches and even private parties, among others, so long as a section of the public, such as members of an association or club, has been invited. In addition, the definition of public processions (at s6) is not limited to any threshold number, and so any number of persons 'processing' on a road or footpath could fall within the remit of the Draft Bill. It is unclear when a 'walk' or 'march' becomes sufficiently formal to be considered a 'procession'. All of these public assemblies could also be subject to a 28 day prohibition order in a given area (by s27 (1)(b)).

The consultation document does not provide any justification for this wide application of the draft Bill. Further, we are not aware of any public meetings

² United Kingdom Parliament. Human Rights Joint Committee - Seventh Report *Demonstrating respect for rights? A human rights approach to policing protest*. Session 2008-2009.

causing serious issues in the past that could adversely affect national security, public safety, health or morals, or the rights and freedoms of others to the extent that would require such limitations. As such, we do not believe that the inclusion of public meetings in the Draft Bill, and the resulting restriction on the freedom of assembly, is either proportionate or necessary.

We understand that the proposal may arise out of a political imperative to broaden the canvas of events to be dealt with under the rubric of the legislation. Mindful of the legitimate political impetus, we have considered whether altering some of the criteria of 'public meeting' such as increasing the number of people might mitigate the infringement of the current fairly open right to organise a public meeting. However, it remains our view that the case has not been made for such a major restriction to a fundamental right and freedom.

It may be that public meetings are intended to avail of the late notice and emergency procedures. However, the inappropriate use of emergency procedures would create inconsistency of approach and further confusion. It would be particularly problematic if used for parades that have previously been contentious but have now settled down. Fundamentally, this wide use of discretion would create much uncertainty and, once on the statute book, would be open to abuse.

Here, and in many other places in the draft Bill, there is a lack of clarity and consistency. This lack of clarity could in itself run contrary to ECHR, in so far as the restrictions to freedom of assembly are not sufficiently '*prescribed by law*' (as per article 11(2)). In this regard we would highlight that '*if individual terms are too vague or the framework as a whole suffers from a lack of coherence it will not be possible to regard the restrictions which it is supposed to authorise as being sufficiently prescribed by law as to justify their imposition.*'³

Public assembly is a vital tool in a vibrant democracy for people to campaign or protest. Significantly, the Human Rights Joint Committee '*recommended against retaining the present system of compulsory prior notification of protests around Parliament. We see no reason to introduce such a requirement elsewhere in the UK. In our view, insisting on prior notification of protests is a disproportionate interference with the right to protest and is more*

³ OSCE, *Benchmarks for Laws related to Freedom of Assembly and List of International Standards*, see also *Steel v United Kingdom*, Judgment of the Court, 23 September 1998 and *Hashman and Harrup v United Kingdom*, Judgment of the Court, 25 November 1999.

likely to discourage some protestors from cooperating with the police than to encourage effective dialogue.⁴

In this regard it is also worth considering that requiring the Police Service of Northern Ireland to enforce contentious legislation is likely to create tension between communities and the police, something that should be avoided, particularly given the history of problems with policing, parading and public order in Northern Ireland.

3.2 Excessive Notice Period

We are aware that in many instances it is both appropriate and necessary to provide the authorities with advance notification of public assemblies, for reasons of public safety, other individuals' right to free movement, and practical needs, such as the forward planning of road closures. However, we believe that increasing the notice period to 37 days for *all* public assemblies is both unnecessary and disproportionate.

The Panel of Experts on Freedom of Assembly of the Office for Democratic Institutions and Human Rights (ODIHR) and the Organisation for Security and Co-operation in Europe (OSCE) have drafted the 'Guidelines on Freedom of Peaceful Assembly' which state '*[t]he legal provisions concerning advance notice should require a notice of intent rather than a request for permission. The notification process should not be onerous or bureaucratic. The period of notice should not be unnecessarily lengthy, but should still allow adequate time prior to the notified date of the assembly for the relevant state authorities to plan and prepare for the event, and for the completion of an expeditious appeal to a tribunal or court should the legality of any restrictions imposed be challenged*'.⁵

