

Don't legislate for collusion?

De Silva documents reveal government reluctance to put the full range of paramilitary informants' activities in writing.

In December of last year CAJ published the '*Policing you do not see*' a report scrutinising accountability of covert policing, and in particular the controversial subject of running paramilitary informants. The research focuses on the growing covert policing accountability gap. This gap is now apparent five years on from the 2007 transfer of primacy for 'national security' covert policing from the PSNI to the Security Service MI5. The report found it is effectively impossible to tell if the agents it runs and MI5 itself is operating within the law. The research reflected that what international standards and the Patten reforms promised were both strict publicly available policy guidelines setting out the acceptable boundaries of agent activity and robust and powerful external oversight mechanisms to ensure the rules were abided by. It concluded, however that neither was in place for MI5.

The extent to which intelligence gathering systems direct, facilitate or permit agents to be involved in crimes has long been the subject of controversy. All police services operate informants. The question is the extent they operate them within the rule of law, including the parameters set by human rights obligations. Following his three Inquiries Stevens defined the elements of collusion as "the wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, the extreme of agents being involved in murder" Among his conclusions were "Informants and agents were allowed to operate without effective control and to participate in terrorist crimes." In his Collusion Inquiry Reports Judge Cory concluded there was an attitude which persisted within RUC Special Branch and the British Army's Force Research Unit (FRU) "that they were not bound by the law and were above and beyond its reach."

The Police Ombudsman, Nuala O'Loan's 'Operation Ballast' report into RUC Special Branch collusion with the north Belfast UVF revealed police intelligence reports and other documents, mostly rated as "reliable and probably true" which linked police agents and one informant in particular to ten murders. Among the other matters recorded in Ballast were failures to arrest informants for crimes to which those informants had allegedly confessed; subjecting informants suspected of murder to lengthy sham interviews and releasing them without charge and falsifying or failing to keep records and interview notes. Ballast also found RUC Special Branch were not adopting or complying with the UK Home Office Guidelines on matters relating to informant handling and did not comply with the Regulation of Investigatory Powers Act (RIPA) when it came into force in 2000. The report concluded that such practices far from being isolated were likely to be systemic. The Ballast investigation ran for a number of years and noted that as a result of concerns the PSNI had conducted reforms. This included the introduction of new policy frameworks and the 2003 Covert Human Intelligence Sources (CHIS) Risk Analysis Group (CRAG) review of informants, which resulted in around a quarter of informants being let go, half of them as they were deemed "too deeply involved in criminal activity."

As is well known, De Silva was not the public inquiry promised into the death of human rights lawyer Pat Finucane, nor, as the family have stressed, did the desktop review get to the bottom of his murder. More

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broadly in his report De Silva, whilst finding collusion in the case, is keen to adopt a narrower definition of collusion than that harnessed by Judge Cory in his collusion enquiries, and to conclude that he does not think collusion was a matter of government policy. However the documents De Silva references and declassifies in relation to the policy framework used to handle paramilitary agents are very enlightening, and themselves question such a conclusion.

In relation to the policy framework in general for running agents De Silva concludes RUC Special Branch “had no workable guidelines”, FRU’s Directives and Instructions were “contradictory” and MI5 had “no effective external guidance to make clear the extent to which their agents could be permitted to engage in criminality”. Pointing the finger at government, De Silva concludes there was a “wilful and abject” failure to provide the “clear policy and legal framework necessary for agent-handling operations to take place effectively within the law.” What is even more enlightening is the narrative of the various initiatives to set up such a framework where agents could operate outside the law.

First, declassified documents explicitly confirm that this was the modus operandi of running paramilitary informants. Records of a high level RUC–NIO meeting in March 1987 confirm the approach was “placing/using informants in the middle ranks of terrorist groups. This meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution.” The system also involved holding back information from the judicial processes to protect informants. The record concedes that all this was “technically” in breach of guidelines. The RUC therefore advocated for more “realistic guidelines”.

It is not that the UK government did not have any policy framework relating to running informants at this time. There were Home Office Guidelines. However, the RUC worked outside them, regarding them as “totally unrealistic/unworkable for dealing with terrorism”. Similarly MI5 “did not consider itself bound by those guidelines”. MI5 did have its own internal instructions which did provide for agent criminality.

