

CAJ's submission no. 279

**CAJ's submission to
Access to Justice Review**

February 2011

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.

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2 February 2011

Dear Jim Daniell,

Thank you for the invitation to the Committee on the Administration of Justice (CAJ) to make a submission to the Access to Justice Review. As you will know, CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies 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 obligations in international human rights law.

As the Review Team is well aware, the notion of 'access to justice' incorporates much more than the financial ability to access justice and we welcome the acknowledgement paid in the guiding principles to equality of arms, preventing avoidable delay and the use of alternative dispute resolutions. We hope that these principles underpin the overall Final Report of the Review Team.

We also welcome the commitments made through the guiding principles to fair and equal access to justice and the importance of human rights. The European Union Agency for Fundamental Rights (FRA) considers access to justice as a 'core element of the rule of law'. In addition to the human rights obligations and standards noted in 'the Discussion Paper' (para 2.3), we draw your attention to the *Charter of Fundamental Rights of the European Union* (art 47) and the Council of Ministers of the Council of Europe *Resolution 78 (8) on Legal Aid and Advice*.

Holistic View of Justice

In order for the Government to ensure access to justice for all there is a need to increase public awareness and knowledge about the right to access justice and to foster public confidence in the related institutions. Given the cross-cutting nature of many of the issues at hand we urge the Access to Justice Review Team to link with both the Youth Justice Review Team and the Prison Review Team.

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Review Process

CAJ is unsure as to how this review fits in with other work being carried out on the issue of legal aid and the related provisions in the Justice Bill. We are also interested in why the Review Team are located within the Court Service rather than the Department of Justice. The documents related to the Access to Justice Review ('the Discussion Paper' and 'the Agenda') appear to be rather disjointed in the message they present, specific examples are noted below, where relevant.

Legal Aid

We are somewhat confused by the message put forth in 'the Discussion Paper' and 'the Agenda'.

Given that 'the Discussion Paper' emphasises (para 1.2) the terms of reference as being 'to review legal aid in Northern Ireland and to develop proposals to improve access to justice which will: ensure that defendants have adequate representation to secure the right to a fair trial in criminal cases; [and] examine previous review work to determine what recommendations and proposals remain relevant' it appears to us that there is indeed the need for the Review Team to, despite recent consultations and subsequent proposals underway, thoroughly consider issues such as revising the legal aid means test and remuneration of solicitors and barristers given the fundamental connection to the right to a fair trial.

'The Agenda', for example, notes the reforms underway (on the back of recent DOJ and NICTS consultations relating to the remuneration of defence representation and means testing for criminal legal aid) (para. 3.2) and states 'we do not propose that our review should impede progress towards implementation of [these] initiatives (para.3.3). This is again reiterated further on in 'the Discussion Paper' (para. 3.7) yet this same paragraph ask for 'views on some of the principles that underlie a fair and affordable approach to remuneration in the straitened financial circumstances in which public services are operating'.

With regard to the means testing of legal aid, the Discussion Paper (para. 3.8) states that 'decisions will be taken following research'. This research is also referred to elsewhere in the document (paras. 3.6 and 4.3) and it is not clear whether this research is the same research referenced by NICTS in the *A Proposal to Revise the Means Test for Criminal Legal Aid in Northern Ireland: A Consultation Response Document*, which states 'Should a decision be taken to proceed with the proposal to introduce a fixed eligibility limit further

public consultation would be required before regulations were made' (para. 4.4). This again appears to reflect a disjointed approach to the issue and to informing the public. CAJ hopes that all related research findings will be made publicly available. We assume that any proposals developed after this research has been completed will be subject to public consultation and relevant equality screening. Perhaps it is needless to say that we hope that the submissions made to the NICTS 2010 consultation on 'Proposals to Revise the Means Test for Criminal Legal Aid' will be taken on board.