We understand that, in the case of contentious parades and associated protests, it is important to allow sufficient time for objections, community dialogue, mediation and, if necessary, adjudication and review. However, this lengthy process is clearly not required for every public meeting or non-contentious procession. The Joint Committee on Human Rights has said that '*regulation of protest should not represent a hidden obstacle to freedom of assembly*'.⁶ The lengthy notice period and consequent bureaucracy could

⁴ United Kingdom Parliament. Human Rights Joint Committee - Seventh Report *Demonstrating respect for rights? A human rights approach to policing protest*. Session 2008-2009

⁵ ODIHR/OSCE *Guidelines on Freedom of Peaceful Assembly*. 2007, p15.

⁶ United Kingdom Parliament. Human Rights Joint Committee - Seventh Report *Demonstrating respect for rights? A human rights approach to policing protest*. Session 2008-2009.

seriously limit the freedom of assembly in Northern Ireland, particularly as the lack of proper notice could result in a criminal offence.

Several public meetings and processions, within the Draft Bills' definitions, may legitimately occur without 37 days' planning, and in such cases 37 days' notice would be impossible. Some public assemblies occur in response to a recent event or spontaneously following the buildup of reaction to an earlier event. Although the draft Bill allows for late or emergency notice periods (at ss33 and 36 respectively), these only operate in strictly limited circumstances.

It is not clear what amounts to 'unavoidable' or 'unforeseen circumstances' (at s33 for late notification) or the 'extreme emergency situations' (reference in explanatory notes for emergency notification, though the draft Bill is silent on this point). However, it is clear that these procedures are intended to be exceptions to the rule and they cannot be used for every non-contentious public assembly.

3.3 Wide Application of Criminal Penalties

CAJ is concerned that the wide application of potential criminal penalties could also create a disproportionate restriction on the freedom of assembly. Although we recognise the need to allow for some criminal penalties, the ECtHR has made clear that an arrest for breach of the peace will be considered a disproportionate measure to the otherwise legitimate aim of preventing disorder and crime (*Steel and Others v. United Kingdom*, 23 September 1998).

We believe that it would be disproportionate for a notice-giver of an informal group to be made criminally responsible for the behaviour of participants over which s/he has no control. Similarly, the imposition of a criminal offence for lack of proper notice when a public meeting unexpectedly passes the 50 person threshold seems unduly severe. Both of these possible consequences could dissuade individuals from exercising their right to freedom of assembly.

Finally, we are concerned that the definition of 'non-participant' is too broad (see s9). The ODIHR/OSCE *Guidelines on Freedom of Peaceful Assembly* state that 'law enforcement officials should differentiate between participants and non-participants. The policing of public assemblies should be sensitive to the possibility of non-participants (such as bystanders or observers) being present in the vicinity of an assembly.' The draft legislation does not adequately discern between bystanders and active participants.

3.4 Lack of Clarity in Human Rights Framework

The consultation document clearly places the draft Bill within a human rights context, which is welcomed. However, human rights are only referred to in abstract throughout the document, except for an undefined '*right to freedom from (all forms of / sectarian) harassment*' (in the Terms of Reference of the Working Group). It is therefore unclear how human rights will be employed to underpin the processes of the draft Bill.

First, the draft legislation states that '*in making a decision PAPPB must have regard to...human rights*' (section 26 (7)(a)) and, although it stipulates that at least three members of the PAPPB will have '*relevant legal expertise*', we are concerned that this does not explicitly state that any members will have human rights expertise.

Secondly, objections and concerns about a proposed public assembly can only be notified if they relate to compliance with the Code of Conduct or '*human rights*'. While we welcome the human rights framework and understand that the draft Bill must limit the scope of possible concerns (to avoid vexatious or petty objections), we are concerned that the public will not know which objections '*relate to human rights*'. It would be helpful if the OFMDFM provided examples or explanations of the human rights that could be invoked.