The RUC request for “realistic guidelines” which in effect would have reduced to writing the policy of running agents outside the law was met with a “not overly enthusiastic” response by the NIO. The then UK Attorney General was concerned his “officials should not participate in the drawing up of guidelines which condone the commissioning of criminal offences.” The Attorney appeared content for prosecutors to use their “discretion” not to prosecute informants for crimes they had committed but drew the line at putting in writing guidelines in which the authorities would have authorised offences being committed in advance. The RUC subsequently conceded that this issue was a “hot potato” for the NIO as they were reluctant to be involved in formulating such a system. This was despite, the RUC noted, “the fact that what actually goes on is known or assumed” and legally, the RUC argued, the NIO were not being asked to approve agent criminality beyond what was already the case. In correspondence the NIO Secretary of State acknowledged the RUC wanted guidance that would permit paramilitary informants “to take part in serious crime” under the supervision of senior RUC officer when “certain criteria” were met.

Further documents indicate the NIO was keen to draw out and fudge the process. The NIO did work on a revised set of Guidelines which in the view of De Silva “did not...represent the tightly defined framework (coupled with rigorous regulation to prevent abuses) that was required.” Indeed it is recorded that the Solicitor General in 1992 regarded the thrust of one key passage as, in effect “Don’t get caught”, and hence was “unpromising territory for Ministerial approval.” Whilst there was no formal Ministerial stamp on the guidelines they, or at least an adapted version of them, were nevertheless adopted for internal use by MI5 and subsequently RUC Special Branch and the successor unit to FRU.

At this very time the fallout of the Brian Nelson trial meant the issue was then subject to a further official review (the Blelloch Review). Minutes indicate Blelloch also dismissed the national standard in the Home Office Guidelines as “unacceptable” in the Northern Ireland context and did not advocate legislating as he believed it would be “politically unobtainable”. Blelloch did endorse the content of the new NIO Guidelines,

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but recognised the problem of the “status of the document” in the absence of ministerial approval. The then Attorney General reiterated to the government working group responding to Bletloch that he would “not approve any guideline which appeared to condone **in advance** the commission of serious criminal acts” [emphasis added]. Also recorded is an earlier creative proposition from the then NIO Secretary of State that that the agents might not after all be guilty of crimes they committed as a

“criminal offence requires a criminal mind: for all practical purposes no offence will be committed by an agent whose act is not accompanied by a criminal mind - that is to say a mind desirous of the commission of the relevant offences.”

Unsurprisingly the Attorney General did not feel such a proposition was likely to stand up in court. The Attorney stated there may be a case whereby agents’ participate in crimes with the intention of frustrating them, but not when participation in a crime is undertaken just to maintain cover to help the security forces generally.

Government therefore found itself in a conundrum. It appeared to wish the modus operandi of agent handling outside the law to continue but did not want to put it into writing. In testimony from retired senior RUC officer to De Silva they argue in effect that there was “reluctance to give official recognition to what Special Branch (SB) was doing, the effect of which would be to authorise agents of the State to allow informants to take part in activities that could lead to the commission of terrorist offences.” The officer states that the gist of the response from government was “carry on what you’re doing but don’t tell us the details.” The narrative presented by De Silva indicates that government were not entirely sure of what to do to address this “unsatisfactory” situation— indeed a Home Office briefing note in 1994 optimistically hoped “the policy issue will be quietly laid to rest” in the context of the IRA ceasefire. A future government did legislate in 2000 to provide the first legislative framework for running agents under RIPA. Interestingly in views similar to those previously expressed by CAJ De Silva does not see RIPA as effectively regulating the activities of agents stating: “...it is doubtful whether RIPA or any of its associated Code of Practice provides a real resolution to these difficult issues given that it provides little guidance as to the limits of the activities of covert human intelligence sources.” This is not to say that De Silva necessarily believes permitting paramilitary agents to operate outside the law is collusion per se or that the practice should never be permitted. There is an undertone in the report that such a policy can be somehow legitimate and justifiable provided it is well regulated and controlled. As set out in our MI5 research CAJ and other human rights groups have taken the opposite view that the state operating outside of the rule of law – as set out in human rights standards relating to impunity, effective investigation and remedy – fuelled, prolonged and exacerbated the conflict. Going back to government’s conundrum, the present situations is that primacy for ‘national security’ covert policing has been transferred to MI5 where it remains impossible to tell the extent the secret agency is operating within or outside of the law.