Further reflection of the inconsistent message is demonstrated in 'the Discussion Paper' (paras. 7.5 and 7.6) which suggest a reduction in remuneration and in the 'proportion of the population [who are] able to take up legal aid'. It is unclear to what degree the Review Team is going to examine these issues which are essential to the access to justice.

While we are aware of the need to bring the costs of our legal aid system under control, we have concerns that reductions in legal aid payments may disproportionately affect those most marginalised in our society. As we noted in a letter to Minister Ford in June 2010, 'it is essential that individuals may exercise their right to a fair trial under Article 6 ECHR. We are concerned that such a large reduction in remuneration to those engaged in criminal defence work may be disproportionate and lead to an inequality of arms and may infringe on the right to a fair trial. The quality of legal representation could be seriously affected. In civil cases, if a lawyer finds the remuneration offered insufficient to cover costs, the potential client may have no other recourse to legal advice. In such cases, an individual may not be able to use the law to defend his/her human rights.' Legal aid is a vital mechanism that contributes to fair access to justice and we remain apprehensive that proposals to cut legal aid may contribute to obstructing access to justice.

CAJ notes the comment that the level of legal expenditure in the period 2009-11 includes the substantial payments made for very high cost criminal cases which are due to the clearance of a backlog. We advocate that attempts to reduce this legal expenditure should also examine *how* the backlog occurred and the steps which could and should be taken to prevent it happening again.

While CAJ acknowledges that budgetary cuts are occurring across Government, we stress the importance of providing adequate funding to the justice system, and to those seeking to utilise its mechanisms. Public confidence in the criminal justice system in Northern Ireland is fragile; disproportionate or unduly severe funding restrictions may serve to undermine this confidence further. The European Commission for the Efficiency of Justice (CEPEJ) comparative report *European Judicial Systems Edition 2008*

(data 2006): *Efficiency and quality of justice* notes that Northern Ireland is leading among EU states as regards:

- a) amount of legal aid allocated per case and
- b) number of cases (both civil and criminal) which benefit from legal aid.

However, it is important to bear in mind that the differences in common law and civil law make comparisons difficult as the needs for legal advice and representation differs. We would hope that Northern Ireland remains at the fore of such a fundamental issue.

Further to the Access to Justice guiding principles, we maintain that the decision process of legal aid – including those around means testing - be just, transparent and accountable. Key decisions concerning criminal legal aid are made by the judiciary, thus we believe that there is merit in decisions relating to financial eligibility, the interests of justice test and representation by counsel being best decided by an independent body ('the Discussion Paper' paras. 3.9 and 6.9).

With regard to the attendance by solicitors to individuals held under PACE in police stations ('the Discussion Paper' para. 3.11) we acknowledge the comment that this work is specialist and of a critical nature. Although we are not aware of any problems with the current provision of service by duty solicitors, the sheer volume demonstrated in Table 2 ('the Discussion Paper') supports the argument for some form of accreditation and particular training or experience for solicitors carrying out this work, perhaps most notably in relation to young people and children. We support the proposal that a suitable *statutory* body, be responsible for maintaining a list of solicitors who may offer advice to those held in police custody and ensuring that all police stations within Northern Ireland have such a list. The Discussion Paper notes that at present there is 'a longstanding arrangement whereby the Legal Services Commission (LSC) maintains a rota of duty solicitors with two years post qualification experience in criminal matters, available to provide advice and assistance in police stations or courts in Belfast; but this does not apply outside the Belfast area' ('the Discussion Paper' para.3.11). The reason why this is not applied across Northern Ireland is not explained, but clearly should be and raises questions about the suitability of LSC to fulfill this function.

In the Review Team's terms of reference, the examination of alternative approaches and structures is positive. CAJ has consistently advocated the use of non-custodial disposals, where appropriate. We believe that those who are offered a diversionary option should be able to access information and advice on the implications of this option. This is particularly important in

relation to young people, who may need additional support in making their decisions. CAJ believes that disposals, which are alternatives to custody, can be cost effective and this highlights the need for the Access to Justice Review Team to link with both the Youth Justice Review Team and the Prison Review Team. We note with concern the comment in ‘the Discussion Paper’ (para. 3.14) that although legal aid is available for diversionary and court-ordered youth conferences ‘the take-up of legal aid in these cases is, we understand, relatively low and, given their nature, the involvement of lawyers in the process itself *should not in normal circumstances be necessary*’. Like the Review Team, we also would question whether there is a clear understanding by the individual and his/her family of the options, proceedings and related implications; we hope that in light of the notion of access to justice for all, this issue is comprehensively examined by the Review Team before making related recommendations.

With regard to disputes between individuals and groups at a neighbourhood level, we concur with the idea of using advice and mediation services to resolve such disputes and to prevent their escalation. It is important such a scheme is flexible enough to take into account and potentially address the varied root causes of such disputes.

For your convenience, we have included our previous submission relating to legal aid reform.

Advice and reliance on the voluntary sector

CAJ notes with interest the idea of building partnerships between the voluntary and private sector. However, our concern with the provisions outlined in the Discussion Paper are that an unfair burden could be placed on the voluntary sector, without the provision of funding needed to support such a burden. It should also be noted that volunteers or those without formal legal training often staff advice centres.

We welcome the proposed development of legal advice centres which would undoubtedly improve engagement with the legal system and increase access to justice, however, we believe that the use of advice centres would not be sufficient to fill the gap left by a significant reduction in legal aid. We believe that community advice centres, which have limited resources, would not be an adequate replacement for the comprehensive provision of legal aid.

Moreover, it is not clear how this proposal would in fact save money as legal advice and time would still be still required and need to be paid for.

Alternative dispute resolution

CAJ welcomes the commitment made here to exploring greater use of alternative dispute resolution. We agree with the importance of applying an effective case selection process. It is important however that individuals are given the choice to not accept the mediation option if they wish. As we previously stated to Minister Ford, in a letter dated 24 June 2010, the promotion of alternative resolution to court proceedings where possible, and the provision of a wider choice of legal help, would be a welcome addition to our justice system. However, their promotion should not be used primarily as a means of reducing costs in the legal system. Fundamentally, they should be available as an alternative to, rather than a replacement for, access to the courts. Litigation is already used only as a last resort and, in the interests of justice, we believe that this option should not be removed.

Children and Young People

CAJ wishes to particularly emphasise the unmet legal need of young people and children. It appears that further attention than that noted in section 4 of the Discussion Paper is needed. As noted above, we strongly urge the Review Team to coordinate with the Youth Justice Review Team, as well as the Prison Review Team. A recent study undertaken by the Howard League for Penal Reform *Access to Justice Denied: Young People in Prison* demonstrated that 'young people in prison go without legal advice as they are unaware of their legal rights, think the law is there to punish and not protect them, and have no idea that they can get free legal aid'. Although this research related to England, the conclusions raise questions about the parallels here in Northern Ireland. The Children's Law Centre (CLC) in their letter dated 28 October 2010 to the Review Team has touched on this and other related issues, and we urge the Review Team to carefully consider the concerns raised by the CLC.

In accordance with the United Nations *Convention on the Rights of the Child*, we emphasise the fundamental importance of considering the best interests of the child in developing further those proposals, which relate to children and young people and believe that this is fundamental to the Access to Justice Review.

Legal aid for inquests

The absence of funding for bereaved families at inquests in Northern Ireland has been an ongoing issue of concern for CAJ. This lack of funding seriously

impedes the ability of the family to have any meaningful involvement in the coronial process. This is particularly significant where there are allegations of state involvement in a death and the inquest is required to be compliant with Article 2 ECHR.