3.5 Appeal Mechanism

CAJ is unclear as to whether there is a right to appeal a decision by PAPPB. The draft Bill contains only a right to review '*on the basis of a significant change of facts*' (s26(11)). However, the recently released statutory code of conduct suggests that it is possible to appeal any panel decision, or review of a panel decision, to the courts via judicial review proceedings (page 17). This inconsistency needs to be clarified. In doing so, CAJ would highlight that the ECtHR has held that such decisions should be subject to prompt and effective judicial control to ensure that the freedom of assembly is not unduly restricted (*Appl 8440/78, Christians against Racism and Fascism v United Kingdom, 21 DR 138 (1980)*).

The ODIHR/OSCE Guidelines on Freedom of Peaceful Assembly advises that '*the assembly organisers should also be able to appeal the decision of the regulatory authority to an independent court or tribunal. This should be a de novo review, empowered to quash the contested decision and to remit the case for a new ruling. Any such review must also be prompt so that the case*

is heard and the court ruling published before the planned assembly date (in order to make it possible to still hold the assembly if the court invalidates the restrictions).⁷

4. Need for Independence

Based on the information provided in the consultation document, it appears that the Appointments Panel and PAPPB may not be sufficiently independent, and that their appointment may not be open to sufficient scrutiny. We question whether the Public Appointments Commission should be involved and are concerned about the potential political influence that may be placed on the Appointments Panel and/or PAPPB. Greater independence for those involved in making decisions about assemblies, notably parades, is needed.

In this regard, we also question whether moving civil servants from OFMDFM to the newly constituted OPAPP will provide sufficient independence. It would seem that a new administrative body would not be sufficiently separate from OFMDFM, and yet would lose the ministerial accountability. This new body, therefore, would arguably place more pressure on the public purse without the benefits of adequate independence or accountability.

We recognise that the above difficulties may be inevitable when quasi-political, as opposed to wholly independent, regulation is applied. We would therefore suggest that a more independent model be employed.

5. Consultation Process

CAJ believes there are serious flaws in the consultation process. Statute, common law, and codes of practice all require genuine and meaningful consultation.

We are not aware of any equality screening having been carried out, as is required by s75 Northern Ireland Act 1998. If and when this is done and if the screening exercise finds that OFMDFM should carry out an equality impact assessment (EQIA) of this major new policy, we would highlight that such an EQIA must inform the public assemblies' policy development, even if carried out after the formal consultation process.

In common law, a number of cases over the years have outlined what is required in any consultation process, including for example what are referred to as the "Sedley Requirements"⁷, namely:

⁷ R v London Borough of Barnet, ex parte B [1994] ELR 357, 372G

- i. it must be undertaken when proposals are still at a formative stage;
- ii. it must give sufficient reasons to permit the consultee to make a meaningful response;
- iii. it must allow adequate time for consideration; and
- iv. the results of the consultation must be conscientiously taken into account in finalising any proposals.

These requirements are also reflected in the Cabinet Office Code of Practice on Consultation,⁸ the first three of which make it clear that formal consultation should take place at a stage when there is scope to influence the policy outcome; consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible; and consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.

It is not clear that these proposals are genuinely at a formative stage, or offer the opportunity to influence, since conclusions seem to have been reached and presented in draft legislative form by the Working Group. There is also little, if any, explanation of or reasoning for the proposals which would permit consultees to make a meaningful response.

Furthermore, although the Code of Conduct is critical to the working of the Draft Bill's new regime, it was not made public until three weeks before the end of the consultation period. This delay has made the full consideration of the Draft Bill impossible within the consultation period (particularly as July is traditionally the holiday period). We understand that the draft Bill was produced in time-pressured circumstances, but we would suggest that the consultation period for the Draft Bill be extended to allow for the full review of its associated Code of Conduct.

6. Conclusion

CAJ believes that the proposed restrictions on the right to freedom of assembly, in relation particularly to public meetings, are not compliant with Article 11(2) of the European Convention on Human Rights. We would highlight that section 6(2)(c) of the Northern Ireland Act 1998 renders any provision of Assembly legislation that is incompatible with any of the Convention rights outside the legislative competency of the Assembly. As such, we believe these proposals need to be revisited.

⁸ <http://www.berr.gov.uk/files/file47158.pdf>