Can ‘supergrass’ help facilitate a cover up?

The ‘supergrass’ system under s71-75 of the Serious Organised Crime and Police Act 2005 (SOCPA) continues to be in the public spotlight. SOCPA provides a framework whereby an ‘assisting offender’ can be offered immunity from prosecution, a reduced sentence or undertakings that evidence won’t be used in prosecutions. To date much of the human rights discourse on SOCPA/supergrass issues has focused essentially on the issues around a fair trial and due process. This is the obvious issue when considering the potential for unsound convictions of accused persons purely on the basis of uncorroborated ‘supergrass’ evidence.

There is a separate human rights angle on SOCPA, namely the extent its processes are compatible with duties to independently investigate deaths in which the state and its agencies, including the police, may be

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implicated. Such obligations have been held to exist under the procedural limb of Article 2 ECHR, the right to life, and increasingly also under Article 3 ECHR (torture and inhuman and degrading treatment). CAJ acted in some of the cases known as the 'McKerr group of cases' which established there had been a violation of the right to an effective investigation under Article 2. These cases established the principle that there should be a practical and hierarchical independence of investigators from those potentially involved in a death. As *Shanaghan v UK* put it the shortcomings included the "lack of independence of the police officers investigating the incident from the security force personnel alleged to have been implicated in collusion with the loyalist paramilitaries who carried out the shooting." The same judgment also criticised the absence of opportunity to scrutinise the decision of prosecutors not to prosecute in respect of alleged collusion. These obligations are particularly relevant to the role of paramilitary informants implicated in killings now subject to SOCPA processes. Assisting offenders may themselves be paramilitary informants, and/or some of the evidence they have may relate to killings in which other paramilitaries who were informants were implicated. This could implicate the informants and their police handlers in unlawful activity. Yet it is the police themselves along with the prosecution service who in effect appear to control the 'deal' with the assisting offender as to what evidence will reach court and form the basis of prosecutions. This could constitute a conflict of interest and engage Article 2 compliance given the lack of independence and impartiality of those involved in making the decisions. Equally new proceedings may expose past decisions to discontinue prosecutions to protect informants and their handlers, yet it is the prosecution body itself that has the formal role in determining the new proceedings.

SOCPA 2005 itself vests the formal power to grant immunity, exclusion undertakings, or a reduced sentence in the prosecutor – normally the Public Prosecution Service (PPS). The written agreement with the assisting offender is also made with the prosecutor. In practice however there is a considerable role in 'debriefing' the assisting offender vested in the PSNI. This is set out in PSNI Policy Directive PD 03/09 SOCPA Debrief Policy which CAJ understands is currently under review, and is not currently available on the PSNI website. The policy was implemented in March 2009 sets out that PSNI will manage such assisting offenders, such operations will 'remain covert' and on a need to know basis with a 'sterile corridor' established with a Debrief Senior Investigating Officer (SIO) and Debrief Manager protecting the information provided and liaising with the PPS. An officer from 'C3' (special branch) will control the input and dissemination of intelligence from this process, which will be firewalled away from the 'CID' Investigation Team.

There may well be scenarios whereby it is right and proper for investigations to be firewalled away from each other. In addition agencies themselves may take measures to ensure those appointed to debrief, disseminate intelligence and handle prosecutions are individually independent from colleagues who may have a conflict of interests. There appears however to be no explicit provision to ensure this in either the legislation or aforementioned PSNI policy document, nor does it address the issue of institutional independence. The process could therefore be open to abuse beyond the question of who is granted immunity from prosecution under SOCPA. Take for example the scenario where evidence and information gathered via an assisting offender is then 'filtered' to selectively prosecute Loyalist paramilitaries on selected charges in a manner designed to prevent evidence uncovered in the process being disclosed that relates to illegality by paramilitary informants and their police handlers?

Examining SOCPA it appears it was introduced largely as a mechanism to ensure assisting offenders followed through and gave the evidence they had earlier committed to rather than retracting it before reaching court. The legislation does not explicitly address the Article 2 context in a post-conflict society leaving risks that it could be abused to facilitate, not just immunity, but impunity. The human rights implications of SOCPA do go well beyond the issues of a fair trial.

CAJ's 1990s publications now online

The CAJ has decided to put its 1990s publications online, now available to download at <http://www.caj.org.uk/publications>. The list of available publications includes:

- No. 15** Plastic Bullets and the Law, 1990
- No. 16** Cause for Complaint: The system for dealing with complaints against the police in Northern Ireland, 1990
- No. 17** Making Rights Count, October 1990
- No. 18** Inquests and Disputed Killings in Northern Ireland, 1992
- No. 19** The Casement Trials: A Case Study on the Right to a Fair Trial in Northern Ireland, 1992
- No. 20** Racism in Northern Ireland: The need for legislation to combat racial discrimination in Northern Ireland, the proceedings of a CAJ conference held on 30th November 1992
- No. 21** A Bill of Rights for Northern Ireland, 1993
- No. 22** Staid agus Stadas Gaeilge i dTuaisceart na hEireann The Irish Language in Northern Ireland: The UK Government's approach to the Irish Language in light of the European Charter for Regional or Minority Languages, 1993
- No. 23** A Fresh look at Complaints against the Police, 1993
- No. 24** Adding Insult to Injury? Allegations of Harassment and the use of Lethal Force by the Security Forces in Northern Ireland, 1994
- No. 25** The States We Are In: Civil Rights in Ireland, North and South, proceedings of a conference held in Dublin by the Irish Council of Civil Liberties and the CAJ, 1993
- No. 26** Civil Liberties in Northern Ireland: The CAJ Handbook (2nd edition), June 1993
- No. 27** "Harassment: It's part of life here..." Survey of young people's attitudes to and experience of harassment by the security forces, December 1994
- No. 28** No Emergency, No Emergency Law: Emergency Legislation related to Northern Ireland the case for repeal, March 1995
- No. 29** Right to Silence debate, the Northern Ireland Experience, May 1994
- No. 30** Human Rights: The Agenda for Change; Human Rights, the Northern Ireland Conflict and the Peace Process (includes proceedings of a conference held in Belfast on 11th & 12th March 1995), December 1995
- No. 31** Fair Employment For All: Submission to the Standing Advisory Commission on Human Rights on Fair Employment, February 1996
- No. 32** The Misrule of Law: A report on the policing of events during the Summer of 1996 in Northern Ireland, October 1996
- No. 33** Mainstreaming Fairness? : A discussion paper by Dr.Christopher McCrudden, on "Policy Appraisal and Fair Treatment", November 1996
- No. 34** Mainstreaming Fairness, "Policy Appraisal and Fair Treatment", A summary of a consultation process around "Policy Appraisal & Fair Treatment", June 1997
- No. 35** Making a Bill of Rights Stick: Options for Implementation in Northern Ireland, A Discussion Paper, September 1997
- No. 36** Policing the Police: A Report on the Policing of Events During the Summer of 1997 in Northern Ireland, November 1997
- No. 37** Human Rights on Duty: Principles for better policing International lessons for Northern Ireland, December 1997
- No. 38** Civil Liberties in Northern Ireland: The CAJ Handbook (3rd edition), December 1997
- No. 39** Benchmarks for Change: A Proposal by Dr. Christopher McCrudden on Mainstreaming Fairness in the Governance of Northern Ireland, February 1998
- No. 40** Plastic Bullets - a briefing paper, June 1998
- No. 41** A Guide to Prisoners' Rights and Prison Law in Northern Ireland, September 1998

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Safeguarding against welfare cuts? A verdict on the Assembly's first equality scrutiny committee since the Agreement

Late last year for the first time a special Committee was set up at the Northern Ireland Assembly to scrutinise the equality and human rights compliance of a legislative bill. The 'Ad Hoc Committee on Conformity with Equality Requirements, Welfare Reform Bill' was voted for on 20 November 2012 and established on 26 November 2012.

This provision was a safeguard within the Belfast /Good Friday Agreement which provided that the "Assembly may appoint a special Committee to examine and report on whether a measure or proposal for legislation is in conformity with equality requirements, including the ECHR/Bill of Rights." Section 13(3)(a) of the Northern Ireland Act 1998 subsequently ensured that the Assembly's Standing Orders must provide for such a Committee. Standing Orders detail the procedures which regulate the way the Northern Ireland Assembly carries out its business. Standing Orders 34 and 35 respectively set out the Committee is to be established for the "purpose of obtaining advice" as to whether a Bill is compatible with equality requirements or human rights (including the ECHR). The Ad Hoc Committee is formed in order to look at a specific area (in this instance equality) and will be dissolved once the matter is completed and the report compiled. Even given the long periods of suspension it surprising that this is the first time such a special Committee has been established, and its existence provided its first test as a safeguard.

CAJ, and indeed the Equality Coalition which we co-convene with UNISON and many of its members, have been working on Welfare Reform issues and campaigns for some time. The planned welfare cuts remain the most pressing equality issue of the day, and are going to lead to wide ranging impacts on many section 75 equality categories and disproportionately affect those with multiple identities such as disabled women and lone parents. Also there is considerable evidence of multiple disadvantage and deprivation in Northern Ireland given contexts including, higher fuel costs, including lower average wages, lack of childcare provision, greater incidence of mental health and higher trends of economic inactivity. In addition, economic forecasts from a variety of sources suggest that Northern Ireland will take longer to emerge from the recession than Britain. Thus the Welfare Reform Bill will have a very significant impact on people in Northern Ireland.

In light of this, Equality Coalition members and other interested parties were keen for the Ad Hoc Committee to be set up to scrutinise the Welfare Reform Bill from an equality and human rights perspective. Once established the Committee took oral and written evidence over a 30 day period. There was a flurry of activity from civil society with over a dozen groups making submissions and highlighting the detrimental equality impacts of the bill.

The Equality Coalition provided a written response to the Committee focused on deficiencies in the Equality Impact Assessment (EQIA) process undertaken by the Department of Social Development (DSD). Other Equality Coalition members gave evidence both orally and in written form to the Ad Hoc Committee. The Ad Hoc Committee could not see all the groups who wished to give evidence due to the short timescale but they did meet with the Northern Ireland Council for Ethnic Minorities (NICEM), MENCAP, Disability Action and the Law Centre NI. The Committee's proceedings were marred in controversy following the evidence given by NICEM who subsequently issued a complaint to the chairman Trevor Lunn that two MLAs had used "inappropriate and disrespectful treatment" as they gave their evidence. NICEM stated that the MLAs in question "As well as being very skeptical towards the witnesses, members also laughed at the witnesses on two occasions. This was also observed by members of the public gallery, who have indicated to NICEM that they felt the NICEM witnesses were not treated with respect during the questioning process." The
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Equality Coalition subsequently wrote to the committee to endorse NICEMs complaint and raise concerns about the manner in which it was dealt with.

Both the Equality and Human Rights Commissions, also key institutions established under the Agreement, also gave evidence to the Committee. The Equality Commission's oral evidence was blemished by the statement from the Chief Commissioner, Michael Wardlow, that on taking up the post as head of the expert equality body nine months ago he had been "trying hard to get my head around what the groups in section 75 are." Nevertheless the Commission's evidence, like that of others, did point to serious deficiencies about the DSD equality impact assessment process. Such deficiencies included DSD not analysing data on four of the section 75 categories – religion, political opinion, ethnicity and sexual orientation. A key question now is that given this context will the Equality Commission pursue a formal investigation against DSD for not complying with the commitments in its Equality Scheme, as it is empowered to do under another key safeguard introduced as part of the equality duty.

On concluding its business the completed report from the special Committee was up for debate on the floor of the Assembly on 29 January 2013. There were 15 recommendations in the report. However, whilst the Committee believed that "Scrutiny had revealed a number of areas of concern" which the Committee made recommendations on, remarkably, given the nature of the legislation, a majority vote of the Committee concluded "it cannot identify any specific breaches of equality or human rights aspects of the Welfare Reform Bill." Voting effectively fell on party lines and in the end the report did not pass a vote on the floor of the Assembly, given the requirement of cross community support. All Unionists votes plus those of Alliance supported the report, All Nationalist votes, plus the Green Party MLA, voted against its adoption. The Bill has now been passed back to the DSD Committee. The final DSD Committee report is due in late February. 18 June 2013 is now the new date for Royal Assent and secondary legislation will probably be rushed through before the summer recess. The verdict? Although the special Committee did provide a platform for many of the undoubted equality impacts of the reforms to be vented and put on record on this occasion it has certainly not been the safeguard imagined by the Good Friday Belfast Agreement.



The proposed reforms to the welfare system have alarmed a large number of community and voluntary groups. The empty purse campaign focuses on changes to how welfare payments are made. More information at <http://www.communityni.org/campaign/empty-purse-campaign>

CAJ's 1990s publications now online contd.

No. 42 The Agreement and a new beginning to policing in Northern Ireland proceedings of a conference held in February 1999, this report also includes Human Rights Benchmarks for policing change, June 1999

No. 43 Fundamental Social Rights in Northern Ireland: Building upon the Agreement and the European Social Charter, October 1999. Proceedings of a conference jointly hosted by CAJ and the Council of Europe, held in June 1999

No. 44 The Patten Commission: The way forward for policing in Northern Ireland? Proceedings of a conference on the findings of the Patten Commission held in October 1999

Civil Liberties Diary - January

2 January

Only 13 people were killed violently in Northern Ireland in 2012. This is the lowest number of murder or manslaughter investigations since before the Troubles began.

Flag protestors resumed their protests for the new year. They have vowed not to cease protesting until the flag is back above Belfast City Hall.

The Northern Ireland Prison Service has paid more than £9.5million in overtime since 2009. Staff at Maghaberry Prison worked the most overtime. As a result of these figures, the Prison Service will hold a recruitment drive for the first time in 20 years.

7 January

The PSNI announced that 70 people have been arrested and 47 charged in connection with the flag protests. Additionally, 52 police officers have been injured during the protests. Belfast Magistrates Court has held special sittings to deal with the civil unrest, for the first time since the Agreement.

Unionist leaders, who met to find a resolution to the five weeks of protesting, failed to find a solution. However, they will be meeting with the PSNI to propose that officers should pull out when under fire.

8 January

Despite a promising announcement last autumn of jobs for new teachers, no one has yet been appointed to a post.

OFMDFM had announced a £26million drive to improve literacy and numeracy levels among children from deprived areas. The Department of

Education has stated that it cannot say when anyone will be given a job or how much the scheme will actually cost.

9 January

Social Development Minister Nelson McCausland has proposed to effectively dissolve the Northern Ireland Housing Executive. He stated that the service was no longer up to the job required of it, the model is not sustainable, and it does not make effective use of public resources.

11 January

The Marie Stopes Clinic has refused to reveal how many, if any, abortions they have carried out in Northern Ireland. The UK Director of the organisation said that the numbers are largely irrelevant but are very low.

14 January

Over 1500 people took to the streets of Belfast to call for peace and to demonstrate their opposition to the ongoing flag violence.

21 January

Facebook has been ordered to close down two internet pages used by loyalists to organise flag protests. The pages contained threats made against a Catholic from East Belfast.

22 January

According to a report by the Consumer Council, one in six people in Northern Ireland believe the price of groceries to be too high. Additionally, nine in ten people worried about the cost of food, regardless of age, demographics, or income.

24 January

The DUP has accused the Equality Commission of having too few Protestants in its workforce. The Commission, which is responsible for promoting religious, gender, and racial equality, employs almost twice as many Catholics as Protestants. The Commission has been unable to fix the disparity due to cuts but is trying to redress the balance.

Compiled by Elizabeth Super from various newspapers

Just News

Just News welcomes readers' news, views and comments.

Just News is published by the Committee on the Administration of Justice Ltd.

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