While exceptional grant funding is available to the next-of-kin in some inquests, this is subject to both a means and an arduous merits assessment. Although there is provision for the Minister for Justice (devolved from the Lord Chancellor) to issue a direction authorising the NILSC to provide exceptional legal aid, it is our understanding that this power is rarely invoked. In seeking such assistance an applicant is required to: justify that the application for funding is in the wider public interest; demonstrate the s/he is *immediate* family to the deceased; and make evident that the circumstances of the death *require funded-representation in order to establish the facts, as required by the European Convention for Human Rights (ECHR) (art. 2)*. The lack of equality of arms is apparent given that legal representation is automatically granted to the various public authorities in inquests. Although it is an inquisitorial process and contrary to the ECHR, this raises concerns that the next-of-kin do not have their interests sufficiently safeguarded.

We also seek clarification of the Lord Chancellor's guidance on Funding of Advice, Assistance and Representation under Article 12 98)- (11) of the Access to Justice (NI) Order 2003, as paragraph 12 states that 'only the Secretary of State has power to waive eligibility limits or contributions'. This appears to contradict the preceding paragraphs which outline the powers of the Lord Chancellor to authorise funding.

It is important to bear in mind the Court of Appeal decision on 21 December 2010, in *Legal Services Commission v Humberstone [2010] EWCA*, which highlighted the lack of clarity that exists within the coronial system. It held that an 'Article 2' compliant inquest is required where there is 'at least an arguable case that the state has been in breach of its substantive duty to protect life' and in those circumstances legal aid should be *automatically available, without the need to apply for exceptional funding*. The judgment criticised the Lord Chancellor's guidance in England and Wales stating that it was too restrictive. The related guidance in Northern Ireland appears to be even more restrictive, in that such funding is only be available to 'immediate family' as compared to the guidance in England and Wales which states that "'family" should be given a *wide* interpretation'. This is perhaps most significant and note worthy in that, at least in relation to historical cases, such as those related to the conflict in Northern Ireland, the next-of-kin may in fact be dead.

Consideration should be given to the anticipated outcome in the McCaughey & Grew case which is due before the Supreme Court at the start of February 2011. If successful this would overrule the McKerr decision as the applicants are arguing that there is an obligation to hold an article 2 compliant inquest into deaths and subsequent investigations that *pre-date* the Human Rights Act 1998. They are relying on the Grand Chamber judgment in *Silih v Slovenia*, which held that the procedural limb of ECHR (art. 2) is 'detachable', binding the state even before the ECHR was in effect.

Options for Further Budgetary Savings

The Review Team mention, perhaps as an option of last resort, the leverage of funding from the Lottery (para.7.9). We believe, however, that the justice system, even when in partnership with the voluntary sector, should remain the financial responsibility of Government.

Equality

The review has, as one of its guiding principles, due regard to human rights, however the equality duty set out both in international human rights law and under section 75 of the Northern Ireland Act (1998) seem to have been ignored in this document. We would welcome the provision of further details on how the Review has addressed the issue of equality generally and specifically the impact under section 75.

Barriers to Justice

Further to the point made in the Guiding Principles ('the Discussion Paper' para. 2.9), there is considerable work that needs done in relation to reducing avoidable delay given the ramifications that such delay has on victims, defendants, public perception and overall access to justice. Indeed, much has been said over recent years concerning avoidable delay within the justice system. Addressing the issues noted by the Criminal Justice Inspection (CJI), for example, in its recent report would increase access to justice as well as have positive financial implications (and seemingly improve public confidence in the justice system). It is worth noting that delay within the justice system has considerable impact on the well being of individuals, perhaps most significantly victims, witnesses and those within the youth justice system.

The Access to Justice Review should perhaps also consider aspects of management and practices which are not cost effective for the justice system as a whole and which may inhibit access to justice. Specifically we are referring to the apparent ability of the PPS to utilise prosecutors from the Bar

Library, as opposed to its own staff prosecutors. Similarly, it is our understanding that prosecutors appear to have excessive power to have cases adjourned, often against the wishes of witnesses and victims and at times without questioning by the judiciary, with resulting cost implications.

Thank you for permitting us to make this brief submission.