

CAJ's Submission no. S422

**CAJ's Written Evidence to the
House of Lords Select Committee on the
Inquiries Act 2005**

September 2013

About 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.

Written Evidence to the House of Lords Select Committee on the Inquiries Act 2005 (September 2013)

Committee on the Administration of Justice ('CAJ')

1. 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.
2. CAJ welcomes the opportunity to provide Written Evidence to the Select Committee on the Inquiries Act 2005. CAJ notes that the Select Committee was set up on 16 May 2013 primarily with the task of conducting post-legislative scrutiny of the Act but also to consider law and practice relating to inquiries into matters of public concern. The Committee is due to report by 28 February 2014. Among the matters covered in the call for evidence are the role and powers of Ministers within the Act.
3. CAJ concerns in relation to the Inquiries Act 2005 centre on the manner in which the Act provides for unprecedented interference at practically every stage of the inquiry by a government Minister despite the very actions of the Executive tending to be the focus of the inquiries. It is our view the Act can prevent truly independent inquiries taking place in conflict with ECHR requirements. Similar concerns have also been articulated by the UN Human Rights Committee,¹ the Northern Ireland Human Rights Commission², Mr Justice Cory³, and Mr Justice Deeny⁴ and will not be further rehearsed in this submission. Our views are further elaborated on in our original 2004 briefing for Parliament on the then Bill.⁵

¹ "...the Committee is concerned that instead of being under the control of an independent judge, several of these inquiries are conducted under the Inquiries Act 2005 which allows the government minister who established an inquiry to control important aspects of that inquiry." UNHRC (Committee Concluding observations on the UK) CCPR/C/GBR/CO/6/CRP.1 21 July 2008, paragraph 9.

² "The 2005 Act made it impossible to set up truly independent inquiries into deaths (and other serious issues) by virtue of an unprecedented subordination of the inquiry process to the control of Government ministers at every stage..." Northern Ireland Human Rights Commission *Submission to UN Committee on the International Covenant on Civil and Political Rights (ICCPR)* (93rd Session 7-25 July 2008) paragraph 18.

³ "...it seems to me that the proposed new Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation", Justice Cory correspondence to US Congressional Committee 15 March 2005. [Available at: <http://www.patfinucanecentre.org/cory/pr050315.html> accessed September 2013.]

⁴ "...one has to ask whether an inquiry conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the Minister, would or could be perceived to be truly independent." *In the matter of an application by David Wright for Judicial Review of a decision of the Secretary of State for Northern Ireland, High Court of Justice in Northern Ireland, Queen's Bench Division, 22 December 2006 NIQB 90* [41].

⁵ CAJ Preliminary Commentary on Proposals in the Inquiries Bill 2004 [Available At <http://www.patfinucanecentre.org/pf/inqubill/cajcomm.pdf> Accessed September 2013] and press release 'End of Public Inquiries as we know them' at <http://www.caj.org.uk/contents/452>.

The introduction of the Inquiries Bill

4. It is worth reflecting on the context in which the legislation was introduced. The UK, in an International Agreement with Ireland relating to furthering the implementation of the Belfast/Good Friday Agreement, had committed the UK to holding public inquiries into “serious allegations of collusion by the security forces.” The commitment was made in relation to a number of cases should such inquiries be recommended by a judge of international standing appointed to investigate them.⁶ Accordingly Mr Justice Cory produced his Collusion Inquiry Reports and recommended UK inquiries into the deaths of Pat Finucane, Billy Wright, Robert Hamill and Rosemary Nelson. It is following this in 2004 that the Inquiries Bill was introduced. The Committee in the evidence it has received has already had the opportunity to reflect on the rushed and irregular circumstances of the introduction of the legislation.⁷ It is reasonable to conclude that the Act was introduced in response to concerns about where the collusion inquiries may lead.

The decision to hold an inquiry

5. In general the decision to hold or not hold an inquiry, currently vested in the Minister, is a matter of significant controversy, as recently demonstrated by the Secretary of State for Northern Ireland’s decision not to hold an inquiry into the Omagh bomb. It is the view of CAJ that rather than leaving the matter to political decision by the department which has the greatest interest in the matter, clearer guidelines to the circumstances requiring the establishment of inquiries should be compiled by a group of international legal experts and consideration given to options about the decision being taken elsewhere.
6. In relation to the Cory Collusion Inquiries it is also notable that, rather than give undertakings not to use its powers under the Act, government ultimately reneged on the commitment to hold the Pat Finucane Inquiry, and were from the outset unwilling to hold the inquiry under other legislation.⁸ The other inquiries have taken place and produced reports (save that of Robert Hamill which awaits the conclusion of legal proceedings). The Hamill and Wright Inquiries, but not the Nelson Inquiry, were both converted to the Inquiries Act 2005.⁹ CAJ has monitored these inquiries.

⁶ Weston Park Agreement (UK-Ireland) 1 August 2001, paragraphs 18-19.

⁷ The Select Committee on the Inquiries Act 2005, *Evidence Session No. 1* 25 June 2013.

⁸ ‘Habits of Mind and “Truth Telling”’: Article 2 ECHR in Post-Conflict Northern Ireland, G. Anthony, and Paul Mageean in Morrison et al (eds) *Judges, Transition and Human Rights* (Oxford University Press, 2007)

⁹ The Rosemary Nelson Inquiry remained under the Police (Northern Ireland Act) 1998. The respective schedule applying to the inquiry has been repealed by the Inquiries Act 2005.

Does the existence of the powers afford Ministers undue leverage?

