CHANGE AND DEVOLUTION OF CRIMINAL JUSTICE AND POLICING IN NORTHERN IRELAND: INTERNATIONAL LESSONS

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What is the Committee on the Administration of Justice?

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 (FIDH). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the rights of all. We are opposed to the use of violence for political ends.

CAJ has made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee, the Committee Against Torture, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, Extra judicial, Summary and Arbitrary Executions, and Freedom of Opinion and Expression, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international non-governmental organisations, including Amnesty International, Human Rights First, Human Rights Watch and the International Commission of Jurists. Our activities include: publication of human rights information; conducting research, holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, criminal justice, equality, and the protection of rights.

Our membership is drawn from across all the communities in Northern Ireland, and beyond, and is made up of lawyers, academics, community activists, trade unionists, students, and other interested individuals.

In 1998, CAJ was awarded the Council of Europe Human Rights Prize in recognition of our work to promote human rights in Northern Ireland.

ACKNOWLEDGEMENTS

This report would not have been possible without the assistance of so many people. Thanks are due primarily to Clare Fox who, as Criminal Justice Researcher for CAJ for a period of eighteen months, was responsible for coordinating and conducting much of this research, and preparing an early draft.

The concept and logistics of this research were guided in the early days by a small sub-group of people made up of Kieran McEvoy, John Jackson, Les Allamby, Stephen Livingstone, Martin O'Brien, and Paul Mageean. We thank them for their inspiration and assistance. In particular, Professor Stephen Livingstone was, as always, an invaluable and steadfast source of support and advice in the early days. We are truly saddened that he is no longer with us to see the report come to fruition, and hope that its contents do his memory justice.

Through the final editing process, all the above people contributed their time and expertise, and again we thank them, and all those who commented on various drafts. Particular thanks go to Paige Jennings for her superb technical editing of the end product.

Clearly those who assisted with the international research deserve particular mention. Our sincere gratitude goes to Prof. Olivier de Schutter (Belgium), Ms. Melanie Lue-Dugmore (South Africa), Dr. Susan Breau (Canada) and Mr. Rocco Caira and Prof. Xabier Etxebarria (Basque Country) for preparing reports on their respective countries. We particularly thank Prof. de Schutter and Ms. Lue-Dugmore for their assistance in arranging interviews in the field visits to Belgium and South Africa. Thanks also go to all those in Belgium, Scotland and South Africa who gave freely of their time to be interviewed, and we hope we have interpreted their comments fairly.

Finally, thanks are due to all the CAJ staff involved in pulling this text together, most particularly Aideen Gilmore who, as Research & Policy Officer, put in a lot of hard work and commitment to getting the report to fruition and ensuring a product that we hope will make a unique and constructive contribution to the debate.

Much of the initial research was carried out in 2003/2004 but changes in CAJ personnel inevitably led to some delay in bringing the report to completion. The continued uncertainty surrounding Northern Ireland's political institutions that was experienced throughout much of the research and the writing phases of this report often appeared to cast doubt over the relevance of any debate regarding the devolution of justice powers. However, CAJ now hopes that the finished product may in fact prove a very timely contribution about the future governance of criminal justice matters in Northern Ireland, and the role that human rights should play in any new arrangements.

Fiona Doherty
Chairperson
January 2006

CHANGE AND DEVOLUTION OF CRIMINAL JUSTICE AND POLICING IN NORTHERN IRELAND: INTERNATIONAL LESSON

SUMMARY OF RECOMMENDATIONS

1. CAJ takes no position on the constitutional status of Northern Ireland and this report therefore takes no formal position on devolution within the UK context, nor does it address a series of issues around an all-Ireland relationship. These questions can and presumably will be addressed in the course of detailed negotiations between the various political parties and the British and Irish governments, in the context of discussions to date in the 1998 Agreement and the subsequent Joint Declaration (2003). At the same time, it is fair to say that the starting premise of this work was that in principle devolution of criminal justice and policing to more localised democratic control was to be welcomed, because it brings crucial decision-making closer to those directly affected by those decisions. That said, our primary concern is that any eventual models of devolution be measured against clear human rights criteria, and that assessments of their relative merits and demerits be made on the basis of such criteria.

   Any proposed devolution model needs to be assessed for its ability to:

   - be open and transparent, so as to secure widespread public confidence;
   - ensure an efficient and effective justice system;
   - provide legal, democratic and financial accountability;
   - represent the diversity that is Northern Ireland, and thereby ensure trust in its ability to work impartially and fairly for all; and
   - deliver the administration of justice to the highest standards, as laid down in international and national human rights law.

2. CAJ recommends that the discussion about the appropriate devolution model to adopt should itself be an open and transparent debate, and should not be, or be seen to be, held behind closed doors and the subject to horse trading between different political parties. CAJ believes that the timetable for debate and for decision making is also a matter of public interest, rather than merely party political interest. It is particularly problematic that many changes recommended in the Criminal Justice Review are being treated (unjustifiably in our view) as contingent on devolution. Further foot-dragging of this kind can only fuel speculation that some of the Review recommendations are being held back so as to be treated as "bargaining chips" in the eventual political negotiations around devolution.

3. Regarding the appropriate governmental structures in any devolved criminal justice arrangements, CAJ concludes on the basis of its research that:

(i) a single department/minister may meet concerns about efficiency and effectiveness but may pose concerns around credibility and legitimacy in a politically polarised society like Northern Ireland. If it is determined to pursue a single ministry model, the emphasis will need to be on safeguards (such as those outlined in recommendation 4) that will ensure that the party 'holding' the single ministry is behaving in an impartial and non-partisan way.

(ii) a two or more departmental model would potentially offer Northern Ireland greater security against charges of ministerial partisanship since the departments can be headed up by members of different political traditions, who could be expected to act as a safeguard upon each other. This model risks being or appearing less efficient, and if pursued, the emphasis would need to be on mechanisms aimed at ensuring coordination, and collaboration across the criminal justice agencies will need to be the primary consideration.

(iii) Northern Ireland already has the experience of the Office of the First and Deputy First Minister, which seeks to bring together cross-community ministerial responsibility within the operation of a single department, and some consideration was given to whether a similar model could be applied to a future Ministry of Justice. In reality, no other country studied had a model of this kind, so comparisons with elsewhere cannot be easily drawn upon. When learning from experience to date in Northern Ireland, it would appear that if this joint-leadership cross-community model were to be applied to criminal justice, it would be important to (i) have a clear delineation of responsibilities between the Minister and Deputy Minister (ii) establish clear protocols governing when joint agreement is needed and/or when a veto arrangement might operate and (iii) introduce a fall back mechanism to resolve any stalemates.

4. No executive governmental model (one, multiple, shared) is going to be self-sufficient in providing safeguards in such a highly contentious and politically problematic area. Northern Ireland should give active consideration to all of the following additional safeguards:

- Constitutional safeguards and Bills of Rights: a strong Bill of Rights for Northern Ireland will be an extremely important element of developing a criminal justice system that is both human rights compliant and sympathetic, and as such has a central role to play as an engine for transformation and change within criminal justice institutions.

- Parliamentary safeguards: tried and tested traditional methods of parliamentary scrutiny such as committees, questions and reporting obligations are extremely effective methods of holding minister(s) to account.

- Inspectorates/oversight mechanisms: such mechanism have already proved essential in monitoring the implementation of change in policing and criminal justice, and more permanent mechanisms should be considered.

- Complaints systems: while these are traditionally more common in relation to policing, the Criminal Justice Review recognised the importance of criminal justice institutions adopting procedures for complaints. Clearly the more independent these mechanisms are the better.

- Effective and independent judiciary: the judiciary must be in a position to rule objectively on the standards and human rights to which a member of the executive must adhere in the exercise of his or her ministerial responsibilities. Its established presence as an impartial and distinct organ of government should be a powerful deterrent to any justice minister who is tempted to act in a way which would be inconsistent with his or her office.

- Scrutiny at the local administrative level: the Criminal Justice Review envisaged a single local entity – building upon the Patten idea of District Policing Partnerships (DPPs) – which would deliver a holistic participatory approach to local policing and community safety. Government's decision to run two local entities in tandem (DPPs and Community Safety Partnerships (CSPs)), with little coordination, seriously risks undermining the impact either body can hope to have.

- International scrutiny mechanisms: Government policy, the judiciary, the police, and all the criminal justice agencies, are obliged to comply with the international human rights standards that the authorities have freely signed up to.

- Civilian oversight and statutory commissions: bodies such as the NI Policing Board, Judicial Appointments Commission, Police Ombudsman and Criminal Justice Inspectorate will all be extremely important in monitoring the police and criminal justice institutions.

5. CAJ recommends that any major institutional change in criminal justice and policing be built upon a detailed programme of work which ensures that the new arrangements embrace change and commit to the principles such as openness, transparency, accountability and human rights as set out in recommendation 1 of the Criminal Justice Review.

In particular, CAJ notes that a number of the key recommendations from the Criminal Justice Review that are instrumental in bringing about such change have made the least progress in implementation. Institutional resistance to change, and the failure to fully embrace cultural transformation leads to serious questions about the ability of the criminal justice system to transform itself into one which commands the confidence of the community it serves. In particular, this report highlights how recommendations relating to securing a representative workforce, a more reflective judiciary, equity monitoring of those who pass through the criminal justice system, the policy around the giving of reasons for no prosecution, the implementation of complaints mechanisms, codes of ethics and discipline, and the provision of adequate and relevant human rights training have been most protracted in their implementation. CAJ notes that institutional and political resistance to deeper cultural change is evident in relation to these recommendations.

Without pressure for deeper institutional change, rebuilding confidence in the criminal justice system faces a tough challenge. At present it is difficult to see where such pressure exists. Arguably, the devolution of criminal justice and policing powers, and the local scrutiny and accountability that this will entail, could increase such pressure. Equally, however, failure to embrace the real and meaningful cultural change envisaged by the Criminal Justice Review could mean that other recommendations and reforms run the risk of becoming redundant, and indeed the devolution of criminal justice and policing powers would be of limited affect.

6. CAJ recommends that criminal justice only be devolved once there is a clear delineation of the exact powers that are to be 'devolved' and those that are to remain 'excepted'. It is particularly important that there is clarity in the area of emergency powers and national security. There will be arguments as to whether to devolve more or less authority to locally elected bodies in these particularly contentious areas, but this must be determined in advance of the transfer of powers. It is extremely worrying that the Northern Ireland Office has not complied with requests from CAJ and others to provide a factual list of the various powers, who holds them currently, and which of these powers might or might not be devolved in future. It is CAJ's view that ambiguity surrounding the nature and extent of authority and powers being transferred from Westminster to Northern Ireland would be very destabilising for the peace process, and could seriously undermine the efficiency and legitimacy of the eventual arrangements. Decisions underway currently, for example, regarding the transfer of key intelligence functions from the Police Service for Northern Ireland to MI5 will determine to a great extent the nature of criminal justice and policing powers to be devolved. In the past, problems of communication between internal branches of the police service – Special Branch and the regular units of either the RUC or PSNI – has led to grave errors (see, for example, the Ombudsman's inquiry into the Omagh bombing). The transfer of some of these functions to an agency outside of the Police Service of Northern Ireland makes the likelihood of such errors more not less likely in future. Very importantly, it removes some key functions – ones which traditionally lend themselves most easily to abuses of human rights – from effective local oversight. A devolution of powers that is seen by people in Northern Ireland to be devolution in name only will only be counter-productive.

7. The current process of reform of the criminal justice system in Northern Ireland, and the potential of local accountability via the devolution of criminal justice and policing powers, presents us with an opportunity to consider innovative thinking in relation to the ways that we treat and respond to crime. In particular, further examination is needed of the extent to which the traditional criminal justice model delivers public safety in Northern Ireland. Such an examination can of course only take place in a wider context of recognising that Northern Ireland is undergoing a process of institutional change that poses particular challenges and opportunities, many of which are explored in this report.

Chapter One

INTRODUCTION

Fundamental change in the criminal justice system and police service in Northern Ireland was a central component of the Good Friday/Belfast Agreement 1998. In this respect, the Agreement established both an independent Policing Commission and a Criminal Justice Review Group, each tasked with producing reports that would make recommendations for reform. A key element, and therefore the ultimate goal of both these reviews, was to give real consideration to devolving justice and policing powers to a Northern Ireland Assembly. This objective is expressed in the Agreement, the Patten report into policing, the Criminal Justice Review and their associated implementation plans.

There are many questions to be considered in determining how this transfer of powers should take place, and there are many different institutional models that could potentially accommodate devolved justice and policing powers. Equally, models are not the only important element – considering how to affect cultural change, and accommodate the political, religious and cultural complexities in Northern Ireland are central to the success of any devolution of powers.

The Committee on the Administration of Justice (CAJ) has been active in the criminal justice field since our establishment in 1981. Our engagement has always been based on the premise that the administration of justice must be in accordance with internationally accepted human rights standards. In the lead-up to the Belfast/Good Friday Agreement and since, we have lobbied for human rights to become a central component of the policing and criminal justice systems in Northern Ireland. In producing this report, therefore, we are making a more detailed contribution to the debate, and addressing some of the questions that will arise based on human rights principles. We have sought to do this by exploring the criminal justice structures in a number of other jurisdictions. Obviously no single model can directly be transferred to Northern Ireland, but there are lessons to be learned. Our primary objective throughout is to look at the human rights dimension, and make recommendations on how human rights considerations can be made central to any structures developed.

1.1 Background/Political Context

The multi-party peace Agreement reached in Belfast on 10 April (Good Friday) 1998 marked an historic turning point in Northern Ireland.[1] For the first time, after a series of unionist-controlled, devolved governments in Northern Ireland,[2] Direct Rule from Westminster, and thirty years of armed conflict, a new devolved Northern Ireland Assembly with a politically inclusive, power-sharing Executive was formed.

1.1.1 Competencies of the Devolved Administration

Under the terms of the Agreement, which were later given statutory effect by the Northern Ireland Act 1998, the devolved Assembly assumed full legislative and executive competence for a number of 'transferred' powers and government departments which, prior to the Agreement, fell within the responsibility of the Northern Ireland Office.[3]

However, a range of other powers, including criminal justice and policing, were not transferred to the Assembly under the Agreement but rather remained 'reserved' matters[4] under the authority of the Secretary of State for Northern Ireland. It is envisaged that a 'reserved' matter can however be 'transferred' if the Assembly, with cross-community support, asks the Secretary of State to present an Order in Council to the Westminster parliament for such transfer.[5] The Agreement indeed contains a conditional commitment by the British government to consent, for its part, to the future devolution of justice and policing powers to Northern Ireland subject to "*ongoing implementation of the relevant recommendations.*"[6]

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[1] Hereafter referred to as "the Agreement" or the Good Friday/Belfast Agreement.

[2] A devolved Parliament under the Government of Ireland Act 1920, which lasted from 1921 – 1972; a devolved Assembly in 1974 with legislative powers; and a devolved Assembly between 1982-1986 with no legislative powers.

[3] The new departments under the devolved administration are: Agriculture & Rural Development; Culture, Arts & Leisure; Education; Employment & Learning; Regional Development; Social Development; Finance & Personnel; Environment; Enterprise, Trade & Investment; Health, Social Services and Public Safety; and the Office of the First Minister/Deputy First Minister.

[4] As listed in Schedule 3 to the Northern Ireland Act 1998.

[5] Cross-community support means that for a motion to be passed, it must receive support from a majority of designated Nationalists, a majority of designated Unionists and an overall majority; or the support of 60% of the house overall and 40% each of the Unionist and Nationalist votes (Northern Ireland Act 1998, s.4(5)).

[6] That is, the recommendations of the Agreement. Good Friday/Belfast Agreement, Policing and Justice, p.23

Schedule 2 of the Northern Ireland Act also lists a number of 'excepted' matters, for which competency will remain with the Secretary of State and which are not to be transferred in the same way. Most important for the purposes of this report is the fact that 'national security' is one such matter. In the event that justice and policing powers are transferred in the future, this will undoubtedly raise questions as to how far the parliamentary and executive competencies of the devolved administration will extend. Many matters which ostensibly pertain to the field of justice and policing arguably fall under the heading of 'national security'. It will remain to be seen what impact the retention of such powers could have on the peace process and consequently on the success or otherwise of devolving justice powers.[7]

Safeguards

Given the extended conflict in Northern Ireland, the Agreement required that the Assembly and Executive operate on the basis of a number of safeguards.[8] These comprised *inter alia* basic principles of parliamentary oversight and both human rights and equality guarantees. For example, the Agreement stipulated that key decisions (designated in advance) must be taken on the basis of "cross-community support" of the Assembly;[9] that all positions within the Northern Ireland Executive and Assembly Committees must be allocated upon application of the d'Hondt formula;[10] that the Assembly will be led by a First and Deputy First Minister from different political traditions whose decisions in all matters within their competence must be taken jointly; and that the Human Rights and Equality Commissions, established under other chapters of the Agreement, shall advise the Assembly on standards and practices relevant to their specialisations.

Notwithstanding these inbuilt safeguards and the relatively less controversial nature of the powers devolved to the Assembly, the administration has had problems and has suffered a number of suspensions. The causes for suspension are politically complex and warrant a more detailed examination than is possible within the scope of this report. It is clear, however, that as the devolved institutions form only part of the Agreement, they will not operate

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[7] This is explored in more detail in Chapter 4.
[8] Op. cit., Strand One, *Safeguards*, pg.5.
[9] Supra note 5.
[10] The electoral system used to ensure proportional representation according to party strength in Assembly Committees and decision-making processes.

successfully, and may in fact cease to function at all, unless other key elements of the Agreement are implemented and broad political stability is achieved.

1.1.2 Justice and Policing

In terms of policing and the administration of criminal justice, the Agreement recognised the need for wide-ranging change in order to establish confidence in the independence and impartiality of the system across the community in Northern Ireland. The Agreement provided the terms of reference for an independent Commission on Policing for Northern Ireland and a Review of the Criminal Justice System.

Independent Commission on Policing

An indication of the importance accorded to policing issues in the political negotiations leading to the Agreement, is the fact that a whole section of the final text was entitled "Policing and Justice". The section starts *"[T]he participants recognise that policing is a central issue in any society. They equally recognise that Northern Ireland's history of deep divisions has made it highly emotive, with great hurt suffered and sacrifices made by many individuals and their families, including those in the RUC (Royal Ulster Constabulary) and other public servants. They believe that the agreement provides the opportunity for a new beginning to policing in Northern Ireland."*[11] Subsequent sections laid down a fairly extensive list of criteria against which the new arrangements were to be measured, and authorised the creation of an independent Commission *"to make recommendations for future policing arrangements in Northern Ireland including means of encouraging widespread community support for these arrangements within the agreed framework of principles."*[12]

On 3 June 1998, less than two months after the Agreement was signed, the Independent Commission on Policing was formed.[13] The Commission's recommendations on future policing arrangements for Northern Ireland – which became known as the "Patten Recommendations" (after the chair of

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[11] Good Friday/Belfast Agreement, Policing and Justice, p.22.

[12] Ibid., p. 22.

[13] "The Commission will be broadly representative with expert and international representation among its membership and will be asked to consult widely and to report no later than Summer 1999." For terms of reference, see op. cit., Annex A - "Commission on Policing for Northern Ireland".

the Commission, Chris Patten) – were published in September 1999. There were mixed reactions to these recommendations across the political spectrum, and the government's response, via its Implementation Plan (June 2000) and the Police (NI) Act 2000, feel far short of the mark set by the recommendations. Under pressure from non-governmental organisations (NGOs), politicians and civil society leaders, the government was accordingly forced to compensate for the shortcomings of the Act and passed the Police (NI) (Amendment) Order 2001. The government then published an updated Implementation Plan (August 2001) and on 8th April 2003 passed enabling legislation to bring the commitments in this revised Plan into effect, via the Police (NI) Act 2003. Much work still remains to be done in terms of implementing the Patten recommendations in full, but analysis on this point is largely outside the scope of this report.[14]

Criminal Justice Review

The Criminal Justice Review was a very different review to the Patten Commission on Policing. It developed very much in the shadow of Patten and did not command the same degree of public or media interest. Unlike the Patten Commission, the Review was government-led with some independent advisors, and there was no international participation – making it a much less independent body. Furthermore, the terms of reference for the Review expressly prohibited an examination of the use of emergency powers, in spite of the fact that it was the long-term use of these powers that had corrupted the rule of law and led to some of the gravest human rights abuses in Northern Ireland.

The Agreement set out terms of reference which requested the Review to address "*the structure, management and resourcing of publicly funded elements of the criminal justice system,*"[15] including the areas of judicial appointments, the organisation of the prosecution service, measures to promote

[14] CAJ has produced many publications on this issue, e.g., "Human Rights on Duty: Principles for better policing – international lessons for Northern Ireland" 1997; CAJ Submission to the Commission on Policing for Northern Ireland 1998; Commentary on the Patten Report 1999; Comments and suggested amendments to the Police (Northern Ireland) Bill 2002; Commentary on the Northern Ireland Policing Board 2003; Commentary on District Policing Partnerships 2005; and Commentary on the Office of the Police Ombudsman for Northern Ireland 2005. See the policing section of our website *www.caj.org.uk* for more details.

[15] Op. cit., Annex B – "Terms of reference for the review of the criminal justice system".

accountability, lay participation in the justice system and structured co-operation between Northern Ireland and the Republic of Ireland. Importantly for the purposes of this report, the Review was also asked to consider "*the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area.*"[16]

In March 2000, the Review published its list of 294 recommendations. Despite the initial concerns expressed about the remit of the Review, the report received broad support and included a number of significant and far-reaching recommendations for change. Proposals were made with regard to new procedures for all judicial appointments, including the establishment of a Judicial Appointments Commission for Northern Ireland; the creation of a new, independent Public Prosecution Service for Northern Ireland; measures to promote a representative workforce in all parts of the criminal justice system; recommendations aimed at placing human rights at the centre of all criminal justice service policies; and reform to many aspects of youth justice. In accordance with its terms of reference, and the conditional pledge by the British government to devolve justice and policing powers to Northern Ireland, the Review – like the Patten report – also made a number of recommendations that dealt with the structures and arrangements relating to justice powers post-devolution.[17]

Despite our earlier reservations regarding limitations on the capacity and scope of the Review, CAJ welcomed many of these recommendations – particularly those which were explicitly grounded in and guided by international human rights standards. Our main criticism, however, was that some of the proposed changes were formulated on the contingency of the devolution of justice and policing powers to Northern Ireland which, in view of ongoing political uncertainty, could substantially delay implementation of the Review. While a number of the recommendations were inevitably linked to broader cross-community agreement, many were long overdue, and CAJ believed that many proposals were in no sense dependent on wider political changes.

Even where the devolution of justice powers was not at issue, there have been long delays in implementing the Review's recommendations. The

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[16] Op. cit., Belfast/Good Friday Agreement, Annex B.
[17] These are dealt with further in Chapter 2.

laggardly response of government and several of the criminal justice institutions to specific recommendations of the Review (which relate mostly to promoting public confidence in the system) suggest serious institutional resistance to change.[18]

Implementation of the Criminal Justice Review

As with many good reports, the problem with the Criminal Justice Review lay in its implementation. A good example of this lies in the fact that the first of four main measures taken by the government to implement the recommendations of the Review (the publication of the Implementation Plan for the Criminal Justice Review) took place only one and a half years after the Review was published, in June 2001. When published, the Implementation Plan failed in every sense to meet the necessary components of a proper "plan".

The Implementation Plan was accompanied by a draft Justice (NI) Bill, which in July 2002 received Royal Assent and became the Justice (NI) Act 2002. The Act was supposedly intended to give statutory effect to the Review but like the Police (NI) Act 2000 fell short of expectations by diluting or, in other cases, omitting a number of important Review recommendations.[19] Moreover, since a large percentage of the Act is dependent upon, and cannot be commenced until, the devolution of justice and policing powers, only small portions of the legislation are yet in force.

Concerns about the government's foot-dragging led to increased political pressure which culminated in the commitments in the Joint Declaration[20] to publish a second Implementation Plan, appoint an independent criminal justice oversight commissioner, and pass new legislation in order to remedy the deficiencies of the earlier document. These commitments have now all been met with varying degrees of success. The Updated Implementation Plan in June 2003 was a substantial improvement: the appointment of Lord Clyde (the former Scottish Law Lord) as Oversight Commissioner has added a new impetus to the implementation process and the passage of the Justice (NI) Act 2004 has gone some way to remedying the shortcomings of the original Justice Act.

[18] This is explored further in Chapter 3.

[19] The shortcomings in the legislation and the implementation plans is discussed further in Chapter 3.

[20] Joint Declaration of the British and Irish governments, April 2003. This document came about following political negotiations to try to resuscitate the then foundering peace process. While political party support was not universal, it is nonetheless relevant for the purposes of this report in highlighting government thinking on the issue of devolution of criminal justice and policing.

Despite these welcome developments, many of the more important recommendations of the Review, such as ensuring a reflective workforce across the criminal justice system and introducing equity monitoring, have yet to be advanced. This lack of implementation has significant implications for the devolution of justice and policing powers to Northern Ireland. Likewise, the lack of devolution has often been used as an excuse for not implementing recommendations which clearly do not require such devolution.[21]

1.1.3 Devolution of Justice and Policing

As mentioned above, the Agreement contained a conditional commitment by the government to devolve justice and policing powers in the future. Indeed, former Secretary of State, John Reid, in a foreword to the Criminal Justice Review Implementation Plan in November 2001, stated that the government's target for the devolution of justice and policing was *"after the Assembly elections scheduled for May 2003."*[22] However, both the Agreement and other parts of the Secretary of State's statement require certain loosely worded preconditions to be met before devolution will occur, such as the *"ongoing implementation of the relevant recommendations"*, *"security"* and *"other relevant considerations."* The position was further addressed by the Joint Declaration in April 2003, which contains numerous references to the devolution of justice, as well as a full appendix on possible institutional models which would accommodate the devolution of justice powers.[23]

For its part, CAJ feels that the devolution of criminal justice and policing should be prioritised so that, among other things, the recommendations of the Criminal Justice Review can be fully implemented. However, the complexities of the Northern Ireland situation necessitate a justice and policing model which has been rigorously and comprehensively assessed in terms of its implications for human rights, equality and broader public policy considerations. Such an analysis offers the best chance to create a sustainable criminal justice system that can withstand whatever political crises may eventually come its way. The question therefore must be: if there is to be devolution of criminal justice and

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[21] For further analysis, see Chapter 3.

[22] This of course predated the later collapse of the Assembly and a return to Direct Rule. Elections were held in October 2003, but ongoing difficulties delayed the restoration of devolved competencies. At the time of writing, direct rule from Westminster is still in place.

[23] See Chapter 2 for further details.

policing powers, how can it be done in a way that maximises human rights protection, ensures representation and promotes accountability?

1.2 Research Questions

Any debate about devolution is likely to be multi-faceted, and frequently engages many competing political positions. However, CAJ is a human rights organisation, so our overarching concern – and therefore the overarching concern of this report– is that, if justice and policing powers are to be devolved, this should occur in a way which maximises human rights protection for all and ensures accountability. In January 2003, CAJ produced a list of questions in order to stimulate debate on the kinds of issues that need to be considered so as to effectively transfer justice powers to Northern Ireland.[24] For the purposes of defining our research, however, we have broken these detailed questions into four key areas:

(i) What governmental model or models could best accommodate the transfer of justice and policing functions from Westminster to Northern Ireland so as to ensure that the human rights of all are protected and that the system enjoys the confidence of the community in Northern Ireland? What mechanisms can regulate the model to ensure accountability for the exercise of executive responsibilities?

(ii) What measures can be taken to embed a culture of human rights in Northern Ireland's criminal justice organisations, such as would give rise to greater public confidence in the independence of the system? How can institutional resistance to change be combated? How important are these developments for the devolution of justice powers to Northern Ireland?

(iii) On the devolution of justice and policing, what will be the exact division of powers between Westminster and the Northern Ireland Assembly? To what extent will that division of power, particularly as it affects areas of national security and emergency laws, impede human rights protection and justice devolution? How might any potential negative impact be reduced?

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[24] The complete list of questions is reproduced in Appendix 1 of this report.

1.3 Research Methodology

In attempting to answer these key questions CAJ felt that it would be beneficial to consider the experiences of other countries/jurisdictions in relation to reform of the administration of justice and the various approaches adopted therein to promoting human rights in the justice field.[25] We were interested in finding out about both good practices that we might wish to emulate in Northern Ireland, and practices that we may be advised to avoid.

In selecting countries for our comparative analysis, CAJ identified the following criteria as making the country particularly useful as a comparator:

- countries with divided societies or a history of conflict;
- countries with experience of federal or decentralised structures of government;
- countries which have recently undergone a process of reforming the administration of criminal justice and policing functions; and
- countries which have had either success or failure in integrating distinct political, religious, ethnic and linguistic groups.

On this basis we selected Belgium, Canada, South Africa, the Basque Country and Scotland. We initially recruited experts from the first four of these countries to each produce a forty page written report on the application of our four key research questions to the experience of the country in question.[26] In the case of Scotland we conducted our own desk/background research, and we carried out a literature review in relation to all of the countries under consideration.

With respect to South Africa, Belgium and Scotland we also carried out significant field visits during which we were able to meet with a wide range of senior government figures, politicians, members of the prosecution service, police, judicial appointments councils, academics and members of the NGO community.

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[25] Such international comparative research is common practice, and indeed CAJ carried out a somewhat similar piece of work in relation to policing prior to the Agreement – see Human Rights on Duty, Principles for better policing – international lessons for Northern Ireland, Mary O'Rawe and Dr Linda Moore, CAJ, November 1997.

[26] The international material in this report draws largely from the four papers that CAJ commissioned from Prof. Olivier de Schutter (Belgium), Ms. Melanie Lue-Dugmore (South Africa), Dr. Susan Breau (Canada) and Mr. Rocco Caira and Prof. Xabier Etxebarria (Basque Country). Any errors or misinterpretations are, however, CAJ's alone.

This report is based on all the information gathered through the commissioned reports, literature reviews, desk reports and field visits. In addition, material CAJ itself had accumulated in relation to the Criminal Justice Review and its implementation were drawn upon to a large extent.[27]

1.4 Structure of Report

The report has three substantive chapters which will consider, in turn, each of the three key research questions outlined above.

Chapter Two will consider the governmental models that could potentially accommodate the devolution of justice and policing powers. In doing so, it will address how to regulate any such model by effective and wide ranging human rights and accountability/oversight mechanisms. It will also evaluate safeguards that have been built into governmental systems in other jurisdictions and consider the application of these to Northern Ireland.

Chapter Three looks at a variety of measures that can be taken by the difference components of the criminal justice system to embed a culture of human rights as well as respond effectively to institutional resistance to change. In particular, it evaluates the implementation of the recommendations of the Criminal Justice Review and assesses the implications of the pace of change in this area for the potential devolution of justice functions.

Chapter Four attempts to determine the statutory and other powers that would accompany the devolution of justice and policing powers to Northern Ireland and those which would remain within the competence of the Secretary of State. It will draw attention to some of the potentially problematic and destabilising aspects of the retention of national security and emergency laws. It will look at how the government might go about reducing these problems by analysing the treatment of national security issues in other devolved or decentralised jurisdictions, and the measures taken elsewhere to promote co-operation between the regional/provincial and central tiers of government.

Chapter Five provides a brief summary of the main recommendations to come out of each preceding chapter and concludes the report.

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[27] An extensive bibliography is available in Appendix 4.

Chapter Two

GOVERNMENTAL MODELS FOR ADMINISTERING JUSTICE AND POLICING FUNCTIONS

Following the conditional pledge by the British government in the Agreement to devolve justice and policing powers to Northern Ireland, many questions have been raised about how this transfer of powers should take effect. Given the political significance that any such devolution will have, it is unsurprising that such questions mainly concern issues around how the powers ought to be organised and allocated at the executive level. The centrality of questions of justice and policing to the broader political conflict in Northern Ireland also means that much focus will naturally centre, for example, on whether ministerial responsibility would be conferred on one of the main political parties to the exclusion of the others, whether a joint or rotating ministry would be established, whether there would be one department for justice and one for policing and so on.

These are clearly very important decisions, but this report does not intend to specifically recommend one governmental model above another in the Northern Ireland context. Rather, by means of international comparative analysis, it will explore a variety of models and identify both successes and problems with each. The overall purpose will be to highlight the human rights principles that need to be enshrined in any institutional arrangements that are agreed.

Accordingly, this chapter will essentially look at the safeguards that can be built into an executive model for administering justice and policing functions in Northern Ireland. This will involve a two-part analysis. Firstly, a number of different executive models used in other jurisdictions will be explored, with a view to determining how the model *per se* can uphold and promote human rights and accountability, while at the same time maintaining efficiency. Secondly, a range of other external mechanisms or practices that may act as a check on the executive will be examined, particularly those that hold the executive to account in terms of its compliance with internationally agreed human rights standards.

In both instances, consideration will be given to the need to ensure strong oversight and accountability mechanisms while at the same time enabling the system to work effectively and efficiently. It is paramount that the criminal justice and policing systems command widespread respect. In a highly contested society with a long legacy of division, it is not enough that the actual appointees to executive positions are subject to checks and balances; the exercise of the functions of the position must similarly be held to account. In CAJ's opinion, one of the best ways to safeguard against the partial or improper use of justice and policing authority by the executive is to ensure that whatever model is used, the relevant minister(s) is/are held responsible for guaranteeing the protection of internationally agreed human rights.

This chapter is broken into three sections:

- Section 1 will briefly discuss how justice and policing powers are currently structured and organised in Northern Ireland and the impact, if any, of UK-wide constitutional reforms, before looking at the relevant recommendations of the Criminal Justice Review and the Joint Declaration on the issue of devolution of these powers.

- Section 2 contains an exploration of the models offered in the countries examined as part of the international comparative research, followed by a brief analysis of their applicability to Northern Ireland.

- Section 3 then looks both at safeguards that are already built into the Northern Ireland system, as well as examples from other jurisdictions.

2.1 Setting the Context

2.1.1 The existing executive model for justice and policing powers in Northern Ireland

As noted earlier, the Good Friday/Belfast Agreement led to certain executive and legislative functions being devolved to Northern Ireland under the Northern Ireland Act 1998.[28] However, justice and policing powers were not

[28] Supra note 3.

among the functions that were transferred and these remained 'reserved' under Schedule 3 of the Act. Accordingly, the powers continue to be exercised by Westminster through the Northern Ireland Office (NIO), which is headed by the Secretary of State for Northern Ireland – a senior minister in the British Cabinet. The NIO thus has responsibility for the police, prisons,[29] probation,[30] the content of the criminal law, the overall operation of the criminal justice system, and financing the Prosecution Service for Northern Ireland.

Two other senior ministers of the British government have responsibility in relation to the criminal justice system in Northern Ireland: the Attorney General for England and Wales and the Lord Chancellor. The Attorney General is the principal legal adviser to the government and is responsible for directing and overseeing the Crown Prosecution Service in England and Wales and the Prosecution Service in Northern Ireland. He is also charged with appointing and, where appropriate, removing the Director of Public Prosecutions in Northern Ireland. The Lord Chancellor is responsible for policy, legislation and resources in respect of the administration of the civil and criminal courts in England, Wales and Northern Ireland, for legal aid, and for making judicial appointments in all of these jurisdictions.

The impact of wider constitutional reforms

Over and above the changes in Northern Ireland's criminal justice arrangements, which are discussed in more detail below, a series of constitutional reforms are underway at the UK-wide level. As part of the Labour government agenda of constitutional reform, on 12th June 2003 the government announced a number of significant changes to the organisation of justice functions. Of most relevance here is the creation of a new Department for Constitutional Affairs, which has assumed the responsibilities formerly belonging to the Lord Chancellor's Department. In the Northern Ireland context, this has meant that many of the responsibilities of the Lord Chancellor in relation to the judiciary and courts here have transferred to the Lord Chief Justice. This changeover is gradual and at the time of writing not all the arrangements had been worked out or taken effect.

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[29] The Northern Ireland Prison Service is an executive agency of the Northern Ireland Office, whose Director General is responsible to the Secretary of State for Northern Ireland.

[30] The Probation Board for Northern Ireland is a non-departmental public body, the members of which are appointed by, and accountable to, the Secretary of State.

The proposals contained in the agenda of constitutional reform are certainly radical, and include the restructuring of government departments and functions, the possible creation of a new Supreme Court and the development of a new system for appointing judges. It could therefore be argued that there is a dynamic of change already underway in Britain and that this may be conducive to the development of an innovative justice model in Northern Ireland.

2.1.2 Models Proposed by the Criminal Justice Review and the Joint Declaration

As mentioned earlier, a number of governmental models for the devolution of justice and policing powers have already been explored in the Report of the Criminal Justice Review (2000) and the Joint Declaration of the British and Irish governments (2003).

Recommendations of the Criminal Justice Review

The Criminal Justice Review, as explained in the introductory chapter, was established under the Good Friday/Belfast Agreement with the task of conducting a full and wide-ranging review of the operation of the criminal justice system in Northern Ireland. The terms of reference for the Review included a requirement to consider:

> *"the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area."*[31]

Although this issue was relatively underdeveloped in the report, the Review Group did commission international comparative research, and seemed to use this as a basis for drawing up a number of its concluding recommendations.[32] Two institutional models were given consideration by the Review for their potential application to Northern Ireland - namely a single department of justice, and a model which separated justice and policing responsibilities into two distinct government portfolios.

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[31] Op. cit., Annex 2.

[32] "Review of the Criminal Justice System in Northern Ireland" March 2000, Chapter 15 (hereafter referred to as "the Criminal Justice Review" or "the Review").

While the Review considered that the application of a two-department system could be feasible in Northern Ireland, it cautioned against having more than one justice department, in addition to the proposed new office of the Attorney General for Northern Ireland.[33] The Review rather recommended the development of a single Department of Justice:

> *"headed by a Minister for Justice, bringing together all justice functions other than the prosecution, responsibility for the Law Commission and judicial matters."*[34]

In formulating this proposal, the Review was clearly of the opinion that the Prosecution Service should remain independent from the executive. This would be consistent with the situation elsewhere in the UK, including Scotland, which, for the Review team, was a model that Northern Ireland could replicate:

> *"We recommend that responsibility for the same range of criminal justice functions as are devolved to the Scottish Parliament should be devolved to the Northern Ireland Assembly. Our preference is that they should all be devolved at the same time."*[35]

In reaching its conclusion that a single justice department would work best for Northern Ireland, the Review appears, at least on the evidence of the report, to have been led by very pragmatic considerations. The Review group explained its preference for a single department on the basis that it would be more efficient than a two-department system (given the problems of co-ordination associated with the latter) and would more closely resemble the justice systems of its neighbours in Scotland, the Republic of Ireland, England and Wales. It is worth highlighting again at this stage, however, the nature of the review body itself, and the repercussions this has for the recommendations it made in this and other regards. As a civil service led review with little

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[33] Op. cit., Criminal Justice Review, paras. 15.61 & 15.62, pg. 367. In Recommendation 43, the Review proposes the creation of an Attorney General for Northern Ireland who would be a non-political actor, appointed by the First and Deputy First Ministers, for the purposes of acting as a legal adviser to the Assembly and Executive on all devolved matters. Importantly, the Attorney General for Northern Ireland will not assume the responsibilities currently held by the present Attorney General (who is also AG for England and Wales) in relation to directing the Director of Public Prosecutions in Northern Ireland, nor will s/he assume the powers of the current Attorney – who after devolution will be termed "Advocate General" – in relation to 'excepted matters', such as issuing certificates for prosecutions to the Director of Public Prosecutions in Northern Ireland.

[34] Ibid, para. 15.62, pg. 367.

[35] Ibid, para. 15.56, pg. 366.

independent input, considerations of efficiency and control would likely have been given primacy over a number of other potential considerations.

What is also perhaps lacking in the Review's assessment is a full appreciation of the distinct political circumstances in Northern Ireland. A "generic UK model" may appear attractive in efficiency terms, but does it best respond to the particular needs of Northern Ireland? As highlighted already, finding an appropriate executive model for justice and policing powers in Northern Ireland requires striking the right balance between a system that facilitates efficient and effective governance while ensuring sufficient accountability and representative measures to promote public confidence in the system. An emphasis on the first of these two criteria might draw one naturally to a one-ministry solution, whereas an emphasis on the second might render a two-department arrangement more attractive.

The Joint Declaration

The Joint Declaration of the British and Irish governments provides further insights into government thinking around the issue of devolution of justice and policing powers.[36]

The Declaration lists a number of models that could potentially accommodate the devolution of justice and policing powers in Northern Ireland.[37] These include:

- A single Justice Department headed by a minister and junior minister (one from each tradition);
- A single department with a rotating ministry based on a modification of the d'Hondt procedure;
- A single department headed jointly by a nationalist and unionist minister, on the same operational basis as the Office of First and Deputy First Minister;
- Adding ministerial responsibilities for justice and policing to the existing portfolios of the Office of First and Deputy First Minister; or
- Splitting responsibility for justice matters into two departments, thereby allowing for the powers to be allocated to a minister of each tradition respectively.

[36] Op. cit., Joint Declaration.
[37] Ibid., paras. 13-21, Annex 2.

The Declaration also raised a number of potential hurdles that models with two or more departments would have to overcome, such as the stipulation in the Northern Ireland Act 1998 that the number of government departments in Northern Ireland should not exceed ten.[38] At paragraph 21 of the Declaration, it discusses the changes that will need to be considered in the present operation and organisation of the Assembly and its various committees. Paragraph 30 refers to the legal measures that need to be taken to give effect to the new model.

The Declaration also highlights certain criteria as being essential to the success and sustainability of an executive model for justice and policing powers in Northern Ireland. For example, it states that the British government would wish to be satisfied that the model is *"robust and workable"* and should *"contain adequate safeguards to protect the rights and interests of all sides of the community while ensuring that there is effective decision-taking capability"*.[39] Paragraph 13 goes on to say that the parties may wish to consider how devolution could be implemented in a way that would give *"due weight to the questions of accountability, risk management and value for money."*[40] Presumably this list is not exhaustive, but it essentially encapsulates what has already been expressed in this paper about the need for a balanced approach. In addition, CAJ would of course stress the primacy of the effective protection of human rights.

2.2 International Comparative Analysis

Some of the models listed in Annex 2 of the Joint Declaration have already been tried and tested in other countries. While it is different political, economic, historic, legal, geographic, cultural and social conditions obviously dictate the suitability of certain forms of governance over others in any given setting, it is nonetheless enlightening to analyse the strengths and weaknesses of different systems in terms of efficiency, representativeness, accountability and ultimately human rights protection for all.

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[38] Op. cit., Joint Declaration, para. 13, Annex 2. The relevant section of the Northern Ireland Act is s.17 ss (4) which states that the number of ministerial offices shall not exceed 10, or such greater number as the Secretary of State may by order provide.

[39] Ibid., para. 13, Annex 2.

[40] Ibid., para. 13.

This section analyses the operation of executive models for justice powers in Belgium, South Africa, Canada and Scotland. CAJ is not attempting to propose any of the specific models developed in other jurisdictions, but rather to draw out themes and issues that may be of relevance. Under each country, therefore, the following issues will be examined:[41]

- What is the model? What are the ministries' areas of responsibility?
- How effectively and efficiently do the ministries co-ordinate their respective areas of responsibility?
- In what ways does the model promote accountability and representation?
- What are the perceived advantages of and problems with the model?

The section will conclude by looking at the applicability of some of the lessons to the Northern Ireland context.

2.2.1 Belgium

What is the model? What are the ministries' areas of responsibility?

In the tradition of criminal code legal systems, Belgium has organised the executive functions in the area of justice and policing into two ministries: the Ministry of Justice and the Ministry of the Interior. The former is responsible for matters relating to the administration of the courts, the judiciary, the criminal law and policy; and the latter has responsibility for the police and law enforcement. Moreover, unlike the situation in the UK and the Republic of Ireland, the prosecution service in Belgium is not independent of the executive; instead the General Prosecutor is directly accountable to the Minister for Justice. Indeed, with the creation of a Federal Prosecution in Belgium,[42] the relationship between the prosecution and the Justice Ministry has in fact been strengthened in recent years. The Minister for Justice now evaluates the Federal Prosecution, and the General Prosecutor is accountable to the Justice Minister for all matters. This is a point of sharp debate, as critics of the system believe that such arrangements do not respect the equilibrium of powers. Critics also argue that the arrangements place the

[41] The large amount of information on the various models gathered in the course of the research is too extensive to go into in detail. Rather, this section seeks to pick out some of the more interesting and relevant features for the Northern Ireland debate.

[42] The service became operational on May 21 2002 and came about as part of the reforms of the Act of 7 December 1998 (one of the major reform instruments).

Justice Minister in a position where he or she could potentially exert pressure on the prosecution service or on individual magistrates, thereby compromising the independence of the judicial system.[43]

Co-operation between the Justice and Interior ministries has changed in recent years, as a result of the reforms that were introduced in the wake of the Dutroux affair in the latter half of the 1990s.[44] This case, and its aftermath, had a profound impact on the organisation of the criminal justice system in Belgium. Allegations of involvement and collusion by members of the state and judiciary in a highly organised paedophile ring, with which Dutroux was connected, seriously damaged public confidence in the independence and integrity of the police and justice system in Belgium. As a result, the government instigated a series of large-scale reforms.

Although the Justice and Interior ministries did not come under express attack, many of the reforms – concerned with overseeing and regulating the activities of the newly proposed police structure – had consequences for the relationship between the two ministers. A number of new areas of joint responsibility were created to monitor and regulate the activities of the police, by means of oversight and scrutiny measures.

Examples of such joint responsibilities include:

- the Ministers of Justice and Interior must both approve all local security plans;
- they are jointly competent to co-ordinate the federal and local police;
- both Ministers have disciplinary authority over the Inspector General[45] and members of the General Inspectorate for the police. They are both competent to organise the Inspectorate and both may request an inquiry by the Inspectorate insofar as this relates to their separate competencies.

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[43] Comments expressed in separate meetings with Lode Van Outrive and Christian de Valkeneer, Brussels, November 2003.

[44] In an unprecedented display of public outrage, Belgians took to the streets to protest over police failures to properly investigate and prevent the murders of a number of young Belgian girls by Marc Dutroux. Dutroux, having escaped from prison and after serious delays in the criminal procedure, was only relatively recently given a life sentence with no hope of parole for the murder of two Belgian girls and the manslaughter of two other girls, along with a string of offences relating to trafficking.

[45] The Inspector General is the head of the new Independent Inspectorate of Police, which was established by the Act of 7 December 1998. Although independent, this is still an "internal" control on the Belgian Police. See section 3 of this chapter.

Results of all inspections are transmitted to both Ministers. The General Inspector is also nominated by the Interior and Justice Ministers;

- both Ministers can request the Comité P (*Comité Permanent de Contrôle des Services de Police)*[46] to conduct an independent inquiry into the police service within the area of his or her own ministerial competencies); and
- both Ministers receive annual reports from the Federal Police Council (see below).

The creation of these joint competencies has meant that the Justice and Interior Ministers in Belgium are statutorily bound to consult and co-operate on certain key issues. The Justice Minister can also give certain orders to the Belgian Federal Police and has authority in respect of certain activities of the judicial police, although this is not common practice.[47] It is generally felt that this model of shared competencies goes some way to improving co-ordination between the two departments.

How effectively and efficiently do the ministries co-ordinate their respective areas of responsibility?

The Belgian experience would seem to suggest that problems of co-ordination between two departments will not necessarily arise if sufficient measures are implemented to avoid them. Belgium has been forced to take such steps because of the previous lack of co-ordination which was publicly exposed (among the various elements of the criminal justice system) as noted earlier.

One reform that was introduced under the Act of 7 December 1998 to strengthen communication and co-operation between the Ministers for Justice and the Interior was the creation of the Federal Police Council. The Council comprises thirteen members, including a designated President, a representative of both Justice and Interior Ministries, representatives from the prosecuting authorities, from the ranks of investigating judges, mayors, the General Commissioner of the federal police and a head of the local police. The

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[46] The Comité P (Comité Permanent de Contrôle des Services de Police – Permanent Police Oversight Committee) was set up under the Act of 18 July 1991 to provide the Belgian parliament with a means of independently and externally monitoring the way in which the police carry out their activities and responsibilities – this is discussed in more detail later in the chapter.

[47] The Police Service is organised in two levels which are autonomous and have distinct authorities, but must co-operate under the framework of the 1998 Act. These are the federal police service and the local police service, the latter being made up of administrative and judicial police.

composition of the Council, with the exception of the President, must be equally balanced between French and Dutch speakers (see below). The Council has responsibility for evaluating the functioning and organisation of the federal and local police agencies.

In what ways does the model promote accountability and representation?

Belgian society is composed of two main communities – Flemish (60%) and Walloon (39%).[48] They have different histories and cultures, a tradition of rivalry and even at times antagonism towards each other. In addition, they speak different languages (Flemish speak Dutch and Walloon speak French). As such, there are some parallels with Northern Ireland and the models developed to promote accountability and representation are of particular interest.

In one example, a distinct feature of the organisation of the Belgian Cabinet is that under Article 99 of the Belgian Constitution, it must contain an equal number of French and Dutch-speaking ministers. The President is expected to be politically neutral. This arrangement is aimed at ensuring a balanced representation of the two main groups in Belgium. These efforts to ensure equal representation are clearly reflected in the allocation of ministerial portfolios in the justice sector as well. The established practice has been that, of the two government departments of Justice and the Interior, one will go to a French-speaking and the other to a Dutch-speaking minister. In fact, the traditional position is that the Minister of Justice is Walloon and Socialist, and the Minister of the Interior is Flemish and Liberal.[49]

The involvement of more than one party political interest might be expected to lead to friction, with each minister seeking to exercise powers of scrutiny over the other. This risk would seem particularly in areas where they are jointly competent (as described above) or where their respective responsibilities overlap. However, despite this potential in the model itself, the Belgian system does not appear to operate this way. Justice and interior powers are not especially politically sensitive in Belgium, and even with the balance of linguistic and political differences between the main parties, there does not appear to be any significant distrust between the Justice and Interior

[48] A further 1% of the population is German-speaking. Figures given in interview with Sebastien Van Drooghenbroeck, University of Saint-Louis, Brussels.
[49] Meeting with Sebastien Van Drooghenbroeck.

ministries. In practice, it is the Interior Minister having responsibility for the operation of the police who holds the more powerful position. While the Justice Minister has broad scope to intervene on security matters and issues pertaining to the judicial police, it is uncommon that he or she would dispute the course taken by the Interior Minister in any given case.

Therefore, while the executive model for organising justice/policing powers in Belgium is equipped – particularly in view of the range of joint competencies – to promote the accountability of its ministers, the political situation in Belgium has not led to this being seen as a problematic issue.[50]

What are the perceived advantages of and problems with this model?

It was suggested in the Criminal Justice Review for Northern Ireland that executive models in which justice and policing are divided into two separate departments are more likely to suffer from problems of co-ordination, which in turn could negatively impact on policy delivery. The experience of Belgium would appear to confirm this; however it also provides models of mechanisms, such as developing joint competencies, to enhance co-ordination between two departments. Obviously, as with all models examined in this report, this does not mean that in another political context joint competencies would provide a sufficient safeguard in a two-department system. However, the Belgian experience is particularly useful to consider, given that reforms were introduced specifically to address previous problems of co-ordination.

2.2.2 South Africa

What is the model? What are the ministries' areas of responsibility?

Parallels are very often drawn between South Africa and Northern Ireland, as two societies in political transition. Decisions about the organisation of criminal justice and policing functions in South Africa had to reflect not only what would be most efficient, but also what would be politically acceptable at that time; this is likely to be the case in Northern Ireland as well. However, one important factor to consider is that the very different local, provincial and

[50] Other reforms that were introduced to improve accountability of the Justice and Interior Ministries will be considered in detail in the third section of this chapter.

national arrangements in a vast country as South Africa make the system quite a complex and thus unique one.[51]

South Africa has a Department of Justice and Constitutional Affairs with responsibility for the courts, the criminal law and policy. It later became responsible also for the Truth and Reconciliation Commission. A Department of Safety and Security is responsible for the police and law enforcement, and a Department of Corrections is responsible for the prison service. In addition, there is an independent National Prosecuting Authority.

Given that under the old regime there were eleven provincial departments of justice, in addition to the prosecuting authority, a decision was taken in the *post-apartheid* arrangements to centralise justice powers. In response to South Africa's problematic history, in which different people experienced different systems of justice, it was felt that one centralised justice system was necessary. This system would ensure that each citizen's rights, particularly those secured in the new Bill of Rights for South Africa, would be protected in the same way for everyone.

Indeed, the research carried out in South Africa consistently highlighted the importance of the Bill of Rights in the reform of the criminal justice system more generally. The rights framework provided by the Bill of Rights was central to developing a culture of respect for human rights within the criminal justice system. It also legally required any subsequent initiatives and legislation to be rights-compliant. In an interview with Mr. Johnny de Lange, MP, Chair of the Justice and Constitutional Portfolio Committee, he emphasised:

> *"A Bill of Rights is important in post conflict societies as it creates a healthy tension, ensuring that politicians can only act in a way which is consistent with the protections in the Bill. A Bill of Rights can ensure checks from all quarters in society and is centrally important for transition countries which have gone through strife. There are no political guarantees or certainties – someone will always have to govern – so you need to create rules of law that will force those in power to act in a certain way."*

[51] Northern Ireland, in contrast, is much smaller and the recent work of the Review of Public Administration has in fact been concerned with reducing the current administrative arrangements here.

How effectively and efficiently do the ministries co-ordinate their respective areas of responsibility?

The South African government departments are organised into cluster groups in order to promote cohesive and joined-up policy-making in areas of common interest. This practice came about as a result of the National Crime Prevention Strategy (NCPS), an ambitious project started shortly after the new South African government came to power in 1994. The NCPS was led by the Ministry of Safety and Security but called upon the co-operation of all other relevant ministries and was largely concerned with re-engineering the criminal justice system and reducing crime. In this way, it was designed to move away from a retributive approach to justice to one focussed on restoration, rights protection and co-operation between government departments and civil society organisations to find multi-agency solutions. Its highly ambitious goals and great expectations for reforming the South African justice system were not met in all instances. However, its idea of government cluster groups lives on, and has proved to be a successful method of co-ordinating policy proposals and strategies.

The truest test of whether the efficiency of the criminal justice system is compromised by having a number of government departments involved is to look at the results of policies and actions. High levels of crime, large numbers of accused persons awaiting trial and prison overcrowding are just some of the difficulties faced by the criminal justice system in South Africa. It is generally accepted that the causes for these problems are manifold and complex, and as such the organisation of the executive model for justice and policing matters has not been singled out for blame or criticism in this respect. However, there is a general acceptance within government that poor co-ordination and co-operation between government departments and ministers does little to improve the ability of the justice system to respond to the myriad of social problems.

In what ways does the model promote accountability and representation?

The allocation of ministerial portfolios to the respective political parties in South Africa is decided by the president and decisions about who will fill those posts are then decided by the nominated party.

The new face of the South African cabinet[52] may have implications for accountability, in the sense that in a majority one party government, there is less tendency to scrutinise the practices of other ministers from the same party. In a divided society, one advantage of having a number of ministries in the area of justice and security is the potential to afford other political parties a share in government, thus bringing them inside the political process. This was the case in the first two South African governments of the new democracy, in which the Inkatha Freedom Party (IFP) was given responsibility for Correctional Services. The Correctional Services Minister had only limited scope to scrutinise the activities of his/her fellow Justice and Interior Ministers, given their areas of distinct competency. Now, however, with the growth in support for the ANC, even this partial scrutiny role that the IFP enjoyed has been lost.

There are other methods of holding the executive to account and ensuring that it complies with human rights standards that do not involve the ministerial model for organising justice and policing powers per se. Some of these will be discussed in section three of this chapter.

What are the perceived advantages of and problems with this model?

Some commentators on the South African criminal justice system suggest that having a single Justice Department to encompass the current justice, security and corrections portfolios might be one solution to the existing inefficiencies, shortages of resources and failures to deliver on policies. However, these views are in the minority. Most people believe that this proposal would be politically untenable and impossible to implement given the workload it would impose on one sprawling department. Another criticism of the multi-department model is that the respective departments are ultimately less accountable to parliament and the public because they tend to cast blame for failure or shortcomings onto others involved in the same field. It is clear that in this model, the delineation of powers and responsibilities needs to be made very clear at the outset.

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[52] Following their landslide victory in the April 2004 elections, the African National Congress (ANC) now head the Department of Correctional Service in addition to the Departments of Justice and Safety and Security. In a break with tradition, they also hold the office of Deputy Minister for Safety and Security.

2.2.3 Canada

What is the model? What are the ministries' areas of responsibility?

Until December 2003, the Canadian criminal justice system had two main government departments at the executive level: the Department of the Solicitor General of Canada (doubling up as the Department of Public Safety and Security) with responsibility for the Royal Canadian Mounted Police, the Correctional Service, the Intelligence Service and the National Parole Board; and the separate Department of Justice and, within this, the Department of the Attorney General of Canada. The same executive minister fulfils both the role of Attorney General and of Justice Minister. As Justice Minister, he or she is concerned with questions of policy; and in the role of Attorney General, he or she is the chief law officer of the Crown. As regards prosecution services, prosecutors in the Canadian system (known as Crown Attorneys) are hired provincially and supervised by the provincial government.

Rising security concerns after the terrorist attacks of September 11th 2001, however, prompted the restructuring of the Office of Solicitor General. In order to enhance Canada's response to terrorism it was felt that there was a need to improve co-ordination between the services working on security and intelligence, law enforcement, corrections, crime prevention, border integrity, immigration and emergency management. Accordingly a new Department of Public Safety and Emergency Preparedness was created, bringing together the public safety and security functions of the previous Department of the Solicitor General, and the Office of Critical Infrastructure Protection and Emergency Preparedness, which was formerly part of the Department of National Defence. The National Crime Prevention Centre, which had been housed in the Justice Department, also transferred to this new department.

How effectively and efficiently do the ministries co-ordinate their respective areas of responsibility?

The arrangements in Canada are too recent to evaluate as regards their delivery of co-ordinated, effective policies for responding to terrorism. However a number of comments can be made on the relationship between the Justice Department and the new Public Safety Department.

Despite the re-structuring of the ministerial portfolio of the former Department of the Solicitor General, its relationship to the Justice Department is expected

to remain relatively unchanged. The reforms did not seek to alter the organisation of justice and policing responsibilities. This would suggest that the Canadian government was satisfied that the two-department divide was functioning effectively, particularly considering that the other changes were made specifically to improve efficiency. This view is supported by the research report commissioned by CAJ on Canada,[53] which did not identify any problems in relation to maintaining two separate ministers to manage justice and policing matters.

Indeed, before the reforms of 2003, the Department of Justice and the Department of the Solicitor General appear to have had an effective and co-operative working arrangement. For example, the departments developed the Anti-Terrorism Act 2001 in consultation and were in regular dialogue through the established system of parliamentary and standing committees. It appears that this relationship will continue, as the Justice Minister already acts as Vice-Chair of the new cabinet committee on Security, Public Health and Emergencies, and as much of the other working arrangements between the two departments appear to have remained as before.

In addition, an "Integrated Justice Information" service has been established with the goal of facilitating information sharing across criminal justice agencies in Canada. This seems to be a similar idea to that of the Causeway Project in Northern Ireland[54] but has developed a more extensive and detailed method of operation and information sharing that operates across the federal and provincial levels.

In what ways does the model promote accountability and representation?

The linguistic and cultural rights for French-speaking Canadians in the province of Quebec are extensively protected under the Canadian Constitution. However, this does not extend to reserving a federal ministerial cabinet position for a French-speaking representative from Quebec, let alone one of the justice or security portfolios. The Constitution – and specifically the Canadian Charter of Rights and Freedoms – does make many demands on the government,

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[53] Criminal Justice in Canada: background paper, a report prepared for CAJ, by Dr Susan C. Breau, 2003.
[54] The Causeway Project is a joint IT enterprise by the criminal justice organisations in Northern Ireland that seeks to improve their performance by sharing information electronically. The Project was officially announced in September 2003 and the first stage of its work – a criminal record viewer – was launched in March 2004. For further information see www.causeway.gov.uk

including cabinet ministers in the justice and policing fields, in regard to the protections that they must offer to the French-speaking population of Canada. This operates as a very strong check on the powers of government ministers. Indeed the Canadian Charter of Rights and Freedoms, like the South African Bill of Rights, is seen to be a key element in ensuring a culture of accountability and human rights in the Canadian criminal justice system. The report commissioned by CAJ comments that *"the Canadian Charter of Rights and Freedoms introduced a sea change into Canadian legal and political culture"* by constitutionally guaranteeing rights directly relating to criminal justice; by placing obligations on personnel at every level of the criminal justice system; and by consequently involving every level of the criminal justice system in extensive human rights training. This has resulted in a strong culture of respect for human rights developing throughout the criminal justice, and indeed the wider legal system, in Canada.[55]

What are the perceived advantages of and problems with this model?

Commentators on the Canadian criminal justice system felt that even though it is quite a complex one, the system functions very well, largely due to the fact that it has a clear constitutionally mandated division of powers, as well as clear operating legislation. This is obviously a very important element, particularly for justice models involving more than one department.

2.2.4 Scotland

What is the model? What are the ministries' areas of responsibility?

Since devolution in 1998, Scotland controls its own laws and policies on justice and policing. These powers have been organised under a single Justice Department, headed by a Minister for Justice. The department is therefore responsible for the police, the courts, aspects of the criminal and civil law,

[55]Canadian Supreme Court Chief Justice Beverley MacLachlin has spoken at a variety of human rights events over the years in Northern Ireland, and in her very first contribution to a CAJ seminar in 1995, she noted that *"The Charter has changed the legal landscape in Canada ... The general expectation was that this document would be something of a dead letter ...but the Charter has been much more significant than even its framers had anticipated...The criminal justice system has been affected very greatly by the Charter....In summary, I think there have been great changes due to the Charter and that our society, in my own view at least, is probably a better society for that."* See "Human Rights - the agenda for change", CAJ, 1995, pp 43-48.

legal aid and fire services, with prison and probation services being administered by Next Steps Agencies.[56]

The Crown Prosecution and Procurator Fiscal Service is not part of the Justice Department, but is separate from the government and headed by the Lord Advocate for Scotland. The Lord Advocate is a unique, historical position that creates a very different dynamic for relationships between Scotland and the Westminster government. This elevated position comes from the historical role played by the Lord Advocate, who in the past acted as the representative of the Crown in Scotland and adviser to the Crown on Scottish affairs. This has changed somewhat with the passage of the Scotland Act in 1998. The Lord Advocate is still responsible for all prosecutions in Scotland – including those within the scope of reserved as well as devolved matters,[57] and is also the Government's constitutional and legal adviser on Scottish affairs. S/he is now a member of the Scottish Executive and advises the Crown and Scottish Executive on legal matters which fall within the devolved powers of the Scottish Parliament. However, the UK government is now advised on Scots law by an Advocate General for Scotland.

How effectively and efficiently do the ministries co-ordinate their respective areas of responsibility?

The idea of a single Department of Justice to manage the ministerial powers for justice and policing in the event of Scottish devolution was first mooted by a Royal Commission on Legal Services in 1980.[58] The conclusions of the Commission were based on the assumption that a single department would be more efficient as it would function more effectively at an organisational level and therefore enjoy greater success in co-ordinated policy delivery.

The experience of Scotland in the years since devolution suggests that the single Justice Department model has worked relatively well. The representatives from the legal, government and academic communities that were interviewed as part of this research were generally supportive of the single justice department system. This is not to suggest that there was complete

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[56] Next Steps Agencies are discreet business units that deliver services either direct to citizens or to other public sector organisations. Although agencies are ultimately under the control of Ministers, they are given freedom to manage their activities with the aim of improving efficiency and the quality of service delivery.
[57] S.48 (5), Scotland Act, 1998.
[58] Presided over by Donald Dewer, who went on to become Scotland's First Minister following devolution in 1998.

satisfaction with the performance of the criminal justice system in Scotland. Indeed numerous reforms have only recently been made and many are still in the process of being made to the operation of the Crown Prosecution and Procurator Fiscal Office.[59] However, the issue of a single Ministry of Justice has barely figured in the debates.

In general, the workload of the Department of Justice in Scotland has reportedly not been so great that it would consider dividing justice functions up between two departments. It should be noted, however, that in the first two sessions of the Scottish Parliament, a total of 61 Sewel motions were passed,[60] many of which were referred from the Department of Justice. A 'Sewel motion' allows for Westminster to legislate on a matter which would normally fall within the competence of the Scottish parliament. The Scottish Executive is spared a lot of work in putting together legislation by delegating responsibility to Westminster in this manner, and this is perhaps one of the reasons why the Justice Department has managed its workload so efficiently to date.

In what ways does the model promote accountability and representation?

It could be argued that a potential weakness of the single department system is that it does not allow for the representation of different political interests in the justice and policing area, and so does not benefit from the scrutiny that one minister could potentially exercise over the other. Indeed, even where the ministers in a two or more department system are of the same party, they may still be able to exert influence over each other, particularly if they hold some powers concurrently.

The political dynamic in Scotland however does not require (or even apparently prefer) that the Minister for Justice be held accountable at that level; nor does it require representation of different political interests in the justice portfolio, even within the coalition government itself. Scotland does not suffer the divisions experienced in societies such as Northern Ireland or South Africa, or even - to a lesser extent - Canada or Belgium. Thus, while good governance

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[59] This was in response to the controversial Chhokar case, which highlighted institutional racism in the Prosecution Service and operational problems in investigating cases.

[60] 39 Sewel motions were passed in the first session of the Scottish Parliament (12 May 1999 – 31 March 2003) and 22 in session 2 (7 May 2003 – 4 March 2005), giving 61 in total. Scottish Parliament Fact Sheet FS3-01, 4th March 2005.

would always demand an adequate level of executive accountability, there are other mechanisms beyond the model itself that have been developed in Scotland for holding the executive, including the Justice Minister, to account.[61]

What are the perceived advantages of and problems with this model?

In general, the research appears to show that single department models are the least common and least preferred, given the massive range and complexity of responsibilities that such a brief entails. The Scottish experience is interesting for the Northern Ireland context given the obvious similarities (i.e. power being devolved from the same parliament). However, political relations between Scotland and Westminster are very different than those between Northern Ireland and Westminster, and it is difficult to see how an equivalent of the 'Sewel motions' that appear to have taken some of the burden off the Scottish Justice Department would operate in Northern Ireland. In addition, Scotland had its own unique criminal justice positions and practices in place long pre-dating devolution.

2.2.5 Applicability to Northern Ireland

Clearly the various models considered above do not cover all of the suggested models that were set out in the Joint Declaration. Neither a single Department of Justice with a rotating minister, nor a department with two ministers who hold an effective veto power over each other (like the Office of First Minister/ Deputy First Minister – OFM/DFM – model that operates already in Northern Ireland) feature in the other legal systems studied. Nor was CAJ made aware of other jurisdictions where such models existed so as to assess the advantages and disadvantages of such models. However, there are lessons gathered from all the jurisdictions studied that can be applied to the various models.

It is interesting to note, for example, that of all the countries examined, Scotland was the only one to adopt a single department model. It could be inferred from this that a single ministry may not be seen as best practice in managing criminal justice and policing powers. The single department model is also not followed in England and Wales. Scotland is obviously not a post-conflict country and does not suffer from the levels of distrust that exist in Northern Ireland. Therefore, while a single department appears to make best sense in

[61] These will be described in the third section of this chapter.

terms of efficiency (particularly for a small jurisdiction), it may be that other factors, such as representation and accountability, will take greater weight in considering the suitability of such a model for Northern Ireland.

Indeed, given the importance of developing widespread public confidence in the eventual arrangements, the strengths of the two or multi department system in promoting representation and accountability could be of particular interest in the Northern Ireland context. This model, for example, appears to be more amenable to a framework of peace building, promoting public confidence in the administration and ensuring fair political representation. In an interview with the Deputy Minister for Justice of South Africa, Advocate Johnny De Lange, an important point was raised about the potential impact that a multi-department system could have on the cultural transformation of institutions in a post-conflict scenario. De Lange explained that in the South African context, confronting the challenge of transforming former *apartheid* institutions such as the army, police, justice and correctional services meant that it was necessary to break these areas down into "bite-size pieces". He felt that an omnibus justice department would have struggled with the enormity of this task and could not have sufficiently transformed and run these institutions successfully.

The main difficulty with models of two or more departments covering the justice and policing portfolios seems to be that efficiency can be limited by lack of co-ordination. Accordingly, it is important to note what measures have been developed in other jurisdictions to ensure that efficiency is not compromised by having a two-department executive model. The South African idea of departmental cluster groups, or the Canadian integrated information system, would be worth exploring further. There are also interesting and relevant initiatives already underway in Northern Ireland. For example, the development of the Causeway Project, which is expected to improve the sharing of information across all of the criminal justice agencies in Northern Ireland, would certainly assist a future government model of two or more departments in the area of justice and policing.

The Joint Declaration also suggested options that might be thought to offer the advantages of both the single and multi departmental models. For example, one model noted was that of a single department with a rotating ministry. The obvious potential of this model lies in 'sharing' responsibility across different ministers (presumably coming from different traditions) whilst administering justice powers via a single institution. The problem with this

model however is likely to be the one inherent in having a change of political leadership on a regular basis. This could very easily lead to a disjointed and inefficient system, where problems are blamed on previous incumbents, policy is changed with each change of Minister, and the brief becomes preoccupied with political agendas and point-scoring, rather than delivering an effective, fair and accountable criminal justice system.

A Justice Department headed by a First Minister and Deputy on the same lines as the existing OFM/DFM for Northern Ireland is really a variant of the two-department system, but without the autonomy of distinct ministerial responsibility. The same problems of political gridlock that have been experienced in the operation of OFM/DFM could apply to a justice department with a minister and deputy having effective veto powers. If this model is going to be seriously considered, methods must be developed to ensure that regular stalemate positions are avoided. The Belgian example of joint ministerial competencies could be an interesting one to explore in this respect.

2.3 Structural and Procedural Safeguards which Regulate Executive Power

Section 2 of this chapter highlighted various executive models on offer from other jurisdictions for the management of criminal justice and policing. However, the course of this research has also clearly demonstrated that governance is by no means entirely a function of the executive model in itself. Instead, the protection of human rights and ensuring of accountability is greatly heightened by various parliamentary, legislative and other scrutiny arrangements.

In the Northern Ireland context, numerous human rights, equality and accountability safeguards have already been built into the system of governance through the Agreement. These can operate to regulate the powers of the executive, and of those responsible for justice and policing matters after devolution.

This section of the chapter will highlight a number of ways in which the executive can be held to account:

- Constitutional safeguards and Bills of Rights
- Parliamentary safeguards

- Inspectorates/oversight mechanisms
- Complaints systems
- Effective and independent judiciary
- Administrative scrutiny
- International human rights mechanisms
- Civilian oversight
- Statutory commissions
- Developing a culture of rights

Of these, the first three are generally considered particularly important, and thus will be considered in greater detail. Under each heading, the *status quo* in Northern Ireland will be examined before looking at what other models have to offer.

2.3.1 Constitutional safeguards and Bills of Rights

Most, if not all, democratic governmental systems contain written constitutional or other provisions that hold executive ministers accountable to the wider legislature. The Good Friday/Belfast Agreement states in its provisions relating to "Executive Authority" that:

> *"As a condition of appointment, Ministers, including the First Minister and Deputy First Minister, will affirm the terms of a Pledge of Office (Annex A) undertaking to discharge effectively and in good faith all the responsibilities attaching to their office."* [62]

The Pledge of Office includes a commitment to non-violence, democracy and a specific requirement to operate within the framework of a Programme for Government that has been agreed by the Executive and endorsed by the Assembly (the Northern Ireland legislature). If a minister fails to comply with the spirit and substance of the Pledge of Office or fails to meet his or her ministerial responsibilities,[63] the Assembly can vote, on a cross-community basis, to remove the minister from office.[64]

The experience of other jurisdictions has shown that constitutional provisions such as these are important for ensuring the accountability of the executive,

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[62] Op. cit., Strand One, para. 23, pg. 7.
[63] For example, if he or she breaches the Ministerial Code of Conduct, Annex A, page 10.
[64] This provision was given statutory effect under s.30 of the Northern Ireland Act 1998.

and for regulating executive compliance with human rights principles as contained in ministerial codes of conduct. Since these provisions are usually legally enforceable, they carry a strong deterrent effect. In the Basque Country, for example, Article 32 of the Basque Devolution Act stipulates that the executive as a whole is accountable to parliament, as is each individual minister, with respect to his/her respective duties and responsibilities. Similarly, the South African Constitution states that members of the South African Cabinet are accountable, collectively and individually, to parliament, and must provide parliament with full and regular reports concerning matters under their control.[65]

One of the key elements of the Good Friday/Belfast Agreement in terms of human rights protection was the proposal to have a Bill of Rights for Northern Ireland. A consultation process on such a Bill has been ongoing since 2000, and the NI Human Rights Commission[66] has drawn up a number of sets of proposals. While there is still some discussion and debate about the final content and remit of such a Bill, it will clearly be a very important mechanism both for instilling a culture of human rights and for creating the necessary atmosphere of openness and accountability required of any future justice and policing ministers. In addition, Bills of Rights generally contain universally accepted civil and political rights, which obviously give added protection to those who find themselves before the criminal justice system. Efforts to embed a culture of human rights in the judiciary in Northern Ireland[67] will also help to promote public confidence that the judiciary will interpret such a Bill of Rights independently and impartially.

As already highlighted, international research in the cases of South Africa and Canada points consistently to the key role played by the Bill of Rights and Charter of Rights and Freedoms respectively in providing good governance and ensuring that the executive is regulated by directly enforceable human rights standards. Similarly, Bills of Rights have a key role to play in developing a culture of respect for human rights in the various criminal justice agencies. The research in South Africa in particular emphasised the central importance of this in a transitional society, where respect for human rights

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[65] Constitution of South Africa 1996, Section 92(2).
[66] A statutory national human rights institution established under the Agreement, one of whose tasks was to undertake a consultation on a Bill of Rights.
[67] See Chapter 3.

was distinctly lacking in the past. For example, a senior manager from the Office of the National Director of Public Prosecutions stressed that:[68]

> *"Prosecutors must understand the concept of justice and its link with human rights – prosecutors must understand and endorse the Bill of Rights."*

Clearly, therefore, a strong Bill of Rights for Northern Ireland will be an extremely important element in developing a criminal justice system that is both human rights compliant and sympathetic. As such the Bill of Rights has a central role to play as an engine for transformation and change within criminal justice institutions.

2.3.2 Parliamentary safeguards

The power-sharing arrangements of the Northern Ireland Assembly provide particular scrutiny of the powers of the executive, as well as of the actual appointments to the executive. The fact that certain designated decisions on legislation and policy have to be passed with the cross-community support of the Assembly is an important safeguard.[69]

The Belgian system of parliament operates a somewhat similar proportionality mechanism which ensures the protection of the French-speaking minority. Article 4 of the Belgian Constitution provides that on sensitive topics ('*les lois speciales*'), a motion can only be passed by parliament if it is supported by a majority of each of the two main linguistic groups (French and Dutch) and receives two thirds of the votes overall in both the House of Representatives and the Senate. Interestingly, the declaration of a state of emergency also requires the same special majorities, although this is provided for in a separate article of the Constitution.[70] These procedures have operated in Belgium for many years and are seen as very successful in protecting the rights of the French minority. Indeed, the tiny percentage of German speakers in Belgium – constituting only 1% of the population – also benefit from the representative approach under Belgian law and are said by some commentators to be the best protected minority in Europe.[71]

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[68] Interview with Advocate Sipho Ngwema, March 2004.
[69] Supra note 5 for an explanation of cross-community support.
[70] Constitution of Belgium, Article 43.
[71] Meeting with Sebastien Van Droogenbroeck and Bruno Lambert, University of Saint-Louis, Brussels, November 2003.

Parliamentary Committees

The Agreement established a number of statutory Assembly committees to advise and assist each government minister on policy.[72] These committees have scrutiny, policy development and consultative roles, and both the party composition of the membership and the appointment of chairs are determined on the basis of the d'Hondt formula.[73] The intention here was obviously to greatly enhance the scrutiny capability of these committees. In their short life, the Assembly committees that were established in Northern Ireland were thought by many to be an extremely effective and important tool for providing good governance and maximising democratic accountability.

The committee system in Scotland has now operated for a number of years under devolved government and is considered to be a cornerstone of the system of governance in Scotland.[74] Under this system, parliamentary committees have the power both to scrutinise and propose legislation,[75] as well as the power to conduct their own inquiries. For example, following the allegations of institutional racism that came about in the wake of the Chhokar case, one of the Justice Committees investigated the management of the Crown Office and Procurator Fiscal Service. This contributed in part to the subsequent restructuring of the relevant institutions and the introduction of measures to improve race and human rights awareness.

The fact that Scotland has had a coalition government since devolution[76] is also arguably one of the reasons for the success of the committees. In fact, the way in which the electoral system operates in Scotland effectively prevents a single party taking power. The result of this is a "cross-party" committee system. This is a definite advantage, as experience elsewhere has shown that in a single party government, committee members belonging to that party might be slow to criticise the government if they feel that it could damage their

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[72] Op. cit., s.29.

[73] Supra note 10 for an explanation of the d'Hondt formula.

[74] Meeting with Professor Alan Miller (former chair of the Scottish Human Rights Centre), Glasgow, December 2003.

[75] The latter of these powers gives the Scottish Committees a much stronger policy development role than that of the Northern Ireland Assembly committees.

[76] The coalition is between Labour and the Liberal Democrats.

own position within the party. Our research in South Africa[77] and Canada[78] also stressed that parliament's oversight functions become limited under a single party government.

Interestingly, given that Scotland operates a one-department system, it has two committees which deal with issues relating to justice and policing. This came about because it was felt that the volume of work was too great for one alone, indicating how active the committees are. Various practitioners have remarked upon the wide range of academics, legal practitioners and representatives from the non-governmental (NGO) sector that the committees have called to testify before them.[79] Not only does this enhance the committees' capacity and assist them technically, but it also provides an opportunity to involve other sectors of society in the policy process.

Parliamentary questions

Parliamentary questions are widely used in democratic systems to allow executive ministers to be questioned on their actions. Experience of parliamentary proceedings in South Africa has highlighted the importance of having a strong Speaker to optimise the full value of parliamentary questions and debates in holding cabinet ministers to account.[80]

Reporting obligations

The requirements on ministers to lay official reports are often the basis for parliamentary scrutiny. In the context of the devolution of criminal justice and policing in Northern Ireland, a number of examples are worth highlighting. For instance, in Northern Ireland the Policing Board must produce an annual report,[81] which it must send to the Secretary of State[82] and publish *"in such*

[77] South Africa: an examination of institutional models and mechanisms responsible for the administration of justice and policing; the promotion of accountability and oversight; and a review of transformation strategies and initiatives developed in relation to the administration of justice and safety and security, a paper commissioned by CAJ, Lue-Dugmore, Melanie, 2003. Also raised in meetings with Prof. Hugh Corder, Cape Town University, and Janine Rauch (former adviser to the Minister of Interior of South Africa), Cape Town.
[78] Op. Cit, Dr Susan C Breau, p.23. See especially comments that the House of Commons Committee, which is dominated by the party in power, is simply a "rubber stamp" forum for review of legislation.
[79] Meeting with John Scott, chair of the Scottish Human Rights Centre, Edinburgh, December 2003.
[80] Meeting with Open Society Foundation, Cape Town, 24 March 2003.
[81] Police (NI) Act 2000, s.57.
[82] Ibid., s.57(3) (b).

manner as appears to it to be appropriate."[83] The legislation creates the opportunity in future for the Board to lay its reports before the Assembly for discussion, which may result in pressure on the relevant Northern Ireland Executive Minister/s to take action on issues the Board may have highlighted.

In addition, the Chief Inspector of the Criminal Justice Inspection[84] must produce annual reports on his work and send them to the Secretary of State, who must then lay a copy before each House of Parliament and arrange for it to be published.[85] If the Secretary of State decides, in the public interest, to omit a section from the annual report, a public statement must be made to this effect.[86] The Updated Implementation Plan for the Criminal Justice Review states that *"on devolution of justice matters, the functions of the Secretary of State in relation to the Chief Inspector will transfer to the relevant Minister in the Executive."*[87] Presumably, therefore, in devolved arrangements, the report will be laid before the Northern Ireland Assembly, as opposed to, or at least in addition to the Houses of Parliament. This would allow the Assembly to pose direct questions to the relevant Minister if the report identifies problems with any aspect of the criminal justice system in Northern Ireland.[88]

Finally, both the Justice Oversight Commissioner and the (Policing) Oversight Commissioner, established to provide independent scrutiny of the implementation of the recommendations of the Criminal Justice Review and the Patten Commission Report respectively, are similarly required to lodge oversight reports with the Secretary of State. Those reports are normally published and laid before parliament, and enable parliament to receive an independent assessment of the implementation of both reform processes. Interestingly, no reference is made either in the statutes, implementation plans or terms of reference for both Commissioners as to whether their reports would be laid before the Assembly upon devolution (as is the case, e.g., with the Policing Board and the Criminal Justice Inspector). This should be clarified in any devolution arrangement, and it could be argued that the practice applying to other reports should be followed.

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[83] Op. cit., Police (NI) Act 2000, s.57(3) (a).

[84] The creation of a Criminal Justice Inspection for Northern Ireland was recommended by the Criminal Justice Review for the purpose of providing independent evaluation and auditing of the operation of the Criminal Justice System. See Chapter 3 for further details.

[85] Justice (NI) Act 2002, Schedule 8, para. 4.

[86] Ibid., paras. 4 (3)and (4).

[87] Criminal Justice Review: updated implementation plan, June 2003, pg.160.

[88] The questioning process could take place either on the Assembly floor or via a specially established Assembly committee.

2.3.3 Inspectorates/Oversight mechanisms

In the Northern Ireland context, inspectorates and oversight mechanisms have proved relatively popular as a method of securing accountability. The Oversight Commissioners for both policing and criminal justice reform (see above) have played a very important role in ensuring implementation of change, particularly given that these powers are operated from Westminster and thus not subject to the same level of local democratic oversight and accountability. The Criminal Justice Inspection (which has certain parallels to Her Majesty's Inspector of Constabulary on the policing side) does not have the advantage of independence that the Commissioners have. However, its permanence and expertise are likely to become invaluable and, though it is in its infancy at the time of writing, it will presumably become a very useful body.

In the context of the potential devolution of criminal justice and policing powers, the impact of and upon one particular mechanism is worth particular consideration – namely the Northern Ireland Policing Board.

The Policing Board was a key recommendation of the Patten Commission.[89] The Board was developed to replace the former Police Authority for Northern Ireland, the composition and powers of which did not provide the kind of democratic accountability that was needed to ensure widespread confidence in policing in Northern Ireland. Patten therefore recommended that the new Policing Board aim to be representative of both party political and broader interests in Northern Ireland. Consequently it was recommended that the Board should be composed of 19 members, with ten to be drawn from the membership of the Assembly on the basis of their party's voting strengths (the d'Hondt system) and the remaining nine to be politically independent. It was recommended that the latter group represent the business, trade union, voluntary, community and legal fields and be appointed by the Secretary of State, after consultation with the First and Deputy First Ministers. [90]

Patten retained the basic British policing system of a tri-partite relationship between the police (Chief Constable), the executive (the Secretary of State), and a civilian oversight body (the new Policing Board), but placed great

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[89] "A New Beginning: Policing in Northern Ireland", Report of the Independent Commission on Policing for Northern Ireland, September 1999 (hereafter the "Patten Report").
[90] Ibid., paras 6.11 and 6.12, pg. 30.

emphasis on the need for a more evenly balanced division of power and authority between all three elements. The aspect of this Patten recommendations was motivated by the determination to strengthen the authority of the Board to hold the police to account democratically, and to somewhat weaken the previously predominant relationship between the Chief Constable and the Secretary of State. In order to set down a clearer nexus between the three distinct bodies, the legislation introduced to operationalise Patten's proposals require the Secretary of State (or his/her successor after devolution) to set long-term governmental objectives or principles, the Board to set medium term objectives and priorities, and the Chief Constable to deliver the short-term tactical and operational plans to deliver on the medium and long term objectives. The overall arrangement was designed to provide a more evenly balanced relationship, so that no one person – in particular neither the Chief Constable nor the minister responsible (the Secretary of State or devolved Northern Ireland Minister) – could abuse their authority. The working together of civil society, cross party representation, a government representative and the chief of police should in these arrangements meet the requirements of efficiency, effectiveness, political non-partisanship, and democratic accountability.

The Patten report is very clear on the role of the Policing Board as an oversight mechanism that would continue after devolution, and the report makes many references to the transfer of the role currently played by the Secretary of State to his/her successor after devolution. Some interesting points arise as to the particular powers of the Secretary of State to be transferred, and these will be examined in further detail in Chapter 4. For the purposes of this discussion, however, the central question is whether the Board will be able to act as an effective check on the powers of a local minister for policing or justice. In this context, it is worth considering the role of parliament (and thus the devolved Assembly) in any future arrangements.[91]

At its most basic, the Policing Board is effectively the equivalent of a parliamentary/assembly committee on policing, drawing its political membership in proportionate numbers from parties elected to the Assembly,

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[91] For example, the Board does not report to parliament per se, but rather under s.57 of the Police (NI) Act 2000, it is required simply to publish reports in such manner as appears to it to be appropriate and to send a copy to the Secretary of State. It is in fact the reports of the Chief Constable that get properly laid before parliament and which therefore give rise to parliamentary questioning. So in the legislation it appears that there is no stated role for parliament vis-à-vis the Policing Board. That said, it would presumably be open to the parliament (or Assembly in a devolved context) to request the reports of the Board and question the minister on the information contained therein.

with the added bonus of the involvement of members of civil society. This begs the question of what would happen post-devolution if, as was previously the case, parliamentary committees were to be established in each of the departmental areas? Surely there would be a need for a specific assembly committee to oversee the work of the local justice department(s), but would this committee examine criminal justice only, leaving the oversight of policing to the Policing Board? Alternatively, would an assembly committee oversee all the functions of the ministry/ies of criminal justice *and* policing and, if so, how would it divide work in this latter area with the Policing Board?

Clearly the Patten report, which looked carefully at the impact of devolution, did not envisage that the Policing Board be seen as an interim measure awaiting the appointment of an Assembly committee to oversee policing, so the option of replacing the Board with a purely committee structure is not an option. CAJ has been critical of many aspects of the Policing Board's work but believes that the structural arrangements have worked reasonably well to date.[92] Certainly, the inclusive nature of the Board's composition (with elected politicians and representatives of civil society), and its detailed legislative framework, give it advantages that a more narrowly based assembly or parliamentary committee could not hope to replicate. Whatever arrangements are eventually agreed for the devolution of policing oversight, they should build upon and not in any sense undermine the strengths of the Policing Board.

We will return in Chapter 4 to the particular issue of the powers of the Policing Board, as it relates to a wider discussion on the need for clarity regarding what powers will be devolved and how these will interact with non-devolved powers. We have discussed above the appropriate relationship between the Policing Board and the legislative assembly, but a clarification of powers is crucial also to any consideration of the appropriate relationship between the Board and a future minister for policing. For example, at the time of the passage of the legislation arising from the Patten report, much parliamentary concern was expressed about the appropriate relationship between the Secretary of State and the Policing Board. The conclusion at that time was that the Secretary of State should be given clear authority to override the

[92] See CAJ Commentary on the Northern Ireland Policing Board, November 2003.

decision of the Board in a number of respects.[93] Such primacy for the executive minister in Westminster was seen by many as problematic, but it might appear just as problematic, or even more so, if the "trump card" is in future held in the hands of a single locally elected minister. It is therefore essential that these powers should be re-examined in the context of future legislation to provide for the transfer of justice and policing powers to Northern Ireland.

As regards international experience of this type of mechanism, Belgium offers an interesting example of how to enhance the capacity of parliament to intervene on justice and policing matters, and equip parliament with information that should compel relevant executive ministers to act. This mechanism, which is known as *Comité P*,[94] was set up under the Act of 18 July 1991 to monitor and ensure that the police carry out their activities and responsibilities in accordance with the rights afforded to the individual under the Belgian Constitution. It was created in the belief that the Belgian parliament needed to ensure greater democratic control over the function of the police. The *Comité P* is composed of five independent "expert" members who are nominated by the House of Representatives for a five-year period, renewable twice. It is generally agreed, even among the critics of the Belgian police reforms, that the *Comité P* has so far proved to be the most successful element in the policing reform process.

A key strength of the *Comité P* is that it reports directly to the Belgian parliament, in addition to the Interior and Justice Ministers, the police and related authorities such as mayors, governors and both general and federal prosecutors. While it is standard procedure for the *Comité P* to transmit its reports first of all to the Justice and Interior Ministers, this is only so as to allow the ministers to read the evidence before them and prepare their responses for parliamentary questions. Ministers are not permitted to edit the reports.

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[93] The Secretary of State can, for example, override a decision by the Board to hold an inquiry if s/he agrees with the Chief Constable that the Board's request would: (a) interfere with national security interests; (b) relate to an individual and be of a sensitive personal nature; (c) likely to prejudice ongoing judicial proceedings; or (d) prejudice the detection of crime or apprehension/prosecution of offenders. See s. 59(3) and s.60(5) of Police (NI) Act 2000. Elsewhere, in s. 25(1)(a), the Secretary of State has a wide-ranging but relatively undefined power to issue "codes of practice relating to the discharge by the Board of any of its functions."

[94] Comité Permanent de Contrôle des Services de Police. Although set up under the 1991 Act, the Comité only became operational in 1994.

The powers of the *Comité P* both to establish inquiries and to pursue cases against individual police officers can be exercised of its own volition or at the request of the parliament or judicial authorities. If the police do not respond adequately to a report or recommendations produced by *Comité P* within a reasonable time (60 days), the committee will then transmit its recommendations and comments to both houses of parliament so that they can ensure either that the police complies with *Comité P* or undertake whatever action they deem appropriate. This procedure provides parliament with an opportunity to change the laws or to put pressure on the responsible minister to take necessary measures.

Indeed the *Comité P* can also be used by parliament to inform itself and therefore to effectively challenge statements by the Minister for Justice or Interior. One of the five permanent members of the *Comité P*[95] gave an example in which parliament asked the *Comité P* to inquire into police conduct at a designated public demonstration, in order to investigate a statement made by the Interior Minister alleging that the police activity had been unproblematic. The *Comité P* was able to give evidence which established that the policing of the demonstration had been problematic, and parliament then used this to exert political pressure on the Interior Minister to respond.

The impact of the *Comité P* is also greatly enhanced by its research capacity, which is often very useful for parliament. At the beginning of 2003 for example, the *Comité*, by commissioning university research, was able to robustly challenge the figures presented by the Prime Minister suggesting that the Belgian police were successful in dealing with criminal activity, particularly organised crime.

2.3.4 Complaints systems

In the Northern Ireland context, one of the key changes in policing oversight was the establishment in 1999 of the Police Ombudsman of Northern Ireland.[96] This body replaced the Independent Commission for Police Complaints, which was largely discredited because of its limited powers and the fact that under

[95] Interview with Mr. Gil Bordeaux, Brussels, November 2003.

[96] The government had, in response to the Hayes review on police complaints in 1997, already accepted the need for such a body, and the Police (Northern Ireland) Act 1998 began the process of establishing the office. However, the Patten recommendations reinforced the need for such a body and made additional recommendations for powers, which were subsequently legislated for in the 2000 and 2003 Police Acts.

its structure the police were effectively still investigating themselves (albeit in some circumstances subject to oversight by independent assessors). The new Police Ombudsman's office now provides an independent and impartial complaints service for members of the public with regard to the conduct of police officers in Northern Ireland. This has been widely welcomed as an important step forward in policing change and police accountability here.[97]

South Africa also established an "Independent Complaints Directorate" (ICD), but it operates somewhat differently. The Director of the ICD is directly responsible to the Minister of Safety and Security for South Africa. Regular meetings are held between the Minister and the ICD, and relations have developed to the point where the ICD is invited by the Minister to sit in on meetings and to offer advice on relevant matters.

A significant portion of the work of the ICD is dedicated to policy development. In this way, the organisation is not only reacting to complaints against the police, but is also involved in identifying areas of police policy that require reform before they give rise to complaints. The ICD then makes its recommendations to the Minister for Safety and Security and to the Chief of Police. In a meeting with the Director of the ICD, Advocate Karen McKenzie, she explained that she always receives a prompt response from the Minister, indicating how he hopes to respond to each of the recommendations. Indeed, the ICD now group the recommendations themselves into immediate, medium and long-term initiatives before presenting them to the Minister. A concern expressed in relation to the Police Ombudsman for Northern Ireland was the extent to which her recommendations are adequately and appropriately addressed by the Chief Constable and Policing Board. In the post-devolution context, it would be important to also address and clarify the role the Ombudsman's office should have with regard to the local minister.

Belgium has also established a General Inspectorate of federal and local police (*Inspection Générale*). The *Inspection Générale* was set up for a number of reasons: (1) to work alongside the *Comité P* in dealing with complaints, as the number of complaints received by the latter exceeded their capability and resources; and (2) to develop internal regulation of police misconduct and

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[97] See more generally, Commentary by CAJ on the Office of the Police Ombudsman for Northern Ireland, June 2005.

failings in order to change the culture of the police force from within. The *Inspection Générale* is internal to the police, and while it is structured in such a way as to ensure that its operations and responsibilities are carried out independently, there are certain practices which have led to doubt about its ability to maintain complete independence.[98] While it is still in the early stages of its development, critics believe that its impact in terms of promoting accountability of the police service will be limited by its internal status and consequent lack of complete independence.

Interestingly, CAJ's research into other jurisdictions did not highlight many examples of complaint mechanisms for the wider criminal justice architecture. Complaints systems seem to be largely restricted to addressing police activity. This may simply reflect the fact that members of the general public are more likely to come into contact with the police than other branches of the criminal justice system, and it is at this interface that most countries have found it necessary to develop mechanisms for attempting to restore public confidence.[99]

2.3.5 Effective and independent judiciary

Obviously, a key building block for any democratic society is a judiciary that is independent from and uninfluenced by the executive, and therefore fully able to play its role in holding that executive to account. The judiciary must be in a position to rule objectively on the standards and human rights which a member of the executive must respect in the exercise of his or her ministerial responsibilities. Its established presence as an impartial and distinct organ of government should be a powerful deterrent to any justice minister who is tempted to act in a way which would be inconsistent with his or her office. While the next chapter, on establishing a culture of human rights, will examine in more detail concerns about the composition of the judiciary, and the importance of having an open and transparent procedure for appointing judges, it is important for the purposes of this chapter to note the important role they play in providing an extra layer of scrutiny over the acts of the government,

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[98] For example, while the Inspectorate has the power to access any police file, this is regulated by a protocol of understanding between the Inspectorate and federal and local police regarding the information which may be accessed.

[99] See Chapter 3 for further analysis of complaint mechanisms.

both executive and legislature.[100] Given the importance of such a role, it is obviously essential that the judiciary is, and is seen to be, independent of government.

In Belgium, the High Judicial Council was established via the Act of 22 December 1998 to improve the independence of the judiciary and restrict the influence of the executive branch of government by introducing an impartial procedure for the appointment of judges, as well as the power to both investigate complaints and launch inquiries on the functioning of the judiciary. The appointment aspect of the High Council will be considered further in Chapter 3; however of relevance to this chapter is the way in which the Council's Commission of Opinion and Inquiry is able to hold the Minister for Justice to account for failures in the judicial system.

The Council is made up of two commissions,[101] which contain equal numbers of judicial and non-judicial members. The most far-reaching of all the powers of the Council is the ability, with the majority support of the members of the Council, to conduct an investigation into the functioning of the judiciary. It is also within the competence of the Justice Minister and the legislature to request such an inquiry - in which case the majority support of the Council is not necessary. The Commission on Opinion and Inquiry is responsible for investigations and delivers the results of these to the executive and legislature, often accompanied by proposals for new legislation, law reform or changes to certain practices. These recommendations are not binding on the Belgian government, but they are an important tool for exerting pressure on the Justice Minister and other relevant cabinet members to take action on issues brought to the attention of the Council.[102]

2.3.6 Scrutiny at the local administrative level

Local councillors, mayors, sheriffs, aldermen [sic] etc in Northern Ireland are famously known as being responsible for very little ("bogs, bins and burials").

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[100] For example, the role of administrative law is obviously very important in the regulation of any criminal justice system, as the various actors involved are invariably state or semi-state bodies and therefore subject to judicial review of their decisions and actions. Admittedly, the difficulty with judicial review is that it only examines the process by which a decision or action was taken, and not the decision or action itself, so it has limited benefits and is of no use in challenging actual decisions.

[101] Commission of Nomination and Designation and Commission of Opinion and Inquiry.

[102] The composition and role of the judiciary in Northern Ireland is discussed further in Chapter 3.

However, an interesting example of scrutiny carried out at this local administrative level can be found in Belgium.

A '*Bourgmestre*' or Mayor in Belgium carries much more authority than the equivalent in Northern Ireland, particularly in the area of justice and policing. It is compulsory for the governors of each of the ten provinces in Belgium to come together to consult on and plan policing and security issues. Each zone in Belgium is divided into six municipalities. By law, the mayor of each municipality and the chief of police for that zone by law must meet once a month and preferably every two weeks. This involves all levels of the justice system – local, intermediary and federal – in planning and assuming responsibility for policing and security issues. At the same time it means that there are more players able to oversee the activities of responsible ministers at the executive level. Of course, there are also those who have expressed concern about this level of scrutiny, and in a meeting with the Chief of Police for the Zone of Schaerbeek, the view was expressed that police chiefs occasionally feel that too much power or influence is given to the mayors.[103]

A parallel could be drawn here with District Policing Partnerships (DPPs) in Northern Ireland. Local Councillors, together with representatives of local civil society, sit on District Policing Partnerships in each of the District Council areas in Northern Ireland. DPPs were established in the wake of the Patten recommendations and their role is to consult with the community, establish policing priorities in conjunction with the relevant police District Commander and monitor police performance against the local policing plan. As such, they have an extremely important role to play in the effective monitoring of local policing and the determination of local policing priorities.[104]

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[103] For an interesting exploration of somewhat similar provisions in the Netherlands, see op. cit., Human Rights on Duty, pgs. 152-153. In that earlier comparative research, the advantages of a model which did not leave the police alone to address complex issues of public order policing but engaged local authorities and others, was seen as relevant to current (and continuing) debates in Northern Ireland.

[104] See CAJ Commentary on District Policing Partnerships, May 2005. Also of relevance are the Community Safety Partnerships (CSPs) set up by government following the recommendation of the Criminal Justice Review. The CSPs are government-funded and have little direct local input. The Criminal Justice Review clearly envisaged a single local entity – building upon the Patten idea of DPPs – which would deliver a holistic participatory approach to local policing and community safety. Government's decision in this regard to run two local entities in tandem (DPPs and CSPs), with little coordination, seriously risks undermining the impact of either body.

2.3.7 International human rights mechanisms

A persistent theme in a number of the earlier sections of this report was the important framework given to government by international human rights standards. Government policy, the judiciary, the police and all the criminal justice agencies are obliged to comply with the international human rights standards to which the authorities have freely signed up.

We noted earlier, for example, that it is the Westminster parliament which must legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland. Conversely, it is the UK government that is held to account by the various UN treaty bodies. Accordingly, the devolution of authority will not be accepted as an excuse if Northern Ireland bodies are found to be in violation of international human rights treaties. In its reporting cycles to bodies such as the UN Committee Against Torture, the UN Committee on the Rights of the Child etc., the UK is expected to file a report covering all the different legal jurisdictions, and is held to account if previous recommendations for action have not been fully implemented. The same is true for its treaty responsibilities within the European Union and the Council of Europe. Findings by the European Court of Human Rights must be implemented and, in any devolved arrangements in future, this will require a reasonable level of cooperation and coordination between the UK and Northern Ireland authorities.

CAJ has had a long experience of working with international and regional human rights bodies, and has found the scrutiny they bring to the behaviour of Member States to be invaluable. Local efforts to secure the extension of anti-race discrimination legislation to Northern Ireland were proving ineffective until the UN Committee for the Elimination of Racial Discrimination sanctioned the UK government on this point. Rulings from the European Court that the UK government had failed to afford adequate article 2 (right to life) protections to its citizens led to a serious re-think about domestic standards of independent and effective investigations. The interplay between international and local scrutiny affords the best possible human rights framework for action.

Human rights are protected primarily at the local level, and indeed a powerful argument for devolution is that it brings decision-making closer to those most affected by it, and should allow for more transparency and accountability. However, there is an inherent value in having an entirely independent and

external arbiter to ensure the 'rules of the game' between governors and governed are fairly maintained, and this role is played by the international human rights community, both governmental and non-governmental.

2.3.8 Additional safeguards - civilian oversight, statutory commissions and developing a culture of rights

There are a number of other mechanisms that exist in Northern Ireland that could potentially act as a check on the powers of a future justice minister(s). For example, civilian oversight has become an increasingly important post-conflict trend. There are now lay members of the Judicial Appointments Commission, independent members of the District Policing Partnerships and the Northern Ireland Policing Board, and a Civic Forum, as well as the existing systems of lay visitors and assessors. These relatively new bodies are able to draw sustenance from the energetic community and voluntary sector that exists in Northern Ireland, and the sector is increasingly interested in making its voice heard in policing and criminal justice debates. Who better to monitor the minister's response to sectarian, racist or homophobic attacks than a vibrant and vocal civil society that faces the brunt of such criminality when it occurs? One of the strongest arguments for devolving criminal justice and policing issues is to ensure that decisions on such important matters are taken as close to possible to those who are affected by them. Local ministers, dependent on an electoral mandate, are likely to be more responsive to an informed and engaged citizenry and, post-devolution, people are likely to feel more empowered to both lobby and challenge local politicians on these issues.

Earlier in the text, reference was made to a number of statutory bodies (the Policing Board, the Policing Ombudsman, the Criminal Justice Inspection etc) that have a particular statutory responsibility to oversee policing and criminal justice. However, there are also a number of statutory commissions, established by the Agreement to monitor government's compliance with human rights and equality standards.[105] Clearly such work has a direct relevance to upholding the highest standards in the administration of justice, and it is important that clear Memoranda of Understanding be created to clarify respective responsibilities.

[105] Namely the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland.

The Agreement has also given rise to a number of other practices within the policing and criminal justice institutions which are designed to make them more accountable and thus human rights compliant. Examples include the development of codes of ethics, human rights and equality training, equity monitoring and so on. To function effectively, however, these practices must operate within a wider culture of human rights, rather than being tokenistic gestures. Chapter 3 examines in more detail the challenge of embedding a culture of rights in criminal justice and policing, and the opportunity devolution provides to progress this.

2.4 Conclusion

The international research has shown that there are a wide variety of executive models on offer for administering criminal justice and policing powers. As can be expected, each country has adopted the model that best suits its own political circumstances, and this is likely to be the case in Northern Ireland as well.

As stated at the beginning of this chapter, this report does not intend to recommend any one particular model over another. However, some general principles can be drawn out:

- Only one of the countries studied (Scotland) adopted a single-department model, and our research would suggest that a single department can be unmanageable, and that policing and criminal justice functions should be carried out by either 'double' or 'joint' ministries (the Scottish system in fact has two parliamentary committees to deal with the workload generated by their one department).
- In societies with a history of distrust to overcome, and where there is a need to establish public confidence in the justice system, two or more departments/ministries have been generally considered to be more representative and accountable (see discussions of South Africa and Belgium).
- The generally recognised concern about anything other than a purely unitary departmental system is the risk of inefficiency and lack of co-ordination. If a model other than a single department/ministry is pursued, the safeguards that have been introduced apparently successfully elsewhere to ensure efficacy should be built in from the outset.

Most importantly, this research has clearly demonstrated that no matter which executive model is chosen, a whole series of safeguards are necessary to ensure that everyone can be assured that they will be treated fairly and have their rights respected. Consideration needs to be given to:

- The importance of written safeguards and specifically a Bill of Rights for Northern Ireland
- The nature of parliamentary safeguards
- The development of effective inspectorates and other oversight mechanisms
- The value of independent complaints systems to address not only policing, but also concerns that may arise within other criminal justice agencies
- The contribution of an effective and independent judiciary
- The value of local accountability mechanisms
- The role of the international human rights framework
- The need for an engaged civil society and the role it can perform informally and formally by way of civilian oversight
- The powers, composition, and liaison required of statutory commissions

The importance of developing a culture of rights within and outside the policing and criminal justice agencies is so crucial as to be the sole subject of the next chapter.

Chapter Three

EMBEDDING A CULTURE OF HUMAN RIGHTS

The challenge of winning over hearts and minds is arguably one of the most difficult aspects of any process of change. In the Northern Ireland context, the question of how to devolve justice and policing powers in a way that would maximise human rights protection is complex. It is not only a matter of determining, as discussed in Chapter 2, the most suitable executive model for accommodating justice powers and the necessary safeguards for holding the executive to account and open to scrutiny in human rights terms. It also requires all of the agencies involved in the administration of criminal justice to internalise human rights practice and thereby truly embed a culture of respect for and protection of human rights across the criminal justice system in Northern Ireland.

Already in the process of criminal justice reform, there are numerous examples of resistance to change through failure to adequately implement recommendations of the Criminal Justice Review, both on the part of the government (despite the fact that the Review was government-led) and the criminal justice institutions themselves.[106] This chapter will:

- begin by looking at the history and perceptions of the criminal justice system in Northern Ireland, and their implications for embedding institutional change;
- examine the challenges of institutional transformation and how real change can be measured;
- comment on the pace and nature of criminal justice change in Northern Ireland to date, as an indicator of commitment to institutional change; and

[106] In discussing the development of a culture of human rights within the criminal justice system in Northern Ireland, the two obvious points of departure are the proposals of the Patten Commission on policing and the recommendations of the Criminal Justice Review. As already highlighted in Chapter 1, CAJ is engaged in a distinct programme of work on policing, and has published a series of commentaries on implementation of key aspects of the Patten Proposals. This chapter will therefore not focus on policing, other than by way of analogy, but rather dedicate itself to considering the implementation of the Criminal Justice Review recommendations in terms of helping to place human rights at the heart of the criminal justice bodies.

- provide a more detailed exploration of some of the key recommendations which relate to cultural transformation, drawing on international comparisons where available.

The findings of our research – internationally and locally – lead CAJ to believe that a failure to fundamentally transform at an institutional level could have significant consequences for any process of devolution of criminal justice and policing powers.

3.1 The history of Criminal Justice in Northern Ireland

As indicated by its name, CAJ (Committee on the Administration of Justice) has worked in the area of the administration of justice since its inception in 1981. Indeed, it was primarily concerns about the administration of justice in the sense of civil and political rights that led to the formation of CAJ.[107] During the 1980s and early 1990s, serious problems with and complaints regarding the criminal justice system provided CAJ with much of its work. The human rights issues drawn to its attention included the lack of independent complaints mechanisms, lack of adequate investigation into abuses of state power, miscarriages of justice, prisoners' rights cases, and the whole myriad of human rights abuses that arose in connection with the ongoing violent conflict. CAJ has consistently been of the view that human rights abuses were feeding and fuelling the conflict, and any attempt to develop a peace process without addressing these abuses would ultimately be doomed to failure.

CAJ's report about policing in 1997 draws certain conclusions that are equally valid when looking at the impact of the conflict, and the long history of emergency legislation, on the criminal justice system:

> *"Our research suggests that a major problem as regards securing effective legal accountability in NI is the existence of emergency legislation. A whole array of powers is conferred on the police by the ordinary criminal law supposedly to assist them police society effectively. Emergency legislation means further powers and seriously risks a*

[107] In line with international human rights thinking, CAJ has since the early 1990s interpreted "justice" in its broadest sense, and works on social and economic rights as well as civil and political. Its mission statement reflects this: "CAJ works for a just and peaceful society in Northern Ireland where the human rights of all are protected."

dilution of the safeguards usually taken for granted in a democratic society. The legislature's rationale in eroding basic civil liberties in this way is that the struggle against terrorism requires extraordinary measures. However, international experience (International Commission of Jurists, 1983) would suggest that it is these very powers which detract from the police's ability to do their job effectively..... It is for this reason that international law seeks to impose strict limits on the use, extent and duration of emergency legislation in any country." [108]

In that report we went on to note that the police in Northern Ireland had never worked solely within the framework of ordinary law. The police – and of more relevance for this debate, all other elements of the legal system – operated a two tier criminal legal apparatus with differing standards and safeguards depending on the motivation of the crime alleged. Academics had already noted, "*It is hard to resist the conclusion that it is often the views of the security authorities on what should be permitted under emergency and related legislation that determine the law rather than the law that sets effective limits on what the security forces are permitted to do.*"[109]

CAJ's research concluded that emergency legislation had become normalised in Northern Ireland, and this clearly had an impact on the courts, on the judiciary, on the legal profession, and on all the criminal justice agencies.

This history of emergency law, and of human rights abuses stemming from the reliance it, led to a distrust of and lack of confidence in the system on the part of many. Academics, human rights activists, and external scrutiny bodies such as the European Court and the various UN treaty mechanisms, were all critical at different stages, but the most vociferous criticisms were made by those who very frequently found themselves at the receiving end of such abuses. Given the nature of the conflict, victims of state abuses tended to come disproportionately from the nationalist community. This reality both in part explained, and was in part exacerbated by the fact that the various elements within the criminal justice system (e.g. the judiciary, the police, the Prosecution Service etc) were largely drawn from the majority unionist Protestant community. As a result, the criminal justice system as a whole was seen as at best unsympathetic to, and at worst biased against, members of the nationalist community. This finding was evidenced in research carried out

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[108] Op. cit., Human Rights on Duty, pg. 109.
[109] "Northern Ireland; The Choice", Kevin Boyle and Tom Hadden, Penguin, 1994.

by the Criminal Justice Review itself. While the Review recorded that the majority of those surveyed reported having confidence in the fairness of the criminal justice system, it noted that there were significant differences between the views of Catholics (61%) and Protestants (77%) about the fairness of the system.[110]

The Patten report noted (with apparent agreement) the comment made to them to the effect that "*much of the dissatisfaction with policing, in both loyalist and republican areas, stems from the use of emergency powers*". [111] Non-jury Diplock courts, restrictions on the right to silence, extended periods of questioning, a requirement for lower standards of evidence, the use of super-grasses, and inadequate investigations into deaths resulting from collusion or direct state involvement, etc. could only lead to the conclusion that the criminal justice system itself had been at the heart of the conflict. A transition to peace required as much of an overhaul of the whole criminal justice system as had occurred in policing via the Patten Commission.

However, implementation of the changes needed and commitment to the cultural change required has arguably been half-hearted. Despite the Criminal Justice Review specifying that *"human rights are central to the criminal justice system"*[112] there is real evidence of a lack of willingness to put the protection of human rights centre-stage in the process of change. Yet, a move in this direction is necessary if these institutions are to be seen as truly open, transparent and representative, and thus command the respect of society as whole. Without a willingness to embed cultural change, all other change is unlikely to be meaningful.

3.2 THE CHALLENGE OF INSTITUTIONAL TRANSFORMATION

As noted above, the criminal justice system played a central part in the conflict in Northern Ireland, and its failures contributed to injustices that emanated from the conflict. The need for fundamental change of the system was therefore apparent, especially to those who felt that they had suffered at its hands.

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[110] Op. cit., Criminal Justice Review, paras 2.23 - 2.24, p.18.
[111] Op. cit., Patten report, pg. 48, citing John McGarry and Brendan O'Leary.
[112] Ibid., para. 3.1, pg. 25.

However, institutional reform is not an easy process. It requires an institution to be open to criticism and to accept that there were failures on its part. It necessitates a change of ideology, mindset, culture, practices and at times even personnel across the system. A system that does not accept that there is a need for change is very likely to resist any move in that direction, since to engage in such change may imply that the critics were right. For those who were involved in making the old system work, change is not an easy process, yet the extent of their ability to engage actively in that process goes to the heart of the ability of any institution to genuinely transform itself.

In the research carried out in South Africa, the issue of cultural transformation was a recurring theme. In the original research paper commissioned by CAJ, this point was strongly made, most particularly in relation to the judiciary:

"One cannot assume that the judiciary is independent and accountable because there is a new dispensation. Many judges appointed under the apartheid regime through a partisan appointment process are still on the bench. Similarly, magistrates were selected primarily from the public service, a public service that supported and enabled apartheid. In both instances, these 'functionaries' were supported by administrations, personnel and an institutional culture which was embedded with apartheid ideology. This influenced mentality, psychology and work ethic. The fundamental question is that until the judiciary is truly transformed and legitimate, can it demand its independence? Who then, is responsible for its transformation and to whom does it account? Surely the principle that no institution can transform itself is applicable to the judiciary as well."[113]

This certainly has resonance in the Northern Ireland context. However, there are also peculiarities to the situation here, and prominent among these is the longstanding operation of direct rule from Westminster, and its impact in terms of placing great amounts of power in the hands of the civil service. Given that ministers had to divide their time between the parliament in London, their constituency and Northern Ireland, they had to rely fairly heavily on

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[113] Op. cit., Report prepared for CAJ by Melanie Lue-Dugmore, p.36. Indeed, it is still the case in South Africa that the pace of transformation is slowed down by institutional resistance to change. An inquiry of the South African Human Rights Commission into racism and racial discrimination in the Department of Justice suggests that while laws have changed, it has been more difficult to change attitudes and values, and aspects of the *apartheid* mentality live on. SAHRC Report on Racism and Racial Discrimination in the Department of Justice and Constitutional Development, February 2002, cited by Lue-Dugmore, p.18 and 19.

their civil servants for local knowledge. Whether true or not, there was often a general perception that civil servants had largely unfettered control over policy formulation and implementation. This perception fed a sense that there was limited political scrutiny over criminal justice policy which, combined with the predominance of security concerns during the conflict, engendered a culture (both real and perceived) of secrecy and caution.

The challenge of cultural transformation in Northern Ireland is therefore great. It could be argued that the retention of key personnel within the system seriously inhibits the ability of the system to transform itself, not least because this renders any internal sympathy for change unlikely. Even strong external mechanisms for the oversight of change might have limited impact in the face of internal resistance.

At a Northern Ireland level, this would obviously have important implications for the devolution of criminal justice and policing powers. Efforts to establishing confidence in the system will be seriously undermined if there is a perception that nothing has really changed. For example, how would any new Department of Justice be staffed? Would it be made up of personnel from within the current criminal justice division of the Northern Ireland Office? Given that (as in the South Africa example above) many of these staff have been involved in administering the old system, would this inspire public confidence that the system is really changing? How open are such staff to transforming the system? What would the relationship be with local politicians? How could the current culture of lack of openness and accountability be changed? This combined with the sensitivities that will attach to the political control of such powers could lead to instability in any devolved system at an early stage. While it could be argued that the act of devolution itself could change the current dynamic and increase pressure for change, there is also a danger that failure to address these concerns in considering devolution will undermine devolution itself.

The remainder of this chapter examines the lack of progress, or at least sufficient progress, in implementing those recommendations in the Criminal Justice Review that go to the heart of institutional change and building confidence in the system. CAJ believes that much of this lack of progress is born out of institutional resistance to change, and is indicative of the challenge that exists in changing the culture within the criminal justice system – a necessary precursor to eventual devolution.

3.3 Criminal Justice Changes to date

As indicated in Chapter 1, the Criminal Justice Review was established pursuant to the terms of the Belfast/Good Friday Agreement with a mandate to conduct a full and wide-ranging review of the criminal justice system in Northern Ireland. As such, it was the product of a hard fought political settlement, the impact of which is certain to have its affect on the capacity of the Review to bring about institutional transformation.

Indeed from the outset the Review was noticeably overshadowed by the parallel review of policing in Northern Ireland. As mentioned earlier, the latter was the subject of an international, independent Commission headed by former Governor of Hong Kong, Chris Patten. This Commission engaged in a broad public consultation exercise, which included the holding of many public meetings in a variety of locations and communities across Northern Ireland. The Criminal Justice Review on the other hand was led by government officials and included a number of independent assessors appointed by the government to assist the officials in their work. It did not engage in the same level of public consultation as the Patten Commission, and had a much lower public profile. Moreover, given the number and nature of human rights abuses arising from the emergency legislation, the explicit exclusion of an examination of emergency powers from the terms of reference of the Review substantially reduced its ability to help establish public confidence and engagement both in the Review and in the system itself.

In spite of these restrictions the Review produced a report in March 2000 containing 294 recommendations for reform of the criminal justice system. This included a number of significant and far-reaching recommendations such as: new procedures for all judicial appointments, including the establishment of a Judicial Appointments Commission for Northern Ireland; the creation of a new, independent Public Prosecution Service for Northern Ireland; measures to promote a representative workforce in all parts of the criminal justice system; reform to aspects of youth justice; and mandatory complaints mechanisms, human rights training and codes of ethics for all criminal justice agencies. Moreover, the entire report was underpinned by human rights considerations.[114]

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[114] The Review states that: "[T]he minimum international standards have guided us throughout our deliberations and we cannot stress too strongly their applicability to all parts of the criminal justice system in Northern Ireland." Op. cit., Criminal Justice Review, para. 3.6, pg. 26.

3.3.1 Implementing the Criminal Justice Review[115]

Criminal Justice Review Implementation Plan

In November 2001, one and a half years after the publication of the Review, the government issued its response in the form of an Implementation Plan. The Plan was a disappointment to CAJ and others who had been active in relation to the Review. As expressed in our submission at the time,[116] CAJ Submission No. 122, Commentary on the Implementation Plan for the Criminal Justice Review and the Justice (Northern Ireland) Bill, January 2002.

we found the Plan to be insubstantial in many respects and particularly lacking in precise and detailed information on both *how* and *when* the Review recommendations were to be implemented. In this sense, the document failed to deliver the key elements of a "plan", suggesting an underlying lack of engagement in the review process. Moreover, unlike the independent oversight arrangements that were put in place to monitor policing reforms in Northern Ireland, the Plan was not accompanied by any government undertaking to create a comparable mechanism for overseeing criminal justice reforms.

Justice (Northern Ireland) Bill 2001 and Justice (Northern Ireland) Act 2002

The Plan referred in many instances to the need for legislation in order to implement a large number of the Review recommendations. To coincide with the publication of the Implementation Plan therefore, the government published a draft Justice (NI) Bill and implied that, once the Bill became law, the way would be clear for full implementation of the Review.

However sections of the Bill was hotly contested as it passed through parliament and a number of recommendations which had not received the full support of the government in the Implementation Plan were omitted from the final stages of the Bill. Two important recommendations which were affected in this way were recommendation 4, which placed a duty on whatever mechanism is devised for administering justice in Northern Ireland after devolution to develop a strategy for securing a workforce that would better

[115] This section draws heavily on Fox, Clare: "New Hope for the Criminal Justice Review? A commentary on the implementation process," Northern Ireland Legal Quarterly, vol.54, no.4, 2003.
[116] CAJ submission no. 122, Commentary on the Implementation Plan for the Criminal Justice Review and the Justice (Northern Iredand) Bill, January 2002.

'reflect' society in Northern Ireland, and recommendation 69 which placed a similar duty on those responsible for judicial appointments.[117]

A number of other Review recommendations were diluted or significantly altered in character during the drafting of the Bill. The most publicised example of this was the express extension of recommendation 141 on the display of symbols inside and outside courthouses. Given that the conflict in Northern Ireland is one of competing national identities and political allegiances, the issue of political symbols is a highly contentious one. The Review had addressed the importance, in the new arrangements, of the criminal justice system creating a neutral and harmonious environment for its entire workforce and for the general public. Accordingly the Review included recommendations about the appropriate use of symbols in and outside courthouses. Recommendation 141 stated: *"[w]e recommend that there should be no change in the arrangements for displaying the Royal Coat of Arms on the exterior of existing courthouses. However, in order to create an environment in which all those attending court can feel comfortable we recommend the interior of courtrooms should be free of any symbols."* The then Secretary of State, Dr. John Reid, citing reasons of "architectural or historical merit,"[118] tabled an amendment at the drafting stages of the Justice Bill so as to exempt a number of courts from the recommendations of the Review on the display of symbols inside certain designated courthouses.[119] Moreover, the Secretary of State, flying in a complete departure from the Review, also interpreted recommendation 141 to mean that new courthouses should be able to display coats of arms.[120] This had the effect of allowing the new Laganside Courthouse, which was subsequently opened in February 2003, to bear the Royal Coat of Arms.

Joint Declaration of the British and Irish Governments

The Joint Declaration of the British and Irish governments of 19th April 2003 set out a programme for implementing the outstanding elements of the

[117] The importance of these measures in embedding a human rights culture will be discussed in detail in a later section of this chapter.
[118] "Symbols of architectural value to remain in coutrooms", NIO Press Release, 1st March 2002.
[119] The courtrooms included - the Royal Courts of Justice in Belfast and the courtrooms in Armagh, Banbridge, Magherafelt and Omagh, as well as Court No.1 in the Courthouse in Downpatrick. When the Bill received Royal Assent in July 2002, the provision came into effect as section 66(2) of the Justice NI Act 2002.
[120] "The Review made an explicit recommendation only in respect of existing courthouses, where it said that coats of arms should be retained. I have concluded that new courthouses should be able to display coats of arms." NIO Press Release ibid.

Agreement, and the Criminal Justice Review received particular attention. In particular, the hitherto resisted recommendation on the establishment of an independent mechanism to oversee the process of change was addressed by the announcement of the intention to appoint an independent Oversight Commissioner. This was a significant development as, up to this point, despite considerable lobbying, the British government had strongly resisted the creation of such a position.

The Declaration also referred to "major transformational change" that would form the basis of an updated government implementation strategy for the Review and promised the introduction of a second Justice Bill to amend the Justice (NI) Act 2002 where it fell short of the Review.

The Updated Implementation Plan

An Updated Implementation Plan was subsequently issued in June 2003. On the whole, CAJ welcomed this revised Plan as a significant improvement on its original. The information on timescales and content was more defined and comprehensive, and developments in advancing several recommendations were noted.[121] Perhaps most significantly, the Plan indicated the substance of a new Justice Bill, and gave details on the creation of the office of Justice Oversight Commissioner. Lord Clyde, the former Scottish Law Lord, was subsequently appointed to the new Office in June 2003.[122]

However, a number of concerns remained, especially in terms of the unreasonable delay in implementing certain Review recommendations. In particular, a number of recommendations were unnecessarily being set aside until such time as devolution of criminal justice and policing powers occurred. It was, and still is, CAJ's view that many of the recommendations contained in the Review are not dependent on devolution, and that criminal justice reforms in particular should not be subject to political developments.[123]

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[121] CAJ Submission No. 146, Commentary on the Updated Implementation Plan to the Criminal Justice Review and the Office of the Criminal Justice Oversight Commissioner, 2003.

[122] Lord Clyde has since produced four reports which can be found at www.justiceoversight.com

[123] This is a view shared by Lord Clyde, the Justice Oversight Commissioner, who notes in his second report (June 2004) that *"thought will now have to be given to seeing whether such recommendations as are indirectly related to, or have been reserved for, devolution should not now be progressed."*

The Updated Implementation Plan also still lacked clarity on how and when recommendations should be implemented, particularly where recommendations had common application to all the criminal justice agencies. Human rights training and complaints mechanisms were only two such areas. It is perhaps this lack of clear government guidance that has led to delays in these recommendations being implemented.

Justice (Northern Ireland) Act 2004

The Justice Bill had its first reading in parliament in December 2003 and received Royal Assent in May 2004. Its most significant provision was that it amended the Justice Act 2002 to allow for the establishment of the Judicial Appointments Commission prior to devolution - thus going beyond even the express recommendations of the Review on this subject. Moreover it gave statutory effect to recommendation 69 of the Review which requires those responsible for judicial appointments to engage in a programme of action to secure a reflective judiciary consistent with the principle of merit.

The Justice Act 2004, the Updated Implementation Plan and the work of the Justice Oversight Commissioner taken together all significantly improve the prospect of implementation of the Review's recommendations for criminal justice reform. However, it is clear from CAJ's discussions and communications with the criminal justice agencies in Northern Ireland, in addition to the material provided by Lord Clyde in his four reports, that there continue to be problems with implementing certain recommendations in full. The next section of this chapter examines the progress, or lack of it, on specific Review recommendations which, if given full effect, would go a long way to embedding cultural change and protecting human rights in the criminal justice institutions in Northern Ireland. Such cultural change would be a necessary component of any devolution of criminal justice and policing powers, if such devolution were to command the respect and confidence of the wider community, and give full effect to the spirit of the Review.

3.4 Cultural Transformation in Practice

While the Criminal Justice Review was concerned with change in its broadest sense, Chapter 2 of the Review is particularly relevant in any thinking around embedding cultural and institutional change. In that chapter, on rights and principles, the Review seeks to examine the principles and values that should

underpin the criminal justice system in Northern Ireland. From CAJ's perspective, we particularly welcomed the prioritisation of human rights as central to the criminal justice system, and the fact that subsequent recommendations are clearly designed to make the system more representative, transparent and accountable. It is all the more telling, therefore, that many of the recommendations contained in this section are among the ones for which implementation has been most protracted. This is again perhaps indicative of the institutional and political resistance to change.

We seek in this section to address a number of these recommendations specifically, as well as two recommendations contained in separate sections of the Review related to the Prosecution Service and the judiciary. These recommendations are:

- Representative workforce
- Reflective judiciary
- Equity monitoring
- Giving of reasons for no prosecution
- Complaints mechanisms, codes of ethics and discipline
- Human rights training

In discussing each recommendation and its implementation, the international research will be drawn on, where appropriate, to give examples of how such issues have been addressed in the other countries researched.

3.4.1 Representative workforce

Recommendation 4 of the Criminal Justice Review proposes that:

> *"whatever machinery is devised for administering criminal justice matters after devolution, it should have as a primary task the development of a concerted and proactive strategy for securing a "reflective" workforce in all parts of the system."*[124]

It is clear that for a criminal justice system to command the respect and confidence of the community it serves, it must be broadly reflective of that community. As noted earlier, the historical perception of the criminal justice system among many in Northern Ireland is of a lack of representativeness, and this has greatly contributed to distrust of the system. In the parallel

[124] Op. cit., Criminal Justice Review, para. 3.35, pg. 37.

debate on policing, the Patten Commission devoted a whole chapter to this single issue – the need for the police service to be representative in general terms of the society they policed – and made a series of wide-ranging recommendations in this respect. One of the better-known, and highly contentious, recommendations was the introduction of a recruitment quota system. The quota arrangement was seen as essential in moving from the prevailing situation, in which the Royal Ulster Constabulary had less than 8% Catholics in a society where Catholics made up well over 40% of the population. Recommendation 4 of the Criminal Justice Review is much less far-reaching but is nevertheless very important in terms of changing the composition of the workforce in the criminal justice agencies. Its objective is to engender more widespread public confidence in the system.

It is revealing therefore that recommendation 4 has proved to be one of the slowest and most difficult to implement. Initial resistance can be seen in the first Implementation Plan, where the government only accepted this recommendation "in principle".[125] This initial response was followed by the failure of government to include a statutory provision on the need to achieve a reflective workforce in the Justice Act 2002. Furthermore, the Updated Implementation Plan simply described varying activities that were already in place to promote equality and increase representation at the level of individual agencies, and thereby only succeeded in highlighting the disparity in standards and levels of proactiveness across the agencies. Again, the Justice Act 2004 failed to provide a statutory basis for this recommendation.

Given that the Review clearly envisaged the development of a single, overarching policy for achieving a reflective workforce, the lack of demonstrable commitment to this recommendation is lamentable. Indeed, this has been highlighted on a number of occasions by the Justice Oversight Commissioner, whose second report states:

> *"No sound reason has so far been advanced why progress cannot be made on the devising of the strategy in advance of devolution...No doubt the strategy may require to be designed in fairly general terms in order to be relevant to the particular circumstances of individual agencies. But a general policy with general guidelines should be feasible and may be of positive assistance to the agencies in dealing with such considerations as recruiting new staff, and in particular in advertising for them."*[126]

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[125] Criminal Justice Review Implementation Plan, NIO, November 2001, p.11.
[126] Op. cit., Second Report of the Justice Oversight Commissioner, June 2004, pg. 27.

His third report notes the importance of this recommendation in embedding cultural change in order to stimulate greater confidence in the system:

> *"The achievement of a reflective workforce may take varying time to achieve by different organisations because, for example, each will have a different starting point in terms of the degree to which it presently has a reflective workforce or because of the extent of the opportunities which it has to change the composition of its workforce. However, what is of paramount importance is the mind-set of those engaged in the work of criminal justice, the environment in which they carry it out, and the culture which is developed within the workforce. This is particularly necessary where a workforce is not fully reflective of the broader community."*[127]

What is clearly needed is a statutory framework from which can be developed an overarching strategy, which in turn provides obligations and requirements for each of the criminal justice agencies on the gathering and sharing of information on, and monitoring and improvement of representativeness across the system. What is happening instead is a non-statutory agency-led approach, with varying degrees of success.

Clear, regular and up-to-date statistical information is key in determining the current composition of the workforce, so that problem areas can be identified, and a baseline and indicators for improvement established. Lord Clyde's reports have been particularly valuable in providing such statistical information from each of the criminal justice agencies. The Commissioner's second report in June 2004 provides the most detailed figures, with the third report in December 2004 largely reporting that figures remained the same as previously reported. A summary of these figures can be provided as follows:

- As at January 2004, the figures for the NIO (which includes civil servants in the Criminal Justice Division, the Youth Justice Agency, the Prison Service and the DPP) showed 68.7% from a Protestant community background, 28% from a Roman Catholic community background, and 3.3% that could not be determined.[128]

[127] Third Report of the Justice Oversight Commissioner, December 2004, pgs. 24 - 25.
[128] Only 1 person had a minority ethnic background, 3% of staff had a disability, and the gender breakdown was 61.3% female, 38.7% male.

- As at December 2003, the figures for the Court Service showed 34.6% from a Roman Catholic community background and 61.7% from a Protestant community background. On gender grounds, 65.3% were female and 34.6% were male.[129]

- As at January 2004, the figures for the Prison Service showed 80% from a Protestant community background, 8.3% from a Roman Catholic community background and 11.7% undetermined.[130]

- As at January 2004, the figures for the Probation Board showed 40.5% from a Protestant community background, 45% from a Roman Catholic community background, and 14.5% undetermined.[131]

- As at October 2004, figures for the DPP showed 49.8% from a Protestant community background, 46.3% from a Roman Catholic community background and 3.9% undetermined.[132]

These figures are difficult to compare and analyse given that they do not derive from any comprehensive/uniform monitoring system, and indeed cover different timescales. However, they clearly show that many agencies are currently unrepresentative. Given that the 2001 census showed that 43.8% of the population was Catholic, the figure of 28% from the Northern Ireland Office is particularly worrying. Equally, the Prison Service falls far short. Another significant problem is that these figures do not show the levels of representation according to rank. From answers to parliamentary questions, it is clear the imbalance is even more marked in the senior ranks of the civil service.[133] Thus, while in some cases the figures may not at first sight seem concerning, a further exploration clearly shows that the senior policy and decision-making positions are the least representative both in gender and community background terms.

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[129] Only 1.16% had a disability and 0.6% came from a minority ethnic background. The Commissioner's third report in December 04 notes that the figure for those with a disability had risen to 2.5%

[130] On gender breakdown, 83.9% were male and 16.1% were female. There was no one from a minority ethnic backgrounds and no one with a disability.

[131] A gender breakdown shows 30.3% males and 69.7% females. No figures were available for ethnicity or disability.

[132] Only 0.3% were from a minority ethnic background and 3.5% has a disability. On gender grounds, 64.3% were female and 35.7% male.

[133] A reply from Angela Smith to a parliamentary question on the religious affiliation of senior management in each government department in Northern Ireland shows that only 31.8% of senior civil servants are from a Roman Catholic community background (15th November 2005). See *http://www.parliament.the-stationery-office.co.uk/pa/cm200506/cmhansrd/cm051115/text/51115w39.htm#column_1191*

Lord Clyde's fourth report of June 2005 simply refers to the fact that the Criminal Justice Board[134] has begun work on a Diversity Strategy, due for publication in autumn 2005, and that he therefore no longer needs to report on the statistics.[135] Given the delays that have already occurred in the implementation of this recommendation, the danger of the timetable for the proposed Diversity Strategy slipping, and the time that needs to be allowed for this Strategy to bed down and be adapted by each particular agency (as indeed recognised by Lord Clyde in his fourth report), CAJ fears that this valuable statistical information will be lost in the interim.

The delay in the implementation of this recommendation is serious, but becomes all the more urgent in light of ongoing appointments. Recruitment of prosecutors for the new Public Prosecution Service in Northern Ireland, for example, is already underway without being subject to the requirements of a new "reflective workforce" strategy. Such delay raises real questions over whether the system has embraced institutional change by being open, representative and accountable in terms of the make-up of its workforce. This is particularly pertinent in light of the earlier discussion on the key role played by the workforce in implementing or opposing reforms. A sense of reluctance or secrecy in this area will only serve to further fuel suspicions in this regard.

International experiences of a reflective workforce

Rules regulating linguistic representation in the civil service in Belgium

The rules on linguistic parity in relation to the composition of the Belgian Cabinet, as explained in Chapter 2 of this report, are also replicated in the Belgian civil service. For the whole of their careers, civil servants are separated according to their assigned linguistic category. The initial designation is in most cases determined by the language of the university from which the individual obtained his or her degree. Even in cases where a potential applicant to the civil service is fully bi-lingual, he or she cannot choose to sit the written entry exam in a language other than that of his/her university. In a meeting with constitutional law academics in Belgium,[136]

[134] The Criminal Justice Board is an inter-agency strategic body consisting of the directors and chief officers of the main statutory agencies involved in delivering criminal justice.

[135] Lord Clyde refers to the expectation that the Criminal Justice Board's annual report in June 2005 will mention the strategy and the timetable for its publication. In fact, the report simply states in a few lines that it is developing a strategy and briefly mentions what it will do, with no mention of publication or implementation. At the time of final editing of this report (January 2006), no strategy had yet been published.

[136] Meeting with Sebastien Van Droogenbroeck and Bruno Lambert, November 2003.

attention was drawn to the fact that in relation to senior civil servant posts, the representation of French and Dutch speakers must be equal. For lower ranking positions, representation depends on the importance of a certain departmental portfolio for the region or province of Belgium. For example, maritime affairs are of greater concern to the areas of Belgium that have Dutch-speaking majorities and consequently there are more junior Dutch-speaking civil servants in this particular area of governance than French.

"Black empowerment", South Africa

In both the public and private sectors in South Africa, the government has introduced a policy of "black empowerment" which mandates that affirmative action be taken in relation to recruiting black South Africans. This measure was considered necessary both to remedy the imbalances of the past and to attempt to build up a black middle class. In relation to the criminal justice system, affirmative practices are applied, and some have argued that this approach in services such as the Prosecuting Authority in South Africa has meant that some of the expertise of the white community has been lost. As with the experience of the 50/50 quota system applied to police recruitment in Northern Ireland, there is a risk of backlash. Just as young Protestant unionists may feel that they personally did not benefit from police recruitment arrangements in the past, and should not be denied work purely on the basis of their community background, so young white South African males, who may have carried no personal blame for the *apartheid* regime of their predecessors, may feel unfairly discriminated against. The debate is a complex one, but in South Africa measures such as these are generally seen and accepted as necessary to redress the historical imbalance, and to develop widespread support for the new arrangements.

3.4.2 Reflective Judiciary

Recommendation 69 of the Criminal Justice Review states that:

> *"It should be a stated objective of whoever is responsible for appointments* [to the judiciary] *to engage in a programme of action to secure the development of a judiciary that is as reflective of Northern Ireland society, particularly by community background and gender, as can be achieved consistent with the overriding requirement of merit."*[137]

[137] Op. cit., Criminal Justice Review, para. 6.85, pg. 130.

As with any other element of the criminal justice system, the Review concluded that the judiciary should be, and be seen to be, reflective of the community it serves. This recommendation runs somewhat counter to a long-standing constitutional convention that because the judiciary must be, and be seen to be, entirely independent and impartial, a 'reflective' judiciary is an unnecessary goal. The logic runs that judges are independent; judges are expected to make their decisions solely in accordance with the law and in the light of the evidence presented to them; judges must therefore have no regard for issues of gender, age, political belief and so on. Apart from the obvious fact that this is not always true in practice, since judges – however well trained – are only human, with the prejudices and stereotypes that society encourages in us all, it disregards the importance in a pluralist society of having judges mirror society's diversity. People of all ages, genders, races and other characteristics pass through the criminal justice system, and a mostly white male judiciary could be ill-equipped to address the challenges posed to the criminal justice system. The claim to be "gender blind" is, for example, unhelpful when a male judiciary is expected to be able to deal effectively with female witnesses, victims, suspects and (increasingly) practitioners.

Certainly given the last thirty years of violent conflict in Northern Ireland, the judiciary have to work hard at building confidence in their independence and impartiality. Many of their critics will point to the fact that judges did not challenge and were therefore arguably complicit in the human rights abuses stemming from the operation of the emergency legislation. Rather, the judiciary has shown itself to be at times indifferent and sometimes hostile to human rights arguments put before them,[138] and have traditionally been perceived as taking a pro-establishment stance. At the very least, there is a problem of perception, if not reality, and the new arrangements need to address this. It is the perception (and reality) of independence in a divided society like Northern Ireland that led the Review to consider Recommendation 69 so important.

However, it was clear from the government's response to this recommendation in the first Implementation Plan[139] that it did not intend to give it statutory

[138] There are a number of very recent examples of this hostility to human rights, see for example In the matter of an application by "E" for judicial review [2004] NIQB 35; In the matter of an application for judicial review by the Northern Ireland Commissioner for Children and Young People of the decisions announced by the Minister of State for Criminal Justice, John Spellar on 10 May 2004 [2004] NIQB 40; and In re Northern Ireland Human Rights Commission [2002] UKHL 25.

[139] Op. cit., Criminal Justice Review Implementation Plan, pg. 40.

effect. Instead, a much weaker response was provided, whereby the NI Court Service would merely be responsible for taking forward the recommendation in co-operation with the Equality Commission. The Justice Act 2002 was similarly weak, stating only that the Judicial Appointments Commission[140] must ensure *"so far as it is reasonably practicable to do so"* that a range of persons reflective of the community is available for consideration by the Commission in making a judicial appointment, with selection solely on the basis of merit. Apart from failing to define "merit" and yet simultaneously implying that "merit" could not itself encompass the value of appointing a more reflective judiciary, this was a very weak formulation. Other important bodies – in particular the Human Rights Commission, the NI Policing Board and the Parades Commission – have all been placed under a statutory requirement to be reflective of society. CAJ expressed concern that similar legislative effect was not given to Recommendation 69.[141]

One of the results of the government's unwillingness to make legislative provision regarding the composition of the judiciary is that two years after the first Implementation Plan, only limited discussion of this issue had taken place between the Court Service, the Equality Commission, the Office of the Judicial Appointments Commissioner, the Bar Council and the Law Society, with little progress achieved. A Judicial Outreach Consultative Forum was set up by the Court Service in December 2003, pending the establishment of the Judicial Appointments Commission, to take forward discussion on how to achieve a reflective judiciary, improve equal opportunities and encourage applications to the judiciary.

After much lobbying, recommendation 69 was eventually made a statutory obligation via the new Justice Act 2004. This should hopefully put pressure on the relevant authorities to take a more active role in considering how to improve the "reflectiveness" of the judiciary.

Despite this welcome development, some obvious difficulties remain in developing a strategy, the most pressing and disturbing of which is the lack of information available on the current composition of the judiciary. An obvious starting point when trying to ensure a reflective judiciary (as with the general workforce, as discussed above) is to ascertain how it stands at present. The

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[140] See discussion below of recommendation 77 re Judicial Appointments Commission.
[141] Op. cit., CAJ Submission no.122, pg. 10.

Audit Report of the Judicial Appointments Commissioner noted that this information was not available and made express recommendations that "*the Court Service should urgently develop an adequate monitoring system for the whole of the judiciary*".[142] However, the Court Service response only indicates that *applicants* for judicial posts will be monitored. This lack of information on community background or political opinion of the current judiciary is confirmed in the various Justice Oversight Commissioner reports. It is also interesting to note that in making judicial appointments to the Judicial Appointments Commission, the Lord Chancellor (or whoever is responsible for making these nominations) is required under the Justice (Northern Ireland) Act 2004 to ensure, as far as is practicable, that the membership of the Commission is reflective of the community in Northern Ireland.[143] Given that we do not know the make-up of the bench at present, it is difficult to ascertain whether the judicial appointments, and thus the Commission as a whole, is reflective as required.

While CAJ welcomes the monitoring of judicial applicants, it is nonetheless insufficient to affirm public confidence in the 'reflectiveness' of the judiciary at all levels in Northern Ireland. It goes without saying that, until the community balance of the current judiciary has been determined, it will be almost impossible to identify whether certain groups are underrepresented. Any measures to promote representation will therefore operate in a knowledge vacuum which is likely to reduce their efficiency. Any resistance to monitoring on grounds of judicial independence can be countered with the following insight from the Judicial Appointments Commissioner's Audit Report:

> *"the argument that monitoring would affect judicial independence is something of a* non-sequitur. *Rather, it would make the appointment process more transparent and open, and highlight if there was a genuine problem of community background within the judiciary. At present, claims that the judiciary do not reflect the community they serve cannot be substantiated or rejected, as the information to support or dispute such claims is not available."*[144]

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[142] Commissioner for Judicial Appointments for Northern Ireland, Audit Report, February 2003, para. 5.5.21, pg. 71. Para 5.10.1 further notes that *"monitoring of all candidates for judicial appointments and... existing members of the judiciary should be undertaken to comply with best practice that occurs in other occupations in Northern Ireland."* (pg.74).

[143] Op. cit., Justice (Northern Ireland) Act 2004, s.2(1). This Act in fact amended s.3(8) of the Justice (Northern Ireland) Act 2002 which only required that lay members of the Judicial Appointments Commission be reflective of the community.

[144] Op. cit., CJA Audit Report, pg.74.

Compulsory monitoring of existing members should be urgently introduced as a sign of genuine commitment to embedding cultural and institutional change via the furtherance of recommendation 69.

Related to recommendation 69 is recommendation 77 on the establishment of a Judicial Appointments Commission (JAC) responsible for judicial appointments from the level of High Court judge downwards.[145] Notwithstanding the requirements to monitor the existing judiciary noted above, the establishment of a JAC (in advance of devolution) is a welcome and much-needed step to ensure greater transparency and openness in the appointment of judicial offices. Its operation should also ensure that a more reflective judiciary can be put in place through future appointments. It is particularly noteworthy that the Justice (NI) Act 2004 gave statutory backing to a key objective of the JAC of engaging in a programme of action to secure a judiciary that is as reflective of Northern Ireland society as can be achieved consistently with the requirement of merit.

International experiences of a reflective judiciary

High Council for the Judiciary, Belgium

Aside from its work in appointing judges and monitoring and receiving complaints in relation to the Belgian judiciary,[146] the Belgian High Council for the Judiciary *(Conseil Superieur de la Justice)* is also very interesting in terms of the approach that it has adopted internally to ensure its representativeness. The appointment of members to the council is a rather complicated but very original process. Of the 44 members, half must be elected from two bodies referred to as "colleges" – one of which is French and the other Dutch. Each college comprises 11 magistrates (elected from within the judiciary) and 11 non-magistrates (elected by parliament). When

[145] The Judicial Appointments Commission (JAC) will be responsible for making recommendations for judicial appointments from the High Court downwards to the Lord Chancellor, in the absence of devolution, and to the First Minster and Deputy First Minister in a devolved administration. Responsibility for appointments to senior judicial office remains with the Queen upon recommendation from the Prime Minister (this is in fact a dilution of the Criminal Justice Review's recommendation in this regard. Recommendation 75 stated that the Prime Minister must make senior judicial appointments on the basis of recommendations of the First and Deputy First Minister. S.4(3) of the Justice (Northern Ireland) Act 2002 instead stated that recommendations for appointment by the Prime Minister would be made "only after consultation" with the First Minister and Deputy First Minister.). The JAC is to be made up of 5 judicial members, 2 members from the legal profession and 5 lay members. Section 3 of the Justice (NI) Act 2002 was brought into force in January 2005 so that the Commission could begin work. Advertising and recruitment for members of the JAC took place in 2004, and appointments were made in June 2005. See www.nijac.org

[146] See Chapter 2.

voting for the 11 magistrates, a vote is only valid if it is cast for at least one sitting magistrate, one member of the "ministère publique" (which includes the prosecution service) and one candidate from each sex. For the 11 non-magistrates, the parliament is obliged to nominate 4 of each sex, at least 4 lawyers, 3 university or higher academic professors, and 4 members from any other professional field. These 44 members are then again divided proportionally on all levels, between the two commissions of the Council – the commission of nomination and designation and the commission of opinion and inquiry. The rationale is that such representation in the Council will improve the chances of appointing a representative judiciary in Belgium and allow the Council to respond to complaints and conduct inquiries with greater impartiality and fairness.

Judicial Appointments Board, Scotland

The Judicial Appointments Board for Scotland was established in 2002 and has ten members, consisting of five legal members and five lay members, including a lay chairperson. The future Judicial Appointments Commission for Northern Ireland on the other hand, consists of eight judicial and legal members, including the chair, and only five lay members. The differences between the two systems are notable, particularly in view of comments expressed in a report from the Lord Chancellor's Department which highlight the impact that the composition of an Appointments Commission may have on efforts to make the judiciary more reflective:

> *"A Commission dominated by the judiciary and lawyers might produce a self-perpetuating judicial oligarchy, hindering attempts to make the judiciary more reflective of society as a whole".*[147]

According to the report, it is the declared intention in Scotland to produce a judiciary "more reflective of society." The report questions whether it would be the place of the responsible minister to issue guidance on this matter, and if so whether the guidance should be statutory; and asks what advisory role, if any, parliament would play.[148] The implication is that changes in all of these areas would be helpful.

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[147] "Judicial Appointments: lessons from the Scottish experience", Committee of the Lord Chancellor's Department, House of Commons 902, Second Report of Session 2002-2003, para.23.
[148] Ibid., para.19.

The first annual report of the Judicial Appointments Board explains that the Board has a remit to consider ways of encouraging applications from minority and under represented groups[149] and includes a requirement:

> *"to make such recommendations on merit, but in addition to consider ways of recruiting a Judiciary which is as representative as possible of the communities which they serve."*[150]

The annual report explains that the Board maintains statistical data on applications received, with particular reference to age, gender, ethnic background and disability, in order to improve the monitoring of diversity in the judiciary. This information is all anonymised and publicly available as an appendix to the report. The results of monitoring have so far highlighted a dearth of applications from members of ethnic minority communities, which in turn has prompted the Board to invest in research into improving opportunities for members of ethnic minorities to study law and later enter the legal or judicial profession. The report of the Committee of the Lord Chancellor's Department noted that there was some evidence that the existence of the Board had helped encourage more applications from practitioners based outside Edinburgh. This might suggest that there is new confidence in the independence of the system and that perceived "connections" are now less of a factor in deciding judicial appointments than previously.

There are many lessons to be learnt from the Judicial Appointments Board in Scotland. The Board is open-minded and enthusiastic about consulting the experience of other countries in relation to achieving a reflective workforce and promoting equal opportunity. It appears keen to draw on best practice from both the private and public sectors and has research capacity (two internal working groups) to carry this out.

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[149] The Judicial Appointments Board for Scotland, Annual Report 2002-2003, p.1.

[150] Ibid., para. 19. Note that this formulation does not allow for the dichotomy that is often established between appointing on "merit" or making "representative" appointments. Both criteria can and should be applied to any good appointments process.

3.4.3 Equity monitoring

Recommendation 5 of the Criminal Justice Review states that:

> *"the Criminal Justice Board and its research sub-committee be tasked with developing and implementing a strategy for equity monitoring the criminal justice system, as it affects categories of people, in particular by community background, gender, ethnic origin, sexual orientation and disability; whilst ensuring that this is done in a way that does not compromise judicial independence."*[151]

Recommendation 6 further states that:

> *"the outcome of equity monitoring should be published on a regular basis, to the maximum extent possible without risking the identification of the community background of individuals."*[152]

As noted by the Criminal Justice Review, *"[A] core value of the criminal justice system ... is that it should treat people fairly and equitably regardless of their background."*[153] The Review highlights that opinions expressed in the course of the consultation indicated variously that, *"Catholics were likely to receive less favourable treatment than Protestants and that the less well-off were likely to be treated unfairly in comparison to the affluent."*[154] Further, *"[s]ome women described the experience of court as being in an unsympathetic environment."*[155]

While Article 56 of the Criminal Justice (Northern Ireland) Order 1996 gives the Secretary of State the power to publish information to help people in the criminal justice system avoid discrimination on any improper ground, data is not yet collected which would allow such monitoring across the system. It was with this in mind that the Review made recommendations 5 and 6 to ensure that any potential differential treatment of people who pass through or are affected by the criminal justice system could be identified and addressed.

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[151] Op. cit., Criminal Justice Review, para. 3.38, p. 38
[152] Ibid., para. 3.41, p.39
[153] Ibid., para. 3.31, p.36
[154] Ibid., para. 3.36, p. 37.
[155] Ibid., para. 3.36, p.37.

This is clearly necessary to ensure both that human rights are being protected within the system, and that the various criminal justice agencies command the confidence of the community served.[156]

The initial Implementation Plan produced by government accepted these recommendations and stated that they would be addressed on an ongoing basis. Again, they were not given statutory effect in the Justice Act 2002. CAJ expressed concern that the gathering of such information was to be addressed internally by the criminal justice agencies themselves rather than via a mechanism with some external or independent input, and that no timetable for implementation was laid out. The Updated Implementation Plan envisaged a gradual "phasing in" of equity monitoring on a pilot-type basis and initial dates were set for the start of this process.

However, the Plan was ambiguous about when exactly equity monitoring would be implemented in full. Moreover, it stated that the initial phases of equity monitoring would concentrate on reviewing data such as age and gender, which is in fact already gathered during the prosecution process. The Plan does not refer to any action to monitor community background, despite the Review's express recommendation on this topic.

CAJ's fears over delays arising from the lack of a clear timetable have in fact been borne out. This is particularly evident when following the progress (or lack of it) of equity monitoring through the various reports of the Justice Oversight Commissioner. Lord Clyde's first report, published in December 2003, indicated that the Statistics and Research Sub-Group of the Criminal Justice Board intended to run a pilot project on equity monitoring, and had appointed a driver to work with the Causeway Project,[157] but that it would be 2008/9 before the results of this would be published. This is clearly an unacceptable delay, particularly if a strategy for overall equity monitoring is dependent upon the results of this pilot project.

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[156] The findings of a 2003 Omnibus Survey commissioned by the Northern Ireland Office's Research and Statistics Sub-Committee, which incorporated several questions on equity monitoring, underscore the importance of equity monitoring to the public. Eighty-three percent of those surveyed agreed that it was necessary to monitor people interacting with the justice system to assess whether everyone is being treated equally and fairly. See NIO Research & Statistical Bulletin 6/2003 "Views on Equity Monitoring in the Criminal Justice System," November 2003, available at *http://www.nio.gov.uk/views_on_equity_monitoring_the_criminal_justice_system_findings_from_ni_omnibus_survey.pdf*

[157] Supra note 54.

The second report in June 2004 goes on to give various examples of some statistics that have been gathered, but it is clear that these are patchy. What is missing is a clearly defined strategy with plans for implementation of that strategy. It is proposed that the information technology systems for the sharing of information across criminal justice agencies via the Causeway Project will provide statistical equity information. However, given that the initial stage of this project is dealing only with criminal records, this information will be extremely limited and is certainly a long way from the broad-ranging statistical equity monitoring that the Review had in mind. It also appears from this report that the Causeway Project will be useful in processing information once it has been collected – but there does not appear to be any discussion of *how* information will be collected, which is clearly the first and most important step. Added to this is the fact that 2008/9 is suggested as the date at which there will be a sufficiency of material derived from the Causeway Project to enable valid and reliable statistics to be published. Again, this is an unacceptable delay.

The third report of the Justice Oversight Commissioner (December 2004) makes for even more depressing reading. It reports that the pilot project has still not come into operation because of *"pressure on resources and requests for extensions to be made to the scope of Causeway."*[158] It is still proposed that the overall strategy for equity monitoring will be developed only upon completion of the pilot and when the necessary information is available from the Causeway Project. Lord Clyde expresses disappointment in this delay and states that:

> *"It is important in the public interest that progress be made in advance of the resource which it is hoped Causeway may eventually provide. What the recommendation requires is firstly the development of a strategy and then the implementation of that strategy."*[159]

The Oversight Commissioner's fourth report in June 2005 sadly reports little real progress in the development of a strategy, apart from the establishment of a high level sub-group and some plans for pilot postal surveys and interviews. Again Lord Clyde emphasises the importance of this recommendation in creating and building upon public confidence in the system.

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[158] Third Report of the Justice Oversight Commissioner, December 2004, p.28.
[159] Ibid., p. 28.

While it is recognised that development of a broad equity monitoring strategy is a large and quite complex piece of work, the requisite sense of urgency is not obvious. A number of simple steps could be taken: the monitoring statistics produced by the Equality Commission on an annual basis could be used as a template and adapted to suit the criminal justice system; if the Causeway Project is to be one of the instrumental motors in this process, it would be helpful to have a detailed timetable and a clearer methodology as to how it is intended to work; the assistance of specialised consultants in the field of equality who may be able to provide expert guidance on how best to proceed with the process of equity monitoring in relation to all of the Section 75 categories could be engaged; if the capacity of the Statistics and Research Branch group would not enable it to publish figures resulting from equity monitoring before 2008/2009, then attempts should be made to secure the allocation of extra resources as a priority.

Overall, however, the impression one is left with is that this is not a recommendation that is being taken sufficiently seriously, and that in fact arguments are being made to suggest that it is a more complex process than it need be. Determining methods of collecting information for the purposes of monitoring would appear to be one of the reasons offered for delay. However, models for doing so are available in England and Wales, where the collection and monitoring of information on race grounds is now required following the recommendations of the Stephen Lawrence Inquiry. Research and evaluation on the success or otherwise of the various procedures is also readily available. Once again, therefore, the long delays in implementation of this recommendation leave open to question the commitment of the government and the various criminal justice agencies to real and meaningful change which would command greater confidence in the system.

3.4.4 Giving of reasons for no prosecution

Recommendation 49 of the Criminal Justice Review states that:

> *"where information is sought by someone with a proper and legitimate interest in a case on why there was no prosecution, or on why a prosecution has been abandoned, the prosecutor should seek to give as full an explanation as is possible without prejudicing the interests of justice or the public interest. It will be a matter for the prosecutor to*

> *consider carefully in the circumstances of each individual case whether reasons can be given in more than general terms and, if so, in how much detail, but the presumption should shift towards giving reasons where appropriate."*[160]

Public confidence in the Prosecution Service has historically been low amongst many in Northern Ireland. This is due in part at least to a number of decisions not to prosecute in controversial cases, which have significantly marred the image of the service as an independent non-politically partisan agency. The failure to give reasons for non-prosecution has served to exacerbate the situation. One of the explanations offered by the Prosecution Service for this failure has included a belief that giving such reasons might breach the rights of the accused person/s by essentially giving rise to a public trial of the accused without any of the protections in law.[161] CAJ's submission to the Criminal Justice Review, however, provided detailed case studies of the Finucane, Hamill and McCabe murders which suggested that the failure to give reasons at least in these three controversial cases had little to do with concerns about possible injustice to an individual, but seemed to be motivated rather by concerns for the interests and reputation of the state.[162]

One measure, therefore, which would most certainly help to build confidence in any new Prosecution Service would be the development of a policy or practice of giving reasons in controversial cases, particularly in cases involving the state police or army forces as accused.

However, the first Implementation Plan gave no indication that the policy of the Prosecution Service in relation to the giving of reasons was likely to change in the aftermath of the Review. Indeed the Justice Act 2002 simply required the Director to develop a code of practice as suggested in recommendation 50 of the Review, but made no reference to *"outlining the factors to be taken*

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[160] Op. cit., Criminal Justice Review, para. 4.167, pg. 95.

[161] Deciding when it might be appropriate to give reasons for failure to prosecute in certain cases is a dilemma that many jurisdictions are attempting to grapple with, even those which do not suffer from problems of public confidence in the independence of their prosecution services. In 2003, following the controversial and public decision not to prosecute in a case in which a young girl was badly injured in a car accident, the DPP for the Republic of Ireland expressed his discomfort at the inadequacies of the system in that jurisdiction in terms of giving reasons to victims where a decision is taken not to prosecute. He said that he would be actively consulting his counterparts in other jurisdictions to see what lessons could be learned from the experiences of others ("DPP Seeking Ways to Explain Decisions", Irish Times, Thursday, September 25, 2003).

[162] Submission by CAJ to the Criminal Justice Review, s. 78, November 1998. See also "A Briefing Paper on the Office of the Director of Public Prosecutions for Northern Ireland", Pat Finucane Centre, February 2000.

into account in applying the evidential and public interest tests on whether to prosecute" as recommendation 50 expressly stated.[163]

This position was maintained in the Updated Implementation Plan, albeit with a proviso that in light of the ECHR decision in Jordan v the United Kingdom,[164] the Director recognised that *"there may be cases in the future, which he would expect to be exceptional in nature, where an expectation will arise that a reasonable explanation will be given for not prosecuting where death is, or may have been, occasioned by the conduct of agents of the state."*[165] However, this is still a long way from the wider practice envisaged by the Review, but rather left the decision and practice entirely at the discretion of the Director.

In CAJ's response to the Updated Implementation Plan,[166] we encouraged the Director of Public Prosecutions to consider drafting an unambiguous public statement, in the codes of practice and ethics or elsewhere, on:

(a) the procedure that should be adopted when making a decision whether to prosecute;
(b) the considerations should be applied in deciding whether or not to give reasons for a prosecutorial decision, including a legal test to determine when a matter is in the "the public interest" or not.

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[163] Op. cit., Criminal Justice Review, para 4.169, p. 60.
[164] Jordan v.United Kingdom (2003) 37 E.H.R.R. 2. In November 1992, 22 year old Pearse Jordan – while unarmed – was shot three times in the back and killed by officers of the Royal Ulster Constabulary (RUC). In November 1993, the Director of Public Prosecutions (DPP) issued a direction of no prosecution on the basis of insufficient evidence to warrant prosecution. The family took the case to the European Court of Human Rights, arguing *inter alia* that Pearse was killed by an excessive use of force contrary to Article 2 of the European Convention on Human Rights, that there had been no prosecution in relation to the unjustified killing and that there had been a failure to comply with the procedural requirement under Article 2 to provide an effective investigation into the circumstances of the death. The European Court of Human Rights commented that Jordan's killing by members of the RUC "cried out for an explanation" and stated that "[t]here was no reasoned decision available to reassure a concerned public that the rule of law has been respected. This cannot be regarded as compatible with the requirements of Article 2 [of ECHR]." Moreover, it noted that the inquest procedure, unlike that in England and Wales, did not, among many other things, provide for an inquest jury to enter a finding of "unlawful killing" which could play an effective role in securing a subsequent prosecution.
[165] Op. cit., Criminal Justice Review Implementation Plan Updated, p. 44.
[166] Op. cit., CAJ Commentary on the Updated Implementation Plan.

A Code for Prosecutors (incorporating the Review requirements to have codes of both ethics and practice for the Prosecution Service) was subsequently drafted and issued for public consultation in March 2004. Unfortunately however, the Code did not encapsulate the Review recommendation that "the presumption should shift towards giving reasons where appropriate". A revised code issued for consultation in April 2005 moved slightly to a policy of giving reasons "when asked and in the most general terms" and the final code removed the category of "when asked" to a policy of giving reasons "in all cases albeit in the most general terms." This is clearly still a long way from the Review's recommendation that "as full an explanation as possible" is given and that the presumption should shift towards the giving of reasons where possible.

In addition, the formulation of section 4.3 (the Public Interest Test) of the Code is problematic in that the presumption that the "public interest requires prosecution where there has been a contravention of the law", is noted only *after* listing the exceptional cases where the public interest would not require prosecution. Moreover the Code does not give guidance, nor does it impose the application of a standard of reasonableness, in deciding when the issue of "national security" (listed as one of the public interest grounds) would justify a decision not to pursue a prosecution. This is particularly problematic, given the perception that national security grounds have been used unjustifiably in the past. All in all, the Code errs towards excessive caution, and provides little guidance to prosecutors who will need to assess whether claims of "national security" should in fact predominate over other concerns, or whether it is simply an excuse to protect ministers or others from public embarrassment.[167]

The situation is even more worrying in light of recent cases around adequate investigation and failure to prosecute. Following the European Court of Human Rights decision in the Jordan case,[168] the Jordan family sought to pursue this judgment in the domestic courts by way of a judicial review of the decision of the DPP not to prosecute. While actions of this nature have not generally been successful in Northern Ireland,[169] it was to be hoped in light of

[167] See Comments by CAJ on the Draft Code for Prosecutors, July 2004 and May 2005.
[168] Supra note 164.
[169] For example, in the case of In the Matter of an Application by David Adams [2001] NICA 2, the court held that there was no statutory obligation on the DPP to give reasons under the 1972 Prosecution of Offences Order, and that the decision by the DPP for England and Wales to decide to give details for reasons not to prosecute in certain cases was "a matter for his discretion".

the ECHR case that this avenue would once again be opened in order to give full effect to the ECHR's decision (and indeed to recommendation 49 of the Criminal Justice Review). Unfortunately, the *status quo* was maintained, with the domestic courts determining that the presumption for not giving reasons stood, and that this was again a decision at the discretion of the Director, which would only be activated in exceptional circumstances.[170]

Recommendation 49 of the Review was even-handed, arguing that the balance should shift towards the giving of reasons while accepting that there may be instances where this was not possible because it could conflict with the interests of justice. What has happened since then is a maintaining of the practice of not giving reasons while accepting that there may be exceptional cases where this may be required. This reverses the emphasis of the Criminal Justice Review.

The lack of progress in implementing this recommendation is particularly disappointing. To many this will be seen as an effort by the Prosecution Service to obstruct progress as recommended by the Review. Indeed, it could be argued that other changes in the Prosecution Service are pointless if elements such as this, so fundamental to commanding confidence in the institution, are resisted.

International experiences of giving reasons

South Africa

Under the *apartheid* regime, the prosecuting authority in South Africa was made up of attorneys-general who decided when and which prosecutions could be instituted and who were not obliged to give reasons for their decisions. With the advent of democracy in 1994, the prosecuting authority was subject to major reform and one of the changes was the development of a National Prosecution Policy for the prosecution service. Among other things, this policy was designed to bolster public confidence in the criminal justice process

[170] In the matter of an application by Hugh Jordan for judicial review, [2003] NICA 54. An even more worrying development in terms of giving effect to the rights arising from the European Convention on Human Rights was the House of Lords decision In re McKerr [2004] UKHL 12 which held that these rights only came into play after the passage of the Human Rights Act in October 2000 which incorporated the ECHR into domestic law. This effectively leaves the victims of any breaches of Article 2 that occurred before 2000 without any remedy, and flies in the face of previous ECHR judgments.

by informing the public on how prosecutors exercise their discretion and make decisions.[171] In addition, actions for judicial review can now be pursued to contest decisions not to prosecute.[172]

The National Director of Public Prosecutions may – for the purpose of reviewing a decision to prosecute or not – intervene in any prosecution process where policy directives are not adhered to.[173] There is also an internal complaints system through which people can lodge complaints if they are unhappy about a decision or procedure. Nolle certificates can be issued so that private citizens can take on prosecutions themselves if the state refused to prosecute.[174]

In a meeting with Advocate Sipho Ngwema, senior manager in the Public Relations Office of the National Director of Public Prosecutions in South Africa, he emphasised that one of the goals of the new prosecution service is to be very open and transparent. In that respect, publication of the prosecuting code has been extremely important so that all citizens understand the grounds on which the prosecution decides to prosecute and when it abstains from so doing. Issues of human rights and of dignity were very much emphasised in this document because of the historical lack of confidence in the old system, and as noted earlier, the Bill of Rights is seen to be a central element of the process.

So far, the policy on the giving of reasons has not been affected by concerns about the independence of the Prosecuting Authority. Some suggested that this might be due to the close links between the ANC and the National Director and other prosecutorial staff of the new Prosecuting Authority, but Advocate Ngwema noted that the Prosecuting Authority had demonstrated their independence from the ANC in several high-profile cases (e.g. the prosecution of well known ANC figures such as Winnie Mandela and the ANC's chief whip in Parliament, Tony Yengeni).

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[171] Op. cit., Research paper commissioned for CAJ, Melanie Lue-Dugmore. The policy manual consists of a prosecution policy, policy directives and a code of conduct for members of the prosecuting authority.
[172] Van Zyl Smit D & Steyn E, Prosecuting Authority of South Africa, as cited in Lue-Dugmore, Melanie 2003.
[173] Ibid.. p.146
[174] Certificates Nolle Prosequi are written by the Director of Public Prosecutions when s/he decides not to prosecute someone. These are required before a private prosecution can be initiated. Meeting with Advocate Sipho Ngwema, Prosecuting Authority, Pretoria, 2003.

Scotland

Traditionally, Scotland also operated a policy of not giving reasons for decisions other than in a limited number of cases related to child abuse and to other victims of sexual offences. However, in February 2005, the Lord Advocate announced a new policy to the effect that wherever possible, victims and next of kin who requested it would be provided with an explanation by the Crown for a decision to mark a case "no proceedings". Indeed in England and Wales, the Crown Prosecution Service (CPS) policy has also changed in line with its "Direct Communications with Witnesses" initiative of 2001 arising from the Glidewell and Macpherson recommendations.[175] The CPS is now committed to giving as much detail as possible on decisions to drop or substantially alter charges.[176] The effect of these initiatives is that Northern Ireland lags significantly behind England, Wales and Scotland in its policy of giving reasons – despite the recommendation of the Criminal Justice Review in 2000.

3.4.5 Complaints Mechanisms, Codes of Ethics and Discipline

Recommendation 16 of the Criminal Justice Review states that:

> *"All parts of the criminal justice system should be covered by complaints mechanisms that are well publicised, easily accessible and understood, administered with due sensitivity and expedition and which, where appropriate, have an independent element. The workings of the complaints mechanisms should receive coverage in annual reports and, in those parts of the system subject to inspection, be inspected."*[177]

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[175] See "Review of the Crown Prosecution Service", cm 3960, June 1998 (Glidewell report), and "The Stephen Lawrence Inquiry
– Report of an Inquiry by Sir William MacPherson", cm 4262 I, February 1999.

[176] The practice of judicial review of decisions not to prosecute is also much more developed in England and Wales, as demonstrated by the judgment in the Manning case (R v DPP ex parte Patricia Manning [2001] QB 330). In this case, Kennedy LCJ made clear that a decision by the DPP in England and Wales is susceptible to judicialreview. While noting that this was a power which would be used sparingly, he stated that "the standard of review should not be set too high, since judicial review is the only means by which the citizen can seek to redress against a decision not to prosecute and if the test were too exacting an effective remedy would be denied." This is in stark contrast to the decisions in cases on this issue in Northern Ireland, where the discretion of the prosecution service is protected.

[177] Op. cit., Criminal Justice Review, para. 3.70, p. 47.

Independent and effective complaints systems are an essential element in ensuring the accountability of any public body. They provide the mechanism for the pursuit of disciplinary action against individuals who are not meeting the appropriate standards, and they also highlight areas where there are systemic as well as, or sometimes instead of, individual breaches. As such, complaints mechanisms provide short and longer-term solutions to problems and over time can be a very important preventative measure. Recommendation 16 therefore sought to make a general point about the need for effective and accessible complaints mechanisms across the system. The Review, however, also made specific recommendations about complaint mechanisms in relation to both the judiciary and the prosecution service.

The initial Implementation Plan published by government accepted these proposals in principle but once again left it to the individual agencies to implement them without any central guidance or timescale. The Justice Act (NI) 2002 gave statutory effect only to the recommendation relating to complaints against the judiciary.[178] The Updated Implementation Plan, while indicating that some progress had been made to meet this recommendation at the level of individual agencies, highlighted that no effort appears to have been made to harmonise approaches across the criminal justice sector. According to the reports of the Justice Oversight Commissioner this continues to be the case.

Central guidance would be particularly useful as regards the Review's reference to an independent element. It is questionable whether a complaint could be deemed to have been independently assessed if the assessor is a member of staff of the agency concerned, albeit unconnected to the person under complaint. It is clear from reading examples from across the agencies that the approach to this aspect of the recommendation varies greatly, ranging from a lay member (the Law Society) to an Ombudsman (Prison Service).

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[178] Recommendations 105 and 55– 57 respectively. The recommendations in relation to complaints against the judiciary have however been extremely slow in progressing. Although legislated for in the Justice (NI) Act 2002, many of the sections related to the judiciary in that Act were framed in the context of devolution where the Lord Chief Justice would be head of the judiciary. Added to this, the reforms to the office of the Lord Chancellor being advanced through the Constitutional Reform Bill (as discussed in Chapter 2) have made the situation more complicated in terms of reallocation of powers and responsibilities. It is now expected that responsibility for the judiciary in Northern Ireland will transfer to the Lord Chief Justice in the absence of devolution. However, CAJ feels the delays in developing complaints mechanisms are unnecessary and unacceptable. As the Justice Oversight Commissioner highlights in his second report, *"It isconsidered that there is no sound reason why these provisions should not be commenced in advance of any constitutional reforms which may or may not take place at a future date."* (op. cit., June 2004, p. 47).

This results in great disparity in the level of independent involvement in complaints mechanisms, despite the fact that this is clearly a crucial factor in securing public confidence in the system.

Although not highlighted specifically by recommendation 16, clearly another important element in commanding confidence in any complaints mechanism is the extent of action taken once a complaint has been upheld. Publication of the number of complaints received, those upheld, and the kinds of issues raised etc. in the agency's annual report is important. There should, however, also be some clarity about the kinds of remedies and disciplinary actions that follow on from founded complaints. A commitment of this kind would lead to greater transparency and accountability.

Linked to this issue of remedy is the extent to which breaches of codes of ethics are adequately tied into disciplinary action. Recommendation 7 of the Criminal Justice Review states that:

> *"As part of our strategy for developing transparency and accountability mechanisms, we recommend the publication of statements of ethics for each of the criminal justice agencies covering all those employed or holding office in the criminal justice system."*[179]

Ethics statements, which include the values and mission statements of an organisation, are one of the important starting points for developing a corporate/institutional culture. They are a point of reference for employees but more importantly, for senior management, who are then responsible for developing policies, practices and working environments to embody the vision that the statement articulates. Training, promotions, managerial supervision and disciplinary codes should all be informed by such ethics statements.

The Review recommended the publication of ethics statements for each of the criminal justice agencies in order to enhance transparency and accountability. The importance of this recommendation is underlined by the fact that there have never been codes of ethics for the prosecution, court, probation or prison services in Northern Ireland. The centrality afforded to international human rights standards in the Review suggests that ethics statements should embody these principles in the hope of attaining an institutional rights-based identity for the criminal justice agencies.

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[179] Op. cit., Criminal Justice Review, para. 3.45, p. 40.

More importantly, however, there must be clear measures in place to allow discipline where breaches of codes of ethics occur. The police in Northern Ireland introduced a code of ethics which is intimately tied into disciplinary codes, and the necessity of disciplining those who are resistant to change was also a point strongly made in the research carried out in South Africa and Belgium.[180] It was clearly felt that disciplining members of criminal justice organisations who breach their own policies or codes of conduct sets an example and sends out a clear message about the values of the organisation. This would therefore be a very important and effective way of combating internal resistance to change.

International experiences of complaints mechanisms, codes of ethics and discipline

Belgium

The research commissioned in Belgium emphasised the important consequences for the organisational culture of the Belgian police of defining the function of the police in human rights terms. The Act of 5 August 1992, as reiterated in the Act of 7 December 1998, defines the police function as being to protect fundamental rights and freedoms and promote a democratic society. This commitment is intended to guarantee the impartiality, integrity and discretion of the police in addition to regulating their powers and mode of operation. The development in 2003 of a Code of Professional Conduct for the Police further develops this principle, and thereby allows human rights to permeate the police and become integral to its culture.

In relation to the judiciary, the Commission of Opinion and Inquiry of the High Judicial Council (referred to above and in Chapter 2) is also vested with the authority to receive and investigate complaints against the judiciary. The main purpose of this mechanism is not to provide remedies in individual cases,[181] but to determine whether the complaint is indicative of a deeper problem associated with certain practices of the judiciary. The Commission puts forward recommendations if it feels that reforms are necessary to deal with the problem area. These recommendations are not legally binding, but

[180] Meeting with Janine Rauch (Former Advisor to the South African Minister for Security and expert on South African police reform), Cape Town, March 2004; op. cit., Report produced for CAJ, Olivier de Schutter.

[181] However an inquiry which raises the existence of misconduct on behalf of a member of the judiciary may be referred to the relevant professional disciplinary body. The Council itself cannot take any civil or penal action against the individual.

the Justice Minister is required to take account of them and to make a public announcement to the parliament about how he/she intends to proceed.

However, one negative aspect of the procedure followed by the Commission of Opinion and Inquiry, as noted by critics from the NGO sector, is that it imposes a strict set of eligibility rules which result in many complaints being deemed inadmissible. One source stated that the first report of the Council in November 2001 showed that 91% of all complaints received were deemed inadmissible and of those that were considered, only 43% were actually processed. This meant that less than 5% of all complaints received by the Council's Commission received a substantive answer.

South Africa

The mission statement and prosecuting code for the South African Prosecuting Authority, refers to prosecutors as "people's lawyers" (to emphasise the idea that they are the lawyers of victims of crime and represent "the people"). This has been an important concept for creating a new culture of human rights in a prosecution service that was formerly complicit in the enforcement of *apartheid* policies. This expression of "people's lawyers" has almost become the logo of the new Prosecuting Authority – it conveys a simple and accessible message to the public of a prosecution service that works for and is open to the people, thus helping to build confidence levels.

Other interview material highlighted the impact that the lack of a code of conduct and ethics was having in relation to the judiciary in South Africa, with the feeling being expressed that in the absence of such mechanisms, cases of inappropriate remarks and other examples of misconduct on the part of the judiciary were left unchallenged.[182]

In South Africa, as already noted, complaints mechanisms and particularly discipline were felt to be even more important than human rights training. One interviewee felt very strongly that internal discipline is key:

> *"Complaints mechanisms are only a start, it is what clear action follows from a positive finding against an officer in a complaint case that is important ... Internal discipline mechanisms must be strong and people at the top of organisations must be willing to use them to fire their own people."*[183]

[182] Interview with the Open Society Foundation.
[183] Interview with Ms Janine Rauch.

3.4.6 Human rights training

Recommendation 1 of the Criminal Justice Review states that:

> *"human rights issues should become a permanent and integral part of training programmes for all those working in criminal justice agencies, the legal professions and the relevant parts of the voluntary sector."*[184]

If human rights are to become a core value of the criminal justice system, as envisaged by the Review, then a clear starting point is to ensure that all who work in the criminal justice system are familiar with human rights principles and legal standards. This requires more than simply learning about the various international human rights instruments and the obligations they give rise to, but also learning of the values and culture that human rights instil. It is pertinent, therefore, that this kind of learning was the Review's first recommendation.[185]

The initial Implementation Plan accepted this recommendation, but left its operationalisation to the discretion of the various agencies. In response to this, CAJ stressed the importance of mainstreaming human rights training throughout the criminal justice agencies and advocated that a definite timescale should be set by which all members of staff, at all levels, could be said to have received an adequate standard of human rights training. However, the Updated Plan merely describes, in more detail than the first, the various unilateral activities that were being undertaken by the respective criminal justice agencies. It did not prescribe any guidelines for human rights training. It has subsequently become obvious that the content, quality and timescale of human rights training are not consistent across the criminal justice sector. CAJ recommended again that an independent audit be carried out on the efficiency of the various types of human rights training being delivered.[186]

The various reports produced by the Justice Oversight Commissioner confirm CAJ's view that the human rights training that is taking place would benefit immensely from a more co-ordinated approach, both within the agencies and across the system. Lord Clyde in his various reports also echoes our concerns that there appears to be little or no independent evaluation of the effectiveness

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[184] Op. cit., Criminal Justice Review, para. 3.24, pg..34.

[185] Indeed, this mirrored the first recommendation of the Patten report.

[186] CAJ's Commentary on the Updated Implementation Plan to the Criminal Justice Review and the Office of the Criminal Justice Oversight Commissioner, s.146, September 2003

and efficiency of training that is being carried out. As a result that it is hard to tell whether it is actually tailored to specific needs that will genuinely benefit staff at a working level and the organisation at a cultural level.

An independent audit would be able to assess a whole range of concerns:

- Does training focus solely on the Human Rights Act (and the obligations of the European Convention that are given domestic effect via the Act) or does it address the wider international human rights standards that the Review referred to and drew upon in making its recommendations?

- Is human rights training fully integrated into the work of the different agencies and given practical effect in policies and practices, or is it simply an add-on?

- Is the training internal to the agency, or is it used to engage with 'users' who can help practitioners address issues of institutionalised sectarianism, racism, sexism or other such concerns?

In CAJ's study into international lessons relevant to policing, published in 1997,[187] great emphasis was placed on the role that training could play in bringing about real cultural and institutional change. This potential is not however capable of being realised if the approach to training is tokenistic: human rights training must become a central component of developing an institutional culture committed to human rights.

Improvements in this area may occur as a result of Section 8 of the Justice (NI) Act 2004, which mandates the Attorney General to issue guidance to criminal justice organisations on the exercise of their functions in a manner consistent with international human rights standards relevant to the criminal justice system. In the interim, however, there is a clear need for central guidance and co-ordination, not least in terms of issuing information on the international human rights standards that apply in the criminal justice field.[188]

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[187] Op. cit., "Human Rights on Duty".

[188] The central training body for the Criminal Justice Sector – Skills for Justice – would be an obvious vehicle for co-ordinating human rights training. However, it does not currently offer any modules on human rights for the agencies in Northern Ireland.

International experiences of human rights training

Belgium

The research report commissioned on Belgium focuses essentially on human rights training within the police rather than on criminal justice, but there are obviously some issues of relevance. It notes that training within the police is regulated by ministerial decree and includes courses in human rights which have on occasion been taught by representatives of the Belgian League of Human Rights (an NGO which is affiliated to the International Federation of Human Rights). Other elements include multicultural dialogues, anti-discrimination legislation, the professional code for police (as above) and on the use of force. The report stresses that this training is not purely theoretical but rather includes practical exchanges with relevant actors in each field. In interviews, the importance of this kind of applied practical human rights training was emphasised.[189]

South Africa

The experience of human rights training in South Africa has been more mixed. The view expressed in a number of interviews was that there are limits to what human rights training can achieve; to be any way effective it must be well designed, delivered by human rights experts and given enough time to bed down. One person interviewed expressed the opinion that human rights training can only go so far in terms of changing perceptions and winning hearts and minds and that discipline mechanisms are much more effective in bringing about cultural change.[190] However, a staff member of the Prosecution Authority commented that very little training on human rights and the Bill of Rights has taken place, so it may well be that training is not working because it is not being delivered in a comprehensive manner.

3.5 Conclusion

As highlighted at the beginning of this chapter, the history of lack of confidence in the criminal justice system, particularly in its independence, openness and transparency, has done a lot of damage to the system as a whole as well as the various agencies within it. This made it all the more necessary for the Criminal

[189] Interview with Lode van Outrive.
[190] Interview with Janine Rauch.

Justice Review to recommend reforms aimed at addressing these larger issues, as well as looking into reforms of procedures and agencies themselves. The Review by and large did an admirable job of appreciating and addressing these concerns, and the particular emphasis on the centrality of human rights was most welcome.

CAJ appreciates that many of the reforms suggested by the Review were quite complex and would require an extended timeframe. Notwithstanding this, it can be argued from the examples given above that a lack of leadership in implementing the recommendations on the part of the government (e.g. by failing to give many of them a statutory basis), as well as a failure by the agencies themselves to engage meaningfully with the cultural change required, means that five years after the Review, we are still not reassured that these changes are being embraced.

One indicator of the degree of change would be levels of confidence in the criminal justice system. One would expect that over the last five years, levels of confidence in the criminal justice system would have improved, or at least been maintained. However, a community attitudes survey carried out by the Northern Ireland Office in 2003 shows that confidence levels in the system are in fact falling.[191] This would seem to suggest that members of the public are either unaware of the changes that have taken place, or believe that these have not made any real difference. Whichever is the case, confidence in the criminal justice system by those it serves is paramount, and any changes are made less meaningful if they do not have the intended impact of increasing confidence in the system. Devolution of criminal justice and policing powers could in fact boost this confidence if there is seen to be local accountability for and management of these issues.

It is worth highlighting at this juncture the important role played by two institutions established by the Review, as they hold a great deal of potential in overseeing the implementation of these reforms.

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[191] Community Attitudes Survey Bulletin March 2004. The last Community Attitudes Survey on this issue was carried out in 2003. It showed that 60% of those surveyed had confidence that the system was operating fairly, as opposed to 72% in 2002, 71% in 2001 and 69% in 2000. In 2003, the NIO discontinued use of the Community Attitudes Survey as a means of measuring public attitudes towards crime and the criminal justice system. The surveys have been replaced with a more comprehensive system based on that used in England and Wales. As a result of the switch, no data is available for 2004 and 2005. According to an NIO statistician, this data will eventually be made available, but will be difficult to compare with earlier data because of the shift in methodology.

The first is the Justice Oversight Commissioner. As already noted, it is telling that establishment of such a statutory oversight mechanism was at first resisted by government. However, Lord Clyde's subsequent four reports have proved to be an invaluable source of information in following the implementation (or lack of it) of the Review recommendations. Although in CAJ's view there are times when the Oversight Commissioner does not go far enough in condemning lack of progress, the information put in the public domain by his reports is extremely important. In addition, there are other occasions where he has usefully been able to point to a lack of progress and unnecessary delays, thereby alerting people outside as well as inside the criminal justice establishment to the need for more urgency.[192] We recommend that the office of Justice Oversight Commissioner be maintained beyond 2006 (the current timetable), so that progress in implementation of the Review can be adequately and independently assessed. CAJ recognises, however, that this body was always intended to have a relatively limited life span, and that the real challenge will be to ensure that the change process is sustained and monitored beyond the life of the Justice Oversight Commissioner.

In this regard, a second – permanent – institution of criminal justice oversight may have a particularly important role to play. The Criminal Justice Inspection[193] has been established to ensure a continuing role of inspection, evaluation, and guidance on best practice across the criminal justice system. Such an independent inspection role is likely to be extremely important in monitoring changes within the criminal justice system. The Criminal Justice Review noted a number of particular situations where the Inspection would prove necessary, for example in examining the operation of complaints mechanisms and the Prosecution Service. The office is now established and has identified a number of inspections for the years 2005/2006.[194] CAJ particularly welcomes the inclusion of the promotion of equality and human rights as one of the elements of the common core framework which the Inspection uses for its work. We look forward to reading the reports it produces, and to full implementation of the recommendations contained therein.

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[192] For example, the Oversight Commissioner has highlighted a number of instances where lack of devolution was being used as an excuse for not implementing certain reforms, where in fact they did not require devolution.

[193] The Criminal Justice Inspection was established under the Justice (Northern Ireland) act 2002, pursuant to recommendation 263 of the Criminal Justice Review. Its Chief Inspector, Kit Chivers was appointed in August 2003 and the office began operating formally immediately thereafter. Its remit is [194] For example, review of delay in the criminal justice system, role of the voluntary sector, the work of Community Safety Partnerships, Office of the Police Ombudsman, police training and the Causeway Project. See "The Spec", Newsletter of Criminal Justice Inspection, December 2004.

As noted at the outset, however, such oversight and independent inspection mechanisms can only be of limited effect in securing change – what is needed is internal pressure for and commitment to such change. Unfortunately, it is clear from the slowness, or in some cases, lack of implementation of key Review recommendations concerned with addressing cultural and institutional change, that the resistance to these is great, both from the government and within the agencies themselves. This institutional resistance to change could have a serious adverse impact. Without the real and meaningful cultural change envisaged by the Criminal Justice Review, other recommendations and reforms run the risk of becoming redundant, and indeed the devolution of criminal justice and policing powers would be of limited affect.

Chapter Four

THE DIVISION OF POWERS AND THE IMPACT OF EMERGENCY LAWS AND NATIONAL SECURITY

The various recommendations proposed by the Criminal Justice Review and the Patten Commission contain references to powers that could be transferred upon devolution, as well as powers that would be retained centrally at Westminster. Neither report addresses issues of emergency powers in any detail, but it is the case that responsibility for "national security"- including the use and regulation of emergency laws and powers – currently lies within the exclusive competence of the Westminster government and is therefore an "excepted" matter under the Northern Ireland Act 1998. The end result of these different kinds of powers ("transferred", "reserved" and "excepted") is that there is some understandable confusion over which specific powers would be devolved and which would be retained by Westminster. Any ambiguity could be politically exploited to have a destabilising effect on moves to strengthen the rule of law and on the transition to a more peaceful society. In particular, the fact that emergency legislation and national security issues will remain within the remit of Westminster could create substantial limitations on the scope of future devolved justice and policing powers in Northern Ireland. It is vital that, to the extent possible, there is clarity as to who will do what in any new devolved arrangements. This chapter is concerned with exploring two main themes.

First, it will look at some of the specific statutory powers in the justice and policing fields that will be devolved to Northern Ireland and those that will be retained by Westminster. It will consider the existing laws and measures that regulate interventions by the Westminster government in Northern Ireland's affairs and the practices that have been developed to promote co-operation and understanding between central and devolved government to assess whether these would ensure effective coordination and a sufficient degree of trust. In doing so, it will examine experiences from other jurisdictions. Particularly attention will be given to the Scottish experience, given the similarities and distinctions of its relationship with Westminster.

Secondly this chapter will look specifically at emergency laws and national security considerations and their impact on the criminal justice system to date, as well as possible future implications. The impact of emergency legislation in other countries will also be examined in this context.

4.1 Delineating Competencies in the Justice and Policing Fields

4.1.1 The legislative framework

As already highlighted in Chapter 1, the Northern Ireland Act 1998 classifies legislative and executive powers into three categories: excepted, reserved and transferred. These denote the respective degrees of jurisdictional competence held by the Westminster and Northern Ireland governments. 'Excepted' matters lie within the exclusive competency of Westminster and can only be transferred to the devolved administration in Northern Ireland by an Act of Parliament. 'Reserved' matters are also the preserve of Westminster but may, subject to the approval of the Secretary of State for Northern Ireland, be transferred to the Assembly where the matter has received the *"cross community support"* of the Assembly.[195] Lastly, powers in the 'transferred' category are those for which the devolved administration in Northern Ireland has full legislative and executive competence.[196]

As already highlighted earlier in this report, the Agreement contained a conditional commitment by the British government to the future devolution of justice and policing powers.[197] Accordingly, schedule 3 to the Northern Ireland Act included: *"(a) the criminal law, (b) the creation of offences and penalties; and (c) the prevention and detection of crime and powers of arrest and detention in connection with crime or criminal proceedings"* in the list of "reserved" matters, in anticipation of the future transfer of these powers to the devolved administration in Northern Ireland.[198] However, this seemingly clear statement of future powers is blurred by the succeeding clause which provides that: *"[S]ub-paragraphs (a) to (c),* [as just listed] *do not include any matter within paragraph 17 of Schedule 2"*; that is to say, any matter which relates to national security, special powers and other provisions for

[195] Op. cit., Northern Ireland Act 1998, ss.4 (2) & 4 (3).
[196] Supra note 3.
[197] Op. cit., the Agreement, Justice and Policing, para. 6.
[198] Ibid., Schedule 2, para. 9.

dealing with terrorism and subversion. As a result, only justice and policing powers which do *not* come within the understanding of "national security" or "terrorism" will be devolved to Northern Ireland. The most obvious questions therefore are: where does that division lie? Who decides where the division lies? And does this mean that the most contentious issues, and the ones that local people most want to determine, are explicitly removed outside their remit?

Further confusion stems from the various pieces of enacting legislation arising from the reports of the Criminal Justice Review and the Patten Commission. These reports and subsequent legislation contain various recommendations imposing obligations and bestowing powers on the local administration, on Westminster, and even more confusingly, on the local administration post-devolution. The result is a distinct lack of clarity on who does what, and when. This was commented upon by the Justice Oversight Commissioner in his second report:

> *"It would be useful for a study to be undertaken in advance of any devolution to identify the precise powers which would be transferred to the Northern Ireland Executive and what arrangements would be needed for their transfer."*[199]

For the purposes of this report, CAJ has sought to secure a basic list of such powers from the Northern Ireland Office. Similar requests were made of them by various political parties, and by the Justice Oversight Commissioner (as above) but no such list was forthcoming. It is clear that the creation of such a list will be quite complex since it will require extensive perusal of old statutory instruments alongside more recent legislation. At the same time, devolution of criminal justice and policing will not be able to proceed without this clarity and detail, and the Northern Ireland Office is the only entity in a position to produce an authoritative list. The nearest that they have come to date to carrying out such work and placing it in the public domain was to prepare a factual note which included an annex entitled "Key examples of executive functions in the policing and justice fields in Northern Ireland."[200]

The list of functions included:

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[199] Op. cit., Second Report of the Justice Oversight Commissioner, p. 185.
[200] "Further Devolution: Policing and Justice Functions", Northern Ireland Office, March 2003.

- Promotion and implementation of the Criminal Justice Review Implementation Plan and the Justice (NI) Act 2002 and the Justice (NI) Act 2004;
- Development of a criminal justice policy;
- Oversight of criminal justice services (including implementation of community safety strategies);
- Court matters, including administration, legal aid, oversight of legislation on coroners and judicial appointments;
- Prisons;
- Public order, including formulating and implementing policy on parades with reference to the Quigley report and firearms and explosives; and
- Policing matters, including the implementation of the Patten proposals and Police (NI) Act 2000, appointments to and funding of the Policing Board, monitoring of police numbers, recruitment and composition, and liaison with the Oversight Commissioner.

Notwithstanding the fact that this list is indicative only, it adds little to the material that is already provided in the Northern Ireland Act, and it might be more helpful to indicate clearly which specific powers Westminster would intend to *not* transfer to Northern Ireland.

There is of course always a limit to how detailed and specific one can be in the elaboration of powers and the differentiation between powers held at a central or devolved level. Moreover, as one commentator suggests: *"the line between reserved and devolved matters could be altered at any time by the British Parliament"*.[201] Indeed, Westminster can exercise the prerogative to intervene in the business of the Northern Ireland, Scottish or Welsh assemblies, even in devolved matters. This power in relation to Northern Ireland is expressed in the Northern Ireland Act: *"[T]his section does not affect the power of the Parliament of the United Kingdom to make laws for Northern Ireland."*[202] In a similar vein, should the Secretary of State for Northern Ireland consider that proposed Assembly legislation is incompatible with the interests of defence, national security or with the protection of public safety or public order, he or she has the power to prevent the legislation from

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[201] Brazier, Rodney, *"The Constitution of the United Kingdom"*, Cambridge Law Journal, 1999, vol. 58, no. 1, pg 102.

[202] Op. cit, Northern Ireland Act, 1998, s. 6. The exact formula is also used in s. 28(7) of the Scotland Act. In the language of the Agreement, explicit reference is also made to the power of Westminster "to legislate as necessary to ensure the UK's international obligations are met in respect of Northern Ireland".

passing.[203] This is the case even when the Assembly is clearly acting within its own devolved competency.

As already highlighted in Chapter 2, some interesting questions arise in terms of devolution of the powers held by the Secretary of State to a local minister(s). A case in point of the confusion that can arise when certain powers are to be devolved and others remain centrally is the example of the Northern Ireland Policing Board. For example, the Secretary of State has the power to overrule a Policing Board inquiry,[204] and the power to dismiss a Policing Board request for a report from the Chief Constable.[205] These powers were retained in the hands of the Secretary of State precisely because they were thought to be potentially contentious, so it is difficult to imagine how these and other powers (such as appointments to the Board) could be simply transferred in a post-devolution context. If the model of a single department and single minister (drawn from only one of the two major traditions) is pursued, there will inevitably be a real or perceived concern around the minister's impartiality. It is likely that it is precisely in the areas of most controversy that the minister's authority will be challenged, thereby threatening the concept of democratic accountability over the function of the police and of non-partisan political oversight of policing.

Perhaps the only way to avoid political controversy would be to ensure that these powers of the Secretary of State under the Police Act are transferred to the Northern Ireland Executive only if there is some 'sharing' of the functions between ministers representing the two main political groupings.[206] Indeed, this must have been a consideration in the Patten Commission recommendations, since they argued that the power of the Secretary of State to appoint the independent members of the Board should, post-devolution, transfer to the First and Deputy First Minister acting together.[207] Interestingly, Patten did not comment on the other contentious issues noted above (e.g. calling for reports/inquiries etc), and it is not clear whether this was intentional or not. Given that the report is explicit about how other powers of the Secretary

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[203] Op. cit., Northern Ireland Act 1998, s.14(5).
[204] Op. cit., Police (NI) Act 2000, s.60(4).
[205] Ibid., s.59(4).
[206] A modification of these powers would be necessary because currently the Secretary of State can take a decision to refuse a report from the Chief Constable to the Policing Board or a public inquiry on national security grounds - this is an excepted matter within Schedule 2 of the Northern Ireland Act 1998 and therefore an exclusive competence of Westminster, even after devolution.
[207] Op. cit., Patten report, para. 6.13, pg. 30.

of State will be organised after devolution,[208] the absence of any express statement by Patten is telling.

This is just one example in which a delineation of powers is necessary in advance of any consideration of devolution. There will of course be many others that this report does not have the scope to explore in detail, but we would urge the government to prepare a list of powers as a matter of urgency.

4.1.2 Measures to promote co-operation and dialogue

In view of the strength of the legal powers available to the government should it wish to use them (as highlighted above), it is useful to explore the political avenues that are open to promote communication and co-operation between the Westminster/ central government and the Northern Ireland Assembly on the exercise of their respective functions.

A number of practices aimed at improving communication and co-ordination have been developed between the three devolved jurisdictions (Northern Ireland, Scotland and Wales) and central government. At the pinnacle of these is the Joint Ministerial Committee on Devolution and a number of non-legally binding agreements - the Memorandum of Understanding, concordats and devolution guidance notes. Responsibility for regulating and overseeing the operation of these arrangements appears to lie with the relatively newly created Department for Constitutional Affairs in London.

Joint Ministerial Committee on Devolution

Provision for the Joint Ministerial Committee (JMC) is made in the Memorandum of Understanding between the United Kingdom government and the devolved governments of Scotland, Wales and Northern Ireland. Under its terms of reference it is required to:

- Consider common issues of concern across all devolved areas;
- Keep the arrangements for liaison under review; and
- Consider disputes between the administrations.

[208] Examples of powers currently held by the Secretary of State in relation to the Policing Board which will transfer to NI ministers are: setting long term policy goals (para. 6.4 of the Patten report); negotiating annual budgets with the Board (para.6.7 ibid); and appointing the independent members of the Board (para. 6.13 ibid). The Patten Report envisages that these powers will be transferred to the First and Deputy First Minister acting together.

The JMC meets once a year in plenary[209] and in smaller sessions at regular intervals throughout the year. During the first year of the JMC in 2000, it was reported that there were few disputes between the devolved administrations and that "difference of view had been settled amicably".[210] A press release issued subsequent to the third plenary meeting in October 2002 noted that "more could still be done to improve understanding and share best practice."[211]

Memorandum of Understanding

The original Memorandum of Understanding was supplemented in 2001 by agreements between the United Kingdom government, Scottish Ministers, the Cabinet of the National Assembly for Wales and the Northern Ireland Executive. The Memorandum sets out the desire of the United Kingdom government to resolve any disputes over competencies or policies through discussion. It suggests that the powers that exist in the respective devolution agreements between Northern Ireland, Scotland and Wales to refer questions of *vires*[212] to the Judicial Committee of the Privy Council and to allow the Secretary of State to intervene in devolved matters will only be used as a matter of last resort.

Concordats

Concordats are non-binding agreements between the devolved executive and a Westminster government department. Prior to the suspension of the Northern Ireland Assembly, there were concordats between the Northern Ireland Executive and each of the Westminster departments for which Northern Ireland had devolved powers.

Importantly, there is also a concordat between the Northern Ireland Office and the Northern Ireland Executive.[213] This set outs an agreed structure for the working arrangements between the two bodies on matters which cross the divide between the 'transferred' field and the 'reserved' and 'excepted'

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[209] The first plenary session was held on the 1st September 2000.
[210] Constitutional Unit at UCL, *Devolution and the Centre – Monitoring Report No. 1*, Nov. 2000.
[211] Joint press statement, 22 October 2002 – see *http://www.dca.gov.uk/constitution/devolution/jmc/jmc_communique_3rd_meeting_oct_2002.pdf* There is no record online of more recent meetings.
[212] *Vires* literally translated means 'strength' but in legal terms has come to mean authority, i.e., *ultra vires* means'without authority.
'[213] Concordat between the Northern Ireland Office and the Northern Ireland Executive Committee, see *http://www.nics.gov.uk/mou/nio.htm*

fields. It recognises that there is a need for co-ordination and agreement on cross-cutting issues, which potentially include justice and policing, in order to ensure coherent policy development and effective administrative action. Thus, there is an undertaking to exchange information at both ministerial and official level about relevant policy initiatives and legislative proposals in their respective areas of responsibility.

Some of the agreements on working arrangements contained in the concordat include:

- A commitment between the Secretary of State and the Northern Ireland Executive to each give the other not less than three months notice of their intention to introduce primary legislation which has an impact on the other's area of responsibility;
- An agreement that the Secretary of State, the First and Deputy First Ministers and other relevant ministers as appropriate should hold regular meetings to exchange view on cross-cutting themes; and
- An agreement that where possible, all efforts will be made in advance by the Secretary of State and the Northern Ireland ministers to resolve points of conflict over competency that might engage the Secretary of State's powers under the Northern Ireland Act.[214]

Devolution Guidance Notes

Devolution guidance notes serve a number of purposes. They are drafted for the purpose of informing Westminster ministers and departments of their responsibilities in relation to the devolved regions. For example Devolution Guidance Note 8 on "Post-Devolution Primary Legislation Affecting Northern Ireland" reaffirms the commitment of the Westminster government to refrain from legislating with regard to devolved matters and to consult with the relevant Northern Ireland department on laws or policies in 'excepted' areas that might have implications for devolved matters. Similar views are expressed in Guidance Note 5 on "The Role of the Secretary of State for Northern Ireland". On the subject of 'excepted' matters, the note states:

[214] As highlighted already, and most notably the powers of the Secretary of State under sections 8, 14, 25, 26 and 27 of the Northern Ireland Act.

"UK Departments have responsibilities which extend to Northern Ireland; the implications for Northern Ireland need to be considered both in terms of their impact on transferred matters, and also in order to ensure that UK policies work effectively and are well received in Northern Ireland."[215]

While these various mechanisms will prove useful, further consideration needs to be given to if and how they need to be updated or improved to facilitate devolution of criminal justice and policing powers. This is essential given that the political sensitivity of these powers, and the retention national security powers at Westminster, could potentially lead to confusion and disagreements – thus threatening the stability of the system.

4.1.3 International lessons

The Basque Country

The Basque Country does not enjoy devolved powers in relation to the administration of justice and prisons, but it does have extremely developed autonomous police powers. The experience of the Basque Country in respect of these powers demonstrates the importance of having legislation or a formal listing which clearly define the respective competencies of the central Spanish government and the devolved jurisdiction.

The legal source of devolved police powers in the Basque Country is quite complex. Asserting the sovereignty of central government, the Spanish Constitution states that "public safety" is an exclusive competence of the Spanish state.[216] However this is *"without prejudice to the possibility of the creation of police forces by the Autonomous Communities, in the manner to be laid down in their respective Statutes and within the framework to be established by the organic law."*[217]

The relevant statute which provides for the creation of the Basque police force – the "Ertzaintza" – is the Basque Devolution Act of 1979. It confers on the Basque government responsibility for the general organisation of the

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[215] Devolution Guidance Note 5, The Role of the Secretary of State for Northern Ireland, DGN5, see *http://www.dca.gov.uk/constitution/devolution/guidance/dgn05.pdf*
[216] Article 149, Spanish Constitution 1979.
[217] Ibid. Article 149.1.19°.

Autonomous Basque Police Forces in providing security and maintaining public order. This at least in practice dilutes the exclusive competence of the state over public safety matters. However the Act recognises the continued supremacy of the state police forces for matters of an "extra- and supra-community nature". Such powers, which include arms and explosives, are not well defined or regulated, leaving a number of grey areas.[218]

Further confusion over the scope of the powers of the Ertzaintza was caused by the development and introduction of legislation regulating the police function.[219] By the time this legislation came into effect, the Basque police had in fact already been in existence for nearly four years and were exercising greater powers than provided for in the legislation. In order to remedy this anomaly, a final amendment was added to the law, stating that the ultimate source of the powers of the Basque police is found in Article 17 of the Basque Devolution Act.

Notwithstanding the precedence of the Devolution Act, this mesh of legislation left doubts in the Basque government over the delineation of competencies on policing matters. The central and Basque governments therefore signed an agreement on the delimitation of services on the 13th March 1989 (partially amended on 16th June 1995) confirming that the Ertzaintza was the ordinary police force of the Basque Country and that the state forces would retain all "residual" powers.

All of this legislation combined however still does not provide detail on the types of powers that are considered to be of a supra-community nature. There are many disputes in the Basque Country over competence, and these become heightened when the relationship between the central and Basque government deteriorates. The Basque Devolution Act therefore provided for one potentially very important innovation – the Security Council.

An important feature of the Council is that it consists of an equal number of Spanish and Basque members.[220] Moreover, the equal weighting of votes means that the Basque Country can block an intervention by the state police

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[218] Basque Devolution Act, Article 17.1.

[219] Act on the Security Forces and Corps of the State, Police Forces of the Autonomous Regions and Local Police, (Ley de Fuerzas y Cuerpos de Seguridad del Estado, de las Policias de la Comunidades Autonomas y de las Policias Locales), Organic Law 2/1986, 13th March 1986.

[220] Basque Devolution Act, Article 17(4), (Estatuto de Autonomia, Organic Law 3/1979 of the 18th December 1979).

in areas that had been agreed were devolved. There are exceptional cases, however, in which the state police can intervene in devolved policing matters. These exceptions are defined as "cases of particular urgency", where the central authorities must infringe on devolved matters in order to fulfil a duty on behalf of the state.[221] Moreover in the event of the declaration of a state of alarm, exception or siege, the Basque police will immediately come under direct state rule.[222]

While the Security Council operated well in its early years, it has fallen into disuse over time. This is partly due to that fact that as the Basque police force evolved, its powers became more defined; but is also due to the deteriorating relationship between the Basque and central governments. The Security Council essentially demonstrated respect by the state for the autonomous police powers of the Basque Country, but subsequent terrorist related incidents have damaged the trust between the two tiers of government. It therefore appears that the potential of the Security Council has not been optimised in the Basque Country, but it is nonetheless an interesting concept for resolving jurisdictional disputes, improving relations, and giving an equal voice to the central and devolved governments.

Belgium

Another potential problem of having two different tiers of authority is the impact it could have on the institutional transformation of the various criminal justice institutions. Such arrangements could cause serious obstacles to the development of a unified institutional culture.[223]

The recent criminal justice overhaul in Belgium has raised some interesting lessons in this regard. One novel idea that came out of the reforms in the 1998 Act[224] was to introduce mobility clauses, which would encourage members of the Belgian police to develop experience of working at both federal and local levels and thereby reduce the possibility of new sub-cultures

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[221] Op. cit., Basque Devolution Act, Article 17.6(b).

[222] Ibid., Article 17.7. The regulation of a state of emergency is governed by Organic Law 4/1981 of 1st June 1981.

[223] See earlier discussion of this point in relation to Northern Ireland in Chapter 3. Would the criminal justice and policy division of the Northern Ireland Office, for example, have one section of staff working on implementing Westminster decisions on excepted matters in the justice and policing fields with another section of staff working solely on devolved justice and policing issues? Clearly this would have an extremely detrimental impact upon efforts to develop an institutional culture.

[224] Op. cit., Act of 7 December 1998, Article 128.

developing within the unified force. In order to ensure that there are no disincentives for the respective levels of the force in allowing their members to move to a different level, the law stipulates that the cost of recruitment and/or training may be reimbursed to the authority that invested them if the officer transfers to a different level within five years of his or her appointment.

Scotland

Of particular relevance to Northern Ireland is the Scottish experience and, in considering the scope of future devolved powers in Northern Ireland, the Criminal Justice Review explicitly recommended that:

> *"responsibility for the same range of criminal justice functions as are devolved to the Scottish Parliament should be devolved to the Northern Ireland Assembly."*[225]

Scotland is an obvious yardstick by which to compare the situation in Northern Ireland, given the similarities between the respective constitutional arrangements. As in the Northern Ireland Act, under the Scotland Act all legislative and executive powers are either devolved and therefore within the scope of the Scottish parliament and executive, or reserved by Westminster. The Scotland Act also similarly defines the powers of the parliament and executive by express reference to the list of reserved matters. These can be found in Schedule 5 and are almost identical in content to the areas listed in Schedule 2 to the Northern Ireland Act.

The two schedules are also alike in the sense that only broad areas of government responsibilities are listed as opposed to specific statutory powers. It is certainly true that in Scotland the more nationalist driven devolution schemes of the 1970s had been in favour of having an explicit list of devolved powers. However after the failed referendum for Scottish independence of 1979, this proposal never really gathered the same support again and the approach of defining Scotland's powers by listing all reserved matters and leaving devolved powers unspecified was accepted.

Colin Boyd, the current Lord Advocate for Scotland, recommended the approach taken in the Government of Ireland Act 1920 of listing non-devolved rather than devolved powers because it was *"clearer and easier for ordinary*

[225] Op. cit., Criminal Justice Review, Chapter 15, para 15.56.

people, let alone lawyers, to understand. It is less likely to lead to disputes and litigation."[226] A different explanation is offered by another commentator:

> *"The Scotland Act seeks to limit the potential for future disputation on contested jurisdictions by avoiding a definitive list of devolved power that might tempt nationalists, looking for a symbolic fight with London, to challenge rigid boundaries."*[227]

In any case, the very contrasting political dynamics in Scotland and Northern Ireland mean that this lack of clarity in the definition of powers has not given rise to the same degree or nature of controversy in Scotland as it might in Northern Ireland. Moreover, if the Westminster government were to be challenged by the Scottish Administration on the nebulous quality of the legislation on the respective powers of the two governments, it is unlikely that such challenges would focus particularly on the boundaries between justice powers and national security. Scotland has no recent history of conflict, and national security has not been a dominant feature in its relationship with Westminster. Rather, determining the line on the division of competencies between central and devolved government in relation to immigration and asylum, or European issues, is potentially the subject of more discontent. In commenting on this, one academic notes:

> *"There is a tendency for the centre to be concerned in Scotland with keeping matters related to the common UK market, while in Northern Ireland the prime concern is with national security."*[228]

Commenting on the devolution arrangements and the lack of explicit powers in the Northern Ireland and Scotland Acts, another academic notes that 'trust' is becoming an important concept in terms of the relationship between the central and devolved powers:

> *"The silences or omissions in the legislation however, especially on the relations between the devolved institutions and Westminster, are of equal significance (to the actual provisions) in terms of our understanding of*

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[226] Boyd, Colin, *Parliament and Courts: Powers and Dispute Resolution,"* in Bates, TJ, "Devolution to Scotland: the legal aspects", 1997, pgs. 24-25.
[227] O'Neill, Michael, in *"Great Britain: From Dicey to Devolution"*, Parliamentary Affairs, 2000, pg.80.
[228] Keating, Michael, in Devolution and Public Policy in the UK: Divergence of Convergence? Seminar Paper for "Devolution in Practice" at the Institute for Public Policy Research, London, 29 October 2001.

> *the nature of devolution. It is also interesting to consider the extent to which the respective Acts now proceed on the basis of trust and expectation of success."*[229]

This trust and expectation of success have largely been evident to date, in that disputes over competence between Holyrood and Westminster have not been a feature of devolved government in Scotland. On the contrary, the Scottish government has opted to allow Westminster to legislate for it on at least sixty instances since Scottish devolution, by means of "Sewel motions." This may be due in part to the dominance of the Labour Party in both jurisdictions, albeit a Labour/Liberal Democrat coalition in the case of Scotland. Alternatively it may be that the Scotland Act, in conjunction with the various inter-governmental mechanisms for promoting co-operation and communication, have proved to be successful at avoiding disputes. Whichever is true, it is unlikely that the Scottish experience will transfer directly to Northern Ireland, given both its history (particularly as regards the use of national security and emergency legislation) and the very different nature of politics in the region.

4.2 The Use and Abuse of Emergency Legislation and National Security

Extreme measures to deal with the threat of terrorism have sadly become a feature of many modern democracies in the world, particularly in the wake of the attacks in the United States on September 11th 2001. Northern Ireland's experience of emergency legislation, however, long pre-dates this. The UK has had "emergency" legislation in place to deal specifically with terrorism in Northern Ireland for over thirty years, and indeed Northern Ireland has never known normality in this regard, since the Special Powers Act was introduced in 1922 and was merely replaced by the Northern Ireland (Emergency Provisions) Act of 1973 and the Prevention of Terrorism Act of 1974 which were renewed and updated throughout the 1980s and 1990s.

However, the events of September 11 in 2001 gave greater urgency to 'counter-terrorism' initiatives which introduced wide-ranging powers of detention and interrogation for those suspected of being involved in terrorist activity across

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[229] Hadfield, Brigid, *"The Nature of Devolution in Scotland and Northern Ireland: Key Issues of Responsibility and Control"*, Edinburgh Law Review, Vol. 3, 1999.

the UK. Such legislation has major implications for the protection of human rights enshrined in the International Covenant on Civil and Political Rights, the European Convention on Human Rights and the UN Convention Against Torture, to name but a few.[230] This blatant disregard for human rights standards agreed over fifty years ago (and subsequently ratified by the UK government) has been a worrying development for those involved in the human rights world, and has led to fears that these emergency laws will leave an unnecessarily wide element of discretion in the exercise of the powers they contain, and will effectively leave human rights abuses unprotected.[231]

In Northern Ireland, the use and abuse of emergency laws and powers has shown that these measures feed and fuel conflict rather than resolve it. The human rights abuses that have stemmed from the use of emergency legislation in Northern Ireland have left a legacy of deep mistrust on the part of many in the workings of central government.

A persistently voiced concern relates to the use and abuse of 'national security' as a get-out clause, or trump card, which has led – at best – to a lack of transparency and accountability across the criminal justice system, and – at worst – to problems of secrecy, collusion and cover-up.

The powers contained in the Northern Ireland emergency legislation included indefinite detention, extensive stop, question and search powers, house searches, Diplock courts[232] and exclusion orders. These powers have violated long-held principles of the rule of law and breached many rights and freedoms under the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against

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[230] Indeed, many countries – the UK included – have had to, on occasion, enter derogations to these covenants to allow new emergency legislation to proceed.

[231] At the time of writing, the UK government was planning to introduce yet more counter-terrorism measures in the wake of the increased threat to security following the bombings in London in July 2005. One measure proposed was the extension of the period of detention of suspects without charge from 14 days to three months. This was ultimately defeated in Parliament but the "compromise" was 28 days detention – hardly a success from a human rights perspective.

[232] Juryless trials in terrorism-related cases.

Torture and Cruel, Inhuman and Degrading Treatment (UNCAT).[233] Indeed, since its establishment, CAJ has campaigned against the use of emergency laws and called for their abolition.[234] As highlighted earlier in this report, the lack of confidence in the administration of justice in Northern Ireland can be attributed directly to the operation of emergency legislation here, and as such, generated the need for a review of the criminal justice system.

4.2.1 Impact on devolution

Despite clarifying where responsibility for some of the powers that relate specifically to the recommendations of the Criminal Justice Review will lie, both the Review and its implementing legislation (the Justice Acts 2002 and 2004), still leave us with many gaps in our understanding of the interface between devolved justice and policing powers on one hand and national security and counter terrorism powers on the other. This is to some extent explained by the limited terms of reference afforded to the Review under the Belfast Agreement. These precluded the Review from examining the use of emergency laws, thereby critically limiting its ability to tackle some of the most problematic areas of the law which have served to undermine public confidence in the independence and fairness of the criminal justice system. The Justice Acts responsible for implementation of the Review's recommendations do not therefore cover emergency laws; instead they deal only with "routine" criminal justice issues without considering where these fit into wider justice concerns.

The proposed division of powers in the justice field raises concerns on a number of different levels. Foremost of these (as discussed above) is that the legislation leaves us with a large grey area in the delineation of competencies between the Westminster and Northern Ireland governments, in the event that

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[233] A number of cases have been brought successfully before the European Court of Human Rights from Northern Ireland – see Ireland V UK (1978 2 EHRR 25 – interrogation techniques amounted to inhuman or degrading treatment); John Murray V UK (1996 2 EHRR 29 – lack of early access to a lawyer was incompatible with the concept of fairness as it had placed the accused in a situation where his rights might be irretrievably prejudiced); Brogan & Ors V UK (1988 11 EHRR 117 - arrest for questioning for more than four days without judicial authorisation in breach of Art. 5). In addition, the monitoring bodies for the ICCPR and the UNCAT have commented on numerous occasions about the breaches incurred by these powers (most recently in November 2004, the UN Committee Against Torture pressed the UK government on the need for continuation of emergency legislation in Northern Ireland given the relative peace and stability that has existed over the last decade – see *http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.33.3.En?OpenDocument*).

[234] For a detailed analysis of the use of emergency powers and laws in Northern Ireland see, CAJ's publication: "No Emergency, No Emergency Law: Emergency Legislation related to Northern Ireland – The Case for Repeal", 1995.

justice and policing powers are devolved. It fails to provide any detailed indication of the kinds of justice and policing powers that are envisaged as falling within the excepted categories of national security and special terrorism powers.[235] Neither does it define 'national security', thus leaving a broad margin for subjective interpretation and the potential for encroachment by the central government on the future devolved powers of the Northern Ireland Assembly and Executive.

If, for instance, the proposals for the central coordination of intelligence via MI5 were to be fully pursued, and all local responsibility for national security concerns and intelligence were removed from local policing control, many questions would obviously ensue. For example, if local police officers are used to carry out intelligence gathering (which is most likely to be the case), are they then above local control mechanisms? Who would the police officers concerned answer to – the Chief Constable or MI5? If a person found him or herself with a complaint against a police officer in relation to such activities, would they still be able to make the complaint to the Police Ombudsman or would there be no complaint mechanism? Where would accountability lie? How in particular would local politicians be able to exert any democratic accountability in this often most sensitive and contentious of areas?

The experience in the relatively recent past of the debacle around the Omagh bombing, and trenchant criticism of failings in communication and cooperation between Special Branch and the regular police, are of direct relevance here.[236] The learning from Omagh was that there should be very close links between the various agencies, and this also is a very strong message from the Patten report which alluded to concerns expressed within the police about Special Branch constituting a "force within a force". The move to centralise intelligence gathering outside of the Police Service for Northern Ireland seems to be moving in an entirely different direction. Instead of developing close coordination across the various police agencies, it requires coordination with bodies external to the PSNI, with the additional difficulties that this is likely to pose.

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[235] This is particularly confusing as the "subject matter" of the Emergency Powers Act 1926 is a reserved matter under paragraph 14 of Schedule 3.

[236] Statement by the Police Ombudsman for Northern Ireland on her investigation of matters relating to the Omagh bombing on August 15 1998; December 2001 – see *http://www.policeombudsman.org//Publicationsuploads/omaghreport.pdf;* PSNI response to Ombudsman's report on the Omagh bomb investigation – see *http://www.psni.police.uk/index/media_centre/press_releases/pg_press_releases_2003-2/pg_omagh_bomb.htm*; See also CAJ Commentary on the Office of the Police Ombudsman for Northern Ireland, June 2005.

To take another practical example, if activity by a local paramilitary organisation were under investigation, and thus categorised as an 'excepted' matter, would it likewise escape local control and accountability? Would someone have to determine whether the alleged activity on the part of individual members with links to a paramilitary group was more 'political' or more 'criminal' in nature? If so, who?

Yet another example is that a local minister for justice with responsibility for the Northern Ireland Court Service would find him or herself with control over all local courts except Diplock courts. Precluding a local minister from making what are clearly very important policy decisions regarding the retention or suspension of Diplock courts would clearly be destabilising, both to the process of moving decision making closer to home, and to the peace process as a whole.

As already highlighted elsewhere in this report, the use and abuse of emergency legislation and counter-terrorism measures have contributed directly to a lack of confidence in the criminal justice system in Northern Ireland. However, given that all policing and criminal justice has previously been controlled in Westminster, problems such as these have not been considered in the context of a local administration. It is clear, however, that no real discussion of devolution of policing and criminal justice powers can take place until consideration has been given to these issues.

A situation where policy decisions are made in Westminster whilst operational power is exercised locally could lead to a sense of little real power being exercised in the local context. This would have ramifications not only for the stability of the system, but also for the nature of institutional or cultural transformation as discussed in Chapter 3. Would the criminal justice and policing division of the Northern Ireland Office, for example, have two divisions – one working on devolved matters and one on excepted? Likewise, it would be extremely difficult to build a common culture in a two-tier system in which only one is working on the more important policy issues.

This lack of clarity is particularly problematic in that the future post-devolution exercise of emergency or national security measures could damage many of the efforts of the Criminal Justice Review and Patten Commission respectively to bring about criminal justice and police change. It could also have potentially disastrous effects on the sustainability of the devolved administration and, by extension, the peace process.

Some government remarks indicate that it is conscious of this difficulty. For example, the former Secretary of State for Northern Ireland, John Reid, stated in the preface to the Implementation Plan on the Criminal Justice Review that justice and policing powers would be devolved once there is sufficient normalisation of security. This is consistent with the section of the Agreement on "Security",[237] where the government states that implementation of the Agreement should mean a normalisation of the security arrangements, including "the removal of emergency powers in Northern Ireland".[238] CAJ has consistently argued that the security situation cannot normalise until these powers are abolished and as such welcomed the statement in August 2005 by the Secretary of State for Northern Ireland, Peter Hain, announcing the "repeal of counter-terrorist legislation particular to Northern Ireland" as part of the "normalisation" process.[239] We were disappointed, however, that there is to be a further delay (possibly as long as two years) and that the timetable for change would be dependent on what government assesses to be an "enabling environment".[240]

CAJ is also concerned that though in future the jurisdiction may lose its particularity, this is only because the provisions it previously experienced have now been applied in all UK jurisdictions. We believe that such a move would effectively reintroduce through the back door powers and practices that have proved both contentious and unsuccessful in Northern Ireland; that this would be a retrograde step; and that it could prove destabilising to efforts to build a more secure and peaceful society here. Indeed, from the discussion above, it could be argued that the case for the abolition of anti-terrorism legislation in the context of devolving criminal justice and policing powers in Northern Ireland is even stronger.

"National security"

Even if the security situation has sufficiently normalised by the time justice powers are devolved, so that emergency laws are no longer in use (at least not in the traditional sense), this does not resolve the fact that other national security measures will be retained at Westminster. For example, prohibiting the disclosure of information which might implicate the state in past human

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[237] Op. cit., Agreement, pg. 21.
[238] Ibid., para. 2(iii), pg. 21.
[239] "Secretary of State publishes normalisation plans", NIO press release, 1st August 2005. See http://www.nio.gov.uk/media-detail.htm?newsID=11919
[240] "The repeal of counter-terrorist legislation", CAJ press release, 2nd August 2005. See www.caj.org.uk

rights violations on the grounds of national security could be severely detrimental to the process of peace building. In this era of "truth" discussions and exploration of past cases – many of which involve the state and its agents – the ability of the state to withhold information on the grounds of national security would be hugely damaging.

In fact, this situation has become even more worrying following the introduction of the Inquiries Act 2005, which effectively changes the nature of public inquiries by investing disproportionate amounts of unfettered discretion in the hands of the minister, who could very often be the subject of any such inquiry.[241] This legislation, while allegedly introduced to update and consolidate previous legislation relating to inquiries, came in the face of extreme pressure on the UK government to hold a public inquiry into the case of Pat Finucane.[242] Indeed, the Finucane family, CAJ and other human rights groups have opposed this legislation on the grounds that it will significantly hamper the ability to get to the truth in the Finucane case. Without truth about the circumstances of this and many other deaths, it will be extremely difficult to provide healing for victims and find a lasting peace.

As already highlighted above, clarity of roles and powers in intelligence procedures will be particularly important. This is especially true given the deep-seated suspicion and mistrust of the operation of this system to date in Northern Ireland, not least in the Finucane case. These are just some examples of where the line between devolved and central competence is unclear. If specific powers were confirmed by the British government, then Northern Ireland ministers would at least be better prepared, and matters which are anticipated to create tension or to threaten the stability of the Assembly could be discussed in one of the various inter-governmental fora described earlier in the chapter. If this problem is not addressed, it could potentially undermine any effort to devolve the exercise of local criminal justice and policing powers.

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[241] This includes the power to appoint the chair and panel members, set terms of reference, withhold information, decide upon publication of any eventual report etc, without the previous requirement to involve Parliament.

[242] Mr. Finucane was killed in front of his family in February 1989. Over the years, evidence has been gathered which clearly demonstrates collusion between British state forces and the paramilitaries who carried out the shooting. In response to growing pressure for a public inquiry in this case, the government appointed Judge Peter Cory, a retired Canadian Supreme Court judge, to look into this and a number of other high profile cases (those of Robert Hamill, Rosemary Nelson and Billy Wright) in order to as certain whether there was a case to answer by public inquiry. Judge Cory found this to be the case but despite moving to set up inquiries in the Hamill, Nelson and Wright cases, the government refrained from setting up a similar inquiry into the Finucane case. This was followed soon after by the announcement of new legislation, which seems to be a rather obvious coincidence.

4.2.2 International experiences of emergency legislation

Basque Country

Many anti-terrorism powers have been added to the ordinary criminal law in the Basque Country to be used in special circumstances.

Article 55.2 of the Spanish Constitution provides that, with the proper parliamentary control and agreement of the courts, legislation can be introduced to suspend the rights and liberties of individuals suspected of being connected with investigations into the activities of armed bands or terrorist groups. The rights that are eligible for suspension include: the restrictions limiting police detention to a maximum of seventy two hours;[243] the inviolability of the home;[244] and privacy of communications (post, telephone etc.).[245] There are also protections under statutory laws which can be foregone. For example, the law providing for the isolation of detainees for up to five days only,[246] can be extended by another three days under the "exceptionality" rules.

These powers have not been labelled "emergency laws", nor is there an official state of emergency, but in terms of restricting rights they have much the same impact as emergency laws in Northern Ireland. Most notably for the purposes of this report, they are state imposed decisions which interfere substantially with the autonomous police powers of the Basque Country.

Belgium

While Belgium has never entered any derogations to the rights protected under the European Convention on Human Rights or the International Covenant on Civil and Political Rights, neither does it have a clean record in terms of how it has used and developed anti-terrorist legislation and measures. For instance, there had been a practice of introducing special investigatory techniques such as systematic observation, infiltration, conversation tapping, mail interceptions and the use of informants, via ministerial directives rather than in formal anti-terrorist legislation.

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[243] Spanish Constitution, Article 17.2.
[244] Ibid., Article 18.2.
[245] Ibid., Article 18.3.
[246] Criminal Procedures Act (ley de Enjuiciamiento Criminal), Article 506.

Since September 11th 2001, however, Belgium has passed a new law which allows for special investigatory techniques to respond to terrorism and organised crime. The problem with the new legislation is that it leaves many areas undefined. So loose are some of the definitions that there is a risk that the techniques may be used by the police or judiciary against persons alleged to have committed ordinary crimes. This clearly demonstrates that emergency measures that are introduced without a strictly defined legal framework of when and against whom the laws can be used run the risk of breaching the legality requirement.

4.3 Conclusion

The devolution of criminal justice and policing powers is likely to be a complex process in and of itself. As highlighted earlier in this report, it will require consideration of the model to be adopted, and what safeguards, checks and balances can be built into this model to promote accountability and compliance with human rights standards. However, the model and mechanisms adopted risk exposure to unnecessary threats to their stability and operation from an early stage unless there is a clear delineation of the powers that will be exercised locally and those which will be retained centrally.

While it is appreciated that a number of fora and agreements are already in place to monitor the exercise of respective competencies between Westminster and the devolved regions, it is arguable that the nature of criminal justice and policing powers is too complex to be regulated by these alone. While Scotland has had a relatively easy transition in this respect, it has also had its own unique criminal justice system in place for many centuries. Added to this is the fact that disputes over the issue of national security have not had the same prominence, nor been particularly contentious, in Scottish history.

CAJ would therefore strongly recommend that consideration of the devolution of criminal justice and policing powers to Northern Ireland begin with a detailed exploration of the powers that will be retained in Westminster and those that will operate locally. In doing so, thought must be given to the kinds of mechanisms necessary to ensure the smooth co-existence of the respective competencies to ensure the stability of the system.

There is also an extremely strong case to be made for the abolition of anti-terrorism legislation here. CAJ has consistently argued over the years that such measures and the human rights abuses that stemmed from them fed and

fuelled the conflict. The fact that the devolution of criminal justice and policing powers is being negotiated is surely sufficient evidence that Northern Ireland has moved on, to the extent that these powers should no longer be deemed either necessary or reasonable.

Notwithstanding this, it is clear from the discussion above that the retention of such powers in Westminster will have important implications for the local administration of criminal justice and policing. Given the history of lack of confidence in the criminal justice system, and the emphasis placed by the Criminal Justice Review in its report and recommendations on the need to build and sustain such confidence, real power and accountability needs to be, and be seen to be, delivered locally, in a fair, effective and impartial manner. It is questionable to what extent that will be possible without serious discussion around the retention of emergency and national security measures at Westminster.

Chapter Five

CONCLUSIONS AND RECOMMENDATIONS

5.1 BEYOND THE TRADITIONAL CRIMINAL JUSTICE APPROACH?

Criminal justice reform is a very complex and multi-faceted challenge for any society, and all the more so for a society like Northern Ireland which is emerging out of violent conflict. The focus of this report has essentially been on the issue of devolution, and how responsibility for criminal justice and policing is devolved in a way that respects human rights. This focus has however meant that very many important topics could not be fully explored, though they might be extremely relevant to the discussions around devolution of justice powers.

In particular, in many of the jurisdictions visited, researchers and those interviewed emphasised the value to any criminal justice reform programme of looking at more innovative approaches to public safety and responses to crime. In South Africa, for example, there was a very strong message coming from those interviewed that the issue of dealing with crime should be central to the devolution debate. If the tackling of crime is not centre-stage, it was feared that the momentum of change could be lost and the tried and largely failed traditional methods of responding to crime would become the 'default' option. In this regard, it is interesting to note that in Northern Ireland, more not less money has been spent on policing and criminal justice since the peace agreement. In 2004-2005 the estimated expenditure on policing, security, criminal justice, prisons etc. will amount to £1.4bn – an increase of 25% since 1999-2000.[247]

With devolution to a Northern Ireland Assembly and Executive, it will be the responsibility of local ministers to make the hard decisions about the appropriate deployment of limited resources, and large sums of expenditure on criminal justice means less money available for other important public services. Moreover, everyone knows that expenditures on policing and criminal

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[247] Northern Ireland Office/HM Treasury Departmental Report 2005, June 2005. See - http://www.nio.gov.uk/departmental_report_2005.pdf

justice amounts to little more than locking the stable door after the horse has bolted. Any society seeking to prevent crime would be much better advised to introduce programmes that target social need, ensure good educational provision, develop employment schemes and economic regeneration projects, introduce youth diversionary schemes etc. Merely penalising the perpetrators after the event does little to reduce crime. Indeed, arguably, by exacerbating inequalities (providing well paid jobs for the well-educated in the criminal justice and policing services, and making it easier to criminalise the poor and unemployed), society is rendered much less stable and much less safe.

In recognition of the importance of putting the devolution of criminal justice and policing debate within this broader framework, CAJ sought to learn something of the more innovative approaches that may have been taken in other jurisdictions. We quickly realised, however, that this would require a whole new area of study and that it could not be done as part of this relatively small project. Accordingly, we decided that it would be more appropriate for us to recommend that more research be done into these kinds of questions and indeed this is the kind of research that a newly devolved minister/s should consider making an early priority. For our part, we can make a small contribution to such work by including in appendix 2 some of the material that was brought to our attention in the jurisdictions visited. We are aware that Northern Ireland has already started some examination of alternative approaches – see for example the material in the Criminal Justice Review, and in subsequent reports by Lord Clyde, about the contribution that restorative justice might make to developing a more holistic – and effective – response to community safety. Hopefully, some of the material in the appendix will be of relevance as that debate deepens and widens.

5.2 The change process itself

In the course of our research, we were given extensive advice about the nature of change itself. As noted earlier, no jurisdiction is like any other and the lessons that are appropriate in one country are not necessarily going to be easily adapted to another. However, the following recommendations were repeatedly made to our researchers in different places. We include them here because we believe that they may be of relevance for Northern Ireland.

A realistic timeframe

Some of the lessons gathered from the international research indicate that any attempts to rush reform will end in failure. Views on the length of time required varied. For example, one source in South Africa advocated factoring in a generation, or effectively a fifteen-year cycle, and gave the example of attempts to reform the New South Wales police force in Australia between 1982 and 1992.[248] He argued that ten years was not long enough given the nature of change required, and this region of course had nothing like the level of division that societies like Northern Ireland or South Africa have had to overcome. On the other hand, a Belgian commentator explained that reforms there were attempted in a period of two years. This he thought proved impossible to sustain, and argued that reform should take between five and ten years. The reform programme in the Netherlands was cited as relatively successful in this regard.[249] Of course, while most people interviewed argued that any major change process be given sufficient time to mature, there was also a widespread recognition that change should not be allowed to drag on interminably. Everyone interviewed highlighted the need for clear and realistic timetables, with well-defined short and long-term objectives, and measurable outcomes to reassure the public that change on the ground would be discernible and could be monitored.

Idealism versus pragmatism

The reform process must embody a balance between idealism and pragmatism. Overly ambitious change projects are liable to burn out quickly or fail because they are too difficult to implement. The South African process showed that the change process needs to be manageable given the resources at hand, but this may of course involve new resources being made available by government. At the same time, many cautioned against pragmatic solutions being privileged over clarity of purpose and principle. Confidence in the rule of law requires developing a shared vision about what constitutes a fair and just society: political expediency may offer short term solutions that will not stand the test of time.

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[248] Interview with Wilfred Scharf, Cape Town University.

[249] Interview with Lode van Outrive. It is also interesting to note that, in his opinion, the Belgian experience showed that there was a need for more pilot projects so that reforms could be properly evaluated before all resources were spent on implementing poor policies. He felt that the lack of evaluation once reforms were implemented was a critical failing in Belgium.

Strong leadership

Leadership is extremely important. In some societies, strong leadership is created by changing some of the key personnel in the course of major reform programmes, but this is not the only option. A policing expert from South Africa highlighted that in their experience putting new faces "in charge" did not necessarily lead to improvements in the system.[250] In some situations, more can be achieved by retaining experienced leadership, but emphasising systemic cultural changes at all the different levels within the institution. One should not, however, ignore that sometimes persistent problems, and particularly any active resistance to the process of change, may derive very much from the actions of certain individuals or elite groups within the old leadership. Public confidence in the new arrangements may also be easier to secure if there is a visible change in the nature of the leadership. But regardless of the particular option pursued, it is vital that the new or renewed leadership give strong and unequivocal support to the process of change, and that they be assessed on their capacity to deliver the agreed change programme.

Investment in staff

As well as any new staff being introduced to the system, existing and remaining staff in institutions undergoing change need support and investment to help them deal with the process of transition. Particularly important is the provision of training to help staff (new and old) deal with what may be relatively new concepts such as human rights, or accountability. Without this, a two-tier effect could develop whereby new trained staff willing to embrace changes could lead an unhappy co-existence with embedded staff who are not being supported or encouraged to deal with the changes to the same extent. Examples were given in the Belgian context where human resources were wasted because the police did not take proper care of the staff, for example by transferring those who failed tests to minor petty jobs.

Independent oversight

A central message emerging from the South African research was the need for independent oversight; in the words of one interviewee "no organisation can

[250] Interview with Janine Rauch.

transform itself." This was echoed in the Belgian context, where one source noted that one of the major criticisms of the policing reforms was that there was no mechanism in place to detect resistance from within the police to the change process.[251] This is particularly interesting in the Northern Ireland context, where Policing and Justice Oversight Commissioners were (albeit reluctantly in some cases) appointed to oversee the process of change and implementation of agreed recommendations. The two posts have proved their worth but both were given relatively short life spans. If this kind of independent oversight of the change process is to be successful, it should more carefully mirror the overall timescale envisaged for the transition. These mechanisms are, however, by their nature intended to be relatively short-term. They need to be complemented by permanent oversight mechanisms which, on a more routine basis, can assess whether the changes envisaged are in fact working, or whether important amendments are required.

Civil society

Again and again throughout the research, the importance of the role of civil society was stressed. Numerous examples were given of initiatives that had collapsed because of a failure to properly engage and consult with civil society. In Belgium, there was no real consultation with NGOs and wider civil society on the process of reform, which was seen as a major downfall. This meant, for example, that the issue of community policing was not high on the agenda for reform, whereas this actually needed to be addressed. Similarly in South Africa, community policing arrangements failed because of the lack of real investment in the role of civil society. Clearly, any criminal justice and policing system needs to relate to the communities it serves, and it can only really do this by engaging meaningfully with them.

5.3 Recommendations

1. CAJ takes no position on the constitutional status of Northern Ireland and this report therefore takes no formal position on devolution within the UK context, nor does it address a series of issues around an all-Ireland relationship. These questions can and presumably will be addressed in the course of detailed negotiations between the various political parties

[251] Interview with Lode van Outrive.

and the British and Irish governments, in the context of discussions to date in the 1998 Agreement and the subsequent Joint Declaration (2003). At the same time, it is fair to say that the starting premise of this work was that in principle devolution of criminal justice and policing to more localised democratic control was to be welcomed, because it brings crucial decision-making closer to those directly affected by those decisions. That said, our primary concern is that any eventual models of devolution be measured against clear human rights criteria, and that assessments of their relative merits and demerits be made on the basis of such criteria.

Any proposed devolution model needs to be assessed for its ability to:

- be open and transparent, so as to secure widespread public confidence;
- ensure an efficient and effective justice system;
- provide legal, democratic and financial accountability;
- represent the diversity that is Northern Ireland, and thereby ensure trust in its ability to work impartially and fairly for all; and
- deliver the administration of justice to the highest standards, as laid down in international and national human rights law.

2. CAJ recommends that the discussion about the appropriate devolution model to adopt should itself be an open and transparent debate, and should not be, or be seen to be, held behind closed doors and the subject to horse trading between different political parties. CAJ believes that the timetable for debate and for decision making is also a matter of public interest, rather than merely party political interest. It is particularly problematic that many changes recommended in the Criminal Justice Review are being treated (unjustifiably in our view) as contingent on devolution. Further foot-dragging of this kind can only fuel speculation that some of the Review recommendations are being held back so as to be treated as "bargaining chips" in the eventual political negotiations around devolution.

3. Regarding the appropriate governmental structures in any devolved criminal justice arrangements, CAJ concludes on the basis of its research that:

(i) a single department/minister may meet concerns about efficiency and effectiveness but may pose concerns around credibility and legitimacy in a politically polarised society like Northern Ireland. If it is determined to pursue a single ministry model, the emphasis will need to be on safeguards (such as those outlined in recommendation 4) that will ensure that the party 'holding' the single ministry is behaving in an impartial and non partisan way.

(ii) a two or more departmental model would potentially offer Northern Ireland greater security against charges of ministerial partisanship since the departments can be headed up by members of different political traditions, who could be expected to act as a safeguard upon each other. This model risks being or appearing less efficient, and if pursued, the emphasis would need to be on mechanisms aimed at ensuring coordination, and collaboration across the criminal justice agencies will need to be the primary consideration.

(iii) Northern Ireland already has the experience of the Office of the First and Deputy First Minister, which seeks to bring together cross-community ministerial responsibility within the operation of a single department, and some consideration was given to whether a similar model could be applied to a future Ministry of Justice. In reality, no other country studied had a model of this kind, so comparisons with elsewhere cannot be easily drawn upon. When learning from experience to date in Northern Ireland, it would appear that if this joint-leadership cross-community model were to be applied to criminal justice, it would be important to (i) have a clear delineation of responsibilities between the Minister and Deputy Minister (ii) establish clear protocols governing when joint agreement is needed and/or when a veto arrangement might operate and (iii) introduce a fall back mechanism to resolve any stalemates.

4. No executive governmental model (one, multiple, shared) is going to be self-sufficient in providing safeguards in such a highly contentious and politically problematic area. Northern Ireland should give active consideration to all of the following additional safeguards:

- Constitutional safeguards and Bills of Rights: a strong Bill of Rights for Northern Ireland will be an extremely important element of

developing a criminal justice system that is both human rights compliant and sympathetic, and as such has a central role to play as an engine for transformation and change within criminal justice institutions.

- Parliamentary safeguards: tried and tested traditional methods of parliamentary scrutiny such as committees, questions and reporting obligations are extremely effective methods of holding minister(s) to account.
- Inspectorates/oversight mechanisms: such mechanism have already proved essential in monitoring the implementation of change in policing and criminal justice, and more permanent mechanisms should be considered.
- Complaints systems: while these are traditionally more common in relation to policing, the Criminal Justice Review recognised the importance of criminal justice institutions adopting procedures for complaints. Clearly the more independent these mechanisms are the better.
- Effective and independent judiciary: the judiciary must be in a position to rule objectively on the standards and human rights to which a member of the executive must adhere in the exercise of his or her ministerial responsibilities. Its established presence as an impartial and distinct organ of government should be a powerful deterrent to any justice minister who is tempted to act in a way which would be inconsistent with his or her office.
- Scrutiny at the local administrative level: the Criminal Justice Review envisaged a single local entity – building upon the Patten idea of District Policing Partnerships (DPPs) – which would deliver a holistic participatory approach to local policing and community safety. Government's decision to run two local entities in tandem (DPPs and Community Safety Partnerships (CSPs)), with little coordination, seriously risks undermining the impact either body can hope to have.
- International scrutiny mechanisms: Government policy, the judiciary, the police, and all the criminal justice agencies, are obliged to comply with the international human rights standards that the authorities have freely signed up to.
- Civilian oversight and statutory commissions: bodies such as the NI Policing Board, Judicial Appointments Commission, Police Ombudsman and Criminal Justice Inspectorate will all be extremely important in monitoring the police and criminal justice institutions.

5. CAJ recommends that any major institutional change in criminal justice and policing be built upon a detailed programme of work which ensures that the new arrangements embrace change and commit to the principles such as openness, transparency, accountability and human rights as set out in recommendation 1 of the Criminal Justice Review.

In particular, CAJ notes that a number of the key recommendations from the Criminal Justice Review that are instrumental in bringing about such change have made the least progress in implementation. Institutional resistance to change, and the failure to fully embrace cultural transformation leads to serious questions about the ability of the criminal justice system to transform itself into one which commands the confidence of the community it serves. In particular, this report highlights how recommendations relating to securing a representative workforce, a more reflective judiciary, equity monitoring of those who pass through the criminal justice system, the policy around the giving of reasons for no prosecution, the implementation of complaints mechanisms, codes of ethics and discipline, and the provision of adequate and relevant human rights training have been most protracted in their implementation. CAJ notes that institutional and political resistance to deeper cultural change is evident in relation to these recommendations.

Without pressure for deeper institutional change, rebuilding confidