

CAJ's submission no. S424

The Haass Proposed Agreement on dealing with the past: analysis from a human rights perspective.

13 January 2014

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.

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Contending with the Past

Introduction

In general, CAJ regards this section of the Proposed Agreement as a careful, sensitive and sensible contribution to the debate on dealing with the past. We also believe that, subject to a number of caveats, it could be compliant with human rights standards. Elements of the proposals are similar to those put forward in CAJ's submission to the Haass process on dealing with the past which can be found here: <http://www.caj.org.uk/contents/1201>.

The Introduction to this section stresses the practical importance of engaging with this issue. It says: "...the past continues to permeate our government, institutions and people. It creates mistrust among leaders at all levels of society ... it maintains the gulf between neighbours who pass each other in the street or in the shops." The document also stresses that "Northern Ireland does not have the luxury of putting off this difficult, but potentially transformative, task any longer."

Support for Victims and Survivors

Correctly, the first substantive part of this section deals with support for victims and survivors. It demands a range of high quality services for those that need them and suggests making available "advocate-counsellors" to work in the interest of an individual victim, providing support and helping him or her understand and request relevant services.

The Proposed Agreement endorses the principle of choice in accessing services and supports the existence both of the Victims and Survivors Service (VSS) and the range of non-governmental victim support organisations. This is in line with the commitment in the Belfast Good Friday Agreement:

"The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks."

The document notes the critical reports of the treatment of some victims by the VSS and urges the Victims Commissioner, currently carrying out an independent assessment of the VSS, to propose specific guidelines and best practices for the provision of services to victims and survivors. The document suggests that the Commissioner look particularly at the provision of high quality mental care and the problems of aging victims with severe physical or mental problems. It strongly encourages the Commissioner to make specific recommendations for policy to the Executive and OFMdFM.

Ironically, amidst the sensitive appreciation of victims' needs, the definition of who is being talked about was a stumbling block. "We wish to note that one of the most contentious issues we considered was who should be considered eligible for victims' services. We found that we were unable to settle this amongst ourselves. Our understandings of the word 'victim' in this context were closely tied to our different narratives of the conflict, which are not presently reconcilable."

In the context of this fundamental disagreement, CAJ believes there is no justification whatsoever for moving from the inclusive definition contained in the Victims and Survivors Order 2006. The Order defines 'victims and survivors' as follows:

- (a) someone who is or has been physically or psychologically injured as a result of or in consequence of a conflict-related incident;*
- (b) someone who provides a substantial amount of care on a regular basis for an individual mentioned in paragraph (a); or*
- (c) someone who has been bereaved as a result of or in consequence of a conflict-related incident.*

The 2006 Order also notes that:

...an individual may be psychologically injured as a result of or in consequence of—

- (a) witnessing a conflict-related incident or the consequences of such an incident; or*
- (b) providing medical or other emergency assistance to an individual in connection with a conflict-related incident.*

Acknowledging Past Acts

This part is a general request to those engaged in the conflict, both individuals and organisations, to acknowledge their role through an "unqualified acceptance of responsibility." No mechanism is suggested for this process and it is not seen as having any legal effect. It could, however, help create an atmosphere of generosity that could assist the more formal processes suggested later.

In an important passage, the Proposed Agreement deals with an issue that can bedevil all attempts to deal with the past – the idea that any kind of allocation of responsibility for wrongdoing either "equates" all sides or in some sense justifies "our" side's actions.

“The burden of the past rests most heavily on those, whether paramilitary or state actors, who acted outside the rule of law. The vast majority assiduously eschewed violence, yet some may have contributed to the environment within which it flourished. To publicly acknowledge these realities does not equate them, but all such acknowledgements will help bring about a better climate.”

Justice

This part of the Proposed Agreement begins with a correct assertion of the importance of the rule of law.

“In any society, holding people accountable for breaking the law is a fundamental responsibility of government. Doing so consistently and even-handedly reinforces belief in the integrity of government and reassures citizens that their society is safe, fair, and just.”

It goes on to say that: “At the time of the Belfast/Good Friday Agreement in 1998, however, there remained thousands of cases relating to the conflict that were unsolved or had been resolved by justice mechanisms that did not elicit full faith from all of society. New institutions were therefore created to address these particular incidents.”

The last sentence rather skates over the historical fact that the UK Government remained unconcerned about this factor until a series of cases were brought to the European Court (by CAJ amongst others) which forced the Government to propose a “package of measures” to meet its Article 2 investigative obligations. The document’s brief overview of the four “Current Institutions” dealing with this backlog of cases also fails to reflect the serious criticisms of each of them. There has been a damning report by Her Majesty’s Inspector of Constabulary into the Historical Enquiry Team (HET), the Office of the Police Ombudsman (OPONI) has had to be subject to a process of major reform to counter a “lowering of independence,” the Inquest system has been robustly criticised by the European Court and the “discretionary tool” of Inquiries has been undermined by the 2005 Inquiries Act and the adamant refusal of the UK Government to carry out an inquiry into the death of Pat Finucane. At this stage, the document also fails to mention the historic enquiries, of various kinds, being carried out by the PSNI itself.

However, what is important is that the Proposed Agreement implicitly recognises the failures of current institutions, especially the HET, and proposes an alternative to elements of them. It excludes inquiries which “will remain the purview of governments,” (British and Irish) and inquests, on the grounds that the European Court has established specific requirements for them and it would require a change in its jurisprudence to include them. In its submission to the Haass process, CAJ noted that further work would be needed to assess the impact on inquests of a single, Article 2 compliant investigative mechanism and we will look into this in the near future.

Historical Investigations Unit

The most important substantive proposal made in the document is the establishment of a Historical Investigations Unit (HIU). This would take over the historic investigations roles of the HET and OPONI, though not of the PSNI. The main features of this proposal are:

- It would be established under the supervision of the Policing Board (NIPB) who would appoint a “trusted figure with relevant investigative or legal experience and a reputation for integrity and independence” as Director
- It would be staffed by persons with “relevant investigative experience and expertise” but who “can be shown to have no conflicts of interest relevant to the sensitive subject matter”
- The HIU would conduct formal investigations, “a power not given to HET,” and would have “investigative powers and arrangements identical to those of the PSNI. Such powers will enable it to conduct investigations that are Article 2-compliant”
- The HIU would have “clear, detailed and transparent investigative and recordkeeping procedures,” “internal quality assurance mechanisms” and “internal protections against conflicts of interest among its investigators”
- Families would have a choice to engage or not with the HIU – those that engage would be offered the services of an “advocate-counsellor unconnected with any work on their file” – those that do not would not be contacted by the body though the review and investigation process would continue
- Outstanding HET and OPONI cases would be combined into a single chronological list; cases would be reviewed and a criminal investigation carried out if the evidence warranted it; where appropriate cases would be referred to the Public Prosecution Service (PPS); where not an information report would be shared with the families
- Where people were severely injured in a case where deaths also occurred, a more general report on the circumstances would be given to all those injured in the event; after all cases involving deaths were dealt with, the HIU would conduct reviews and investigations into cases involving severe injuries, “if resources permit”
- “In order to avoid confusion and duplication of effort, investigations underway by the PSNI will be completed by the PSNI”

The HIU bears a close resemblance to the single Article 2 compliant investigative mechanism proposed by CAJ in its submission to the Haass talks (see link above). We will therefore examine the

proposed body under the headings we used to propose a new body derived from the principles of the investigative obligation of Article 2 as laid down by the European Court. Before that, however, we would question why historic cases being pursued by the PSNI are excluded from its purview. For example, the PSNI has declared that it will pursue any opportunities to prosecute soldiers arising from the Bloody Sunday events and has also taken it upon itself to review the cases involving soldiers to which the HET applied an “unlawful” approach. Are such cases as these, otherwise fully appropriate for the HIU to take up, to be excluded simply because the PSNI has taken charge of the file? We would require to hear further justification for this view. We should also note that CAJ supports the extension of the brief of the HIU to cases involving severe injury.

Independence

In CAJ’s submission, we broke down the concept of independence into a number of headings, starting with governance. We said: “The person or body in charge of the investigation must be capable of acting independently without control or interference, direct or indirect, from government, any agency of the state, any political party or any other interest group in society.” The Proposed Agreement suggests the Policing Board as the effective governing body for the HIU since it would appoint the Director and “oversee the quality, responsiveness, independence, and timeliness of its operations, and it will be responsible for receiving and addressing complaints from the public and others affected by the HIU’s work.”

We would need to look in more detail about how these oversight functions were managed, whether there was a ring-fenced budget, how the management of the HIU was separated from that of the PSNI, the role, if any, of the Chief Constable and other details of the establishing legislation. However, in principle, we believe that the Policing Board has operated as an independent overseer of the PSNI and we believe that it is capable of being an independent governing body in terms of Article 2 standards.

In our submission, we stated that a new body would have to be established by legislation and we raised the question whether that should be at Stormont or Westminster or both and how the non-devolved question of “national security” should be dealt with. The Proposed Agreement does say the HIU would be established through legislation but does not specify the location or type – in sharp contrast to the section on Parades which goes into some detail regarding legislative provisions. We understand that the Justice Minister believes that the relevant legislation would all be passed at Stormont but we think this is something that would require clarification.

The next issue we raised in our submission, in relation to independence, was access to intelligence. The Proposed Agreement says that “the HIU will begin its work on each case with a review of the case’s existing file and any associated intelligence that may be held by the PSNI.” The processes for accessing PSNI intelligence on historic cases are deeply problematic and the HMIC Report into the HET questioned the fact that ex-RUC Special Branch officers were amongst the “gatekeepers” of that intelligence. It went on to recommend:

“For this reason, it would be preferable to institute some independent procedure for guaranteeing that all relevant intelligence in every case is made available for the purposes of review, to ensure compliance with the Article 2 standard.”