7. As well as looking at actual incidents when Ministers can or have used their powers the Committee may also wish to consider the extent to which the very existence and risk of the use of wide ministerial powers of intervention is a chill factor over the independence of inquiries. From the outside it is difficult to determine the private level of contact by the Secretary of State or their representatives with an inquiry team, but this is a matter the Committee would be in a position to question Ministers on.

The power to appoint the inquiry panel

8. As well as the concern that a Minister may 'lean on' inquiries there is also a potential conflict of interest created by the Minister appointing the inquiry chair and panel members. This can lead to perceptions, heightened by previous experience in Northern Ireland, that a Minister will appoint persons who effectively do not require 'leaning on' as they are already unduly sympathetic to the Executive.

The Power to issue restriction Notices and Orders

9. Under the Act Restriction Notices (Secretary of State) and Restriction Orders (Chairperson) can be issued. CAJ is aware of six Restriction Orders during the Hamill and Wright Inquiries, mainly to prevent the publication or disclosure of particular evidence given to the Inquiry and one in the Hamill Inquiry relating to closed parts of the proceedings. The Committee may wish to explore the use of these powers.

The Power to set the Terms of Reference

10. A number of significant issues have arisen in relation to Ministers' use of powers to set the Terms of Reference of an Inquiry. In the Robert Hamill Inquiry the Secretary of State excluded analysis of the role the Director of Public Prosecutions (DPP) from the Terms of Reference. The Inquiry requested this be added but the Secretary of State rejected the request on the basis of the DPP's decisions having been reasonable.¹⁰ The Hamill family sought a judicial review seeking scrutiny of the decisions.¹¹ The family further claimed that there was potential bias in the decision of the Minister.¹² Justice Weatherup upheld the family's complaint that

¹⁰ "[My independent Counsel's] advice was that the decisions taken by the DPP and his staff were reasonable; that there was no basis for suggesting there were additional steps that should have been taken; and that the case was assessed both objectively and professionally. I have, therefore, concluded that in all the circumstances there are no justifiable grounds to extend the terms of reference." 'Woodward decides against extending Hamill inquest terms of reference,' *NIO Latest News* (20 March 2008).

¹¹ An Application for Judicial Review by Jessica Hamill [2008] NIQB 73.

¹² One of the advisors to the Secretary of State, David Perry QC, had also been involved in the original prosecution decision. 'Inquiries Update', *Just News*, CAJ (July/August 2008) page 4.

the test applied “did not correspond to the test of public interest” under s15(6) of the Act. The Secretary of State still declined to extend the Terms of Reference but now stated they could be interpreted as allowing limited scrutiny of DPP decisions insofar as they shaped the RUC investigation, but precluding the Inquiry from examining the merits of the prosecutorial decisions themselves.¹³ In the Rosemary Nelson Inquiry, which was not conducted under the Act, the Secretary of State did amend the Terms of Reference to include ‘the Army or other state agency’ in its list of possible actors.¹⁴

11. One of the most significant issues in relation to the Cory Collusion Inquiries, established further to the international agreement relating to “serious allegations of collusion” by the security forces and recommended by Cory on the basis of evidence of collusive acts, was the decision of the Secretary of State not to include ‘collusion’ in the Terms of Reference of any of the Inquiries.
12. Furthermore the Billy Wright Inquiry Report indicates the Inquiry Panel was conscious of the ‘significance’ of the Secretary of State for Northern Ireland having emphasised his view that Judge Cory’s definition of collusion was ‘very wide’.¹⁵ The Panel subsequently adopted a much narrower definition of collusion, which required an ‘agreement or arrangement’ between state and non-state actors, and which would exclude matters such as the state ‘turning a blind eye’ from the definition of collusion. Representations from the family that the Inquiry follow the Cory definition of collusion were considered but rejected by the Inquiry Panel who justified the decision by stating that “we must have primary regard to our Terms of Reference” as well as indicating such matters could still be covered by the inquiry without consideration of them being ‘collusion’.¹⁶ The Inquiry subsequently concluded that there had not been ‘collusion’.¹⁷ It is not clear if the Secretary of State or his representatives sought to otherwise influence the Inquiry as to the definition of collusion it adopted but this may be a matter the Committee wishes to explore.

Control over the publication of the report

13. A further outworking of the above approach is also seen in the Secretary of State, rather than the panel or Parliament, being able to deliver and give first reaction to the final report of an Inquiry. In relation to the Rosemary Nelson Inquiry the Secretary of State in delivering the report was able to, in effect, emphasise a finding of no collusion despite on further examination the report containing detail

¹³ ‘Terms of Reference Decision by the Secretary of State for Northern Ireland,’ *Robert Hamill Inquiry Press Notice 013* (5 November 2008): <http://www.roberthamillinquiry.org/press/13/>

¹⁴ ‘Secretary of State Announces Changes to the Terms of Reference for the Rosemary Nelson Inquiry’ *Rosemary Nelson Inquiry Press Notice 05/02*(24 March 2005): <http://www.rosemarynelsoninquiry.org/press-notices/2/>

¹⁵ Billy Wright Inquiry Report, paragraphs 1.23-4.

¹⁶ As above, paragraphs 1.33-1.34.

¹⁷ As above 16.4.

of a range of collusive acts. Whilst the Rosemary Nelson Inquiry was conducted under other legislation the Inquiries Act 2005 legislates for such an approach with s24-25 providing that the Inquiry must deliver their report to the Minister and that it is the Minister, unless he or she decide otherwise, who is to publish the report.

Committee on the Administration of Justice, September 2013