There is no mention of this vitally important recommendation in the Proposed Agreement and without such an “independent procedure” the practical independence of any new body would be seriously compromised.

We also dealt with the question of personnel in our submission. We noted that the HET theoretically deployed only investigators with no connection with Northern Ireland on cases potentially involving former RUC officers. We also noted that, with a single mechanism to investigate all deaths, distinguishing between cases involving state actors and non-state actors, which in any case can be difficult and contentious, would be invidious. Our conclusion was that “no investigators should be ex-RUC or PSNI officers, or have been involved in any armed group, or be involved in any political party with an interest in Northern Ireland and other criteria about connection with Northern Ireland may need to be developed.” The Proposed Agreement recognises the possibility of conflict of interest but does not go into detail about how it might be avoided.

In summary, with regard to independence, we would need to see the detail of governance arrangements and other aspects of the foundation legislation, including its nature and location; we would regard as essential an independent oversight of the provision of intelligence (from the PSNI and any other agency) and it should be made clear that former RUC and PSNI officers are ineligible for the post of investigator in the new body. Subject to these caveats, we accept that the Policing Board is an independent body and the proposed mechanism is capable of achieving Article 2 compliance in terms of independence.

Effectiveness

In our submission we said: “The effectiveness of an investigation depends on the relevant body having sufficient powers to determine the full circumstances and nature of the actions of those responsible for the death and to lead to the identification, and where appropriate, prosecution and punishment of those responsible.” It appears that the HIU would have full police powers and would be able to undertake effective investigations. It would be helpful if there was a duty on serving and ex-members of the security forces to cooperate with the new body and a similar obligation on public authorities.

Transparency

The proposals on publication of procedures and on relations with families seem to CAJ, in principle, to fulfil the obligations around transparency.

Promptness

In the circumstances of historic cases, we interpret this obligation as being fulfilled by the proper upholding of the rule of law in all cases and specifically by the “proper resourcing of a new body and the vigour with which it undertakes its duties.” It therefore remains to be seen whether this obligation will be met in practice.

Independent Commission for Information Retrieval (ICIR)

The Proposed Agreement goes into some detail about a suggested new mechanism that would encourage any person or organisation with information about cases involving death or serious injury to bring it forward and offer victims and families the ability to request a report on their case. The body would have no separate investigative function but would use open source material and past and future files from investigative bodies. The body could also “assess patterns” of violent acts in relation to discernible policies or strategies of state and non-state actors.

This is a form of information retrieval that could contribute to truth recovery which CAJ recognises as an important part of post-conflict reconciliation. We have little to say about it from a strictly human rights point of view, save in two respects, first, in relation to the proposal that any information given in this process would be inadmissible in any subsequent court proceedings and second, in relation to the assessment of patterns.

The document stresses that the proposed limited immunity does not amount to amnesty but to the inadmissibility of statements given to the body in any criminal or civil actions against those giving the information or anyone named in it. The proposal would not prevent prosecution using other evidence and the process could be initiated before, during or after any investigation by the HIU. However, this is actually a three level immunity. First, the statements cannot amount to self-incrimination. Second, the statements cannot be used as evidence against any third party named. Third, the “raw information” provided to ICIR “will not be disclosed under any circumstances” and, specifically, ICIR “will never inform law enforcement” of any claimed links with other people.

This third level, together with the offer of anonymity to those providing information, implies that the information giving process will actually be entirely secret. This is not a matter of information given on the record not being admissible in future court proceedings, as happens in many inquiries, but of the information itself being kept secret. CAJ would like further discussions on the implications of this third level of immunity. However, CAJ sees no problem from a human rights point of view with the first two levels of limited immunity. In the pursuit of the overall aim of social reconciliation and the eradication of political violence – which would solidify the rule of law and a rights based society – such a level of suspension of the normal criminal justice process is completely permissible.

Looking at the assessment of patterns, CAJ notes that the ICIR will be tasked with analysing themes and policies but with no power to compel the production of documents or other information or to carry out investigations. At one level, if the idea is to produce reasonably authoritative historical narrative, that is no problem. However, in certain cases, the exposure of patterns and policies is a prime method of combating impunity and requires a vigorous and powerful investigative mechanism to achieve it. We note, for example, that one of the suggested themes is “mistreatment of detainees and prisoners.” Article 3 (Prohibition of Torture) of the European Convention imposes similar investigative obligations to Article 2 and an allegation of systematic ill-treatment would require something other than collation of open source material. Again, we think further discussion on this point would be useful.

Conclusion

CAJ believes that this part of the Proposed Agreement is a good basis on which to construct a comprehensive mechanism for dealing with the past. We have raised a number of concerns about matters which could only be addressed in the necessary detail on the basis of draft legislation. Though we recognise it is for the Parties to decide whether and how to move this process forward, we believe that this part of the Proposed Agreement forms a sufficient basis on which to move to draft legislation and we urge this course on Assembly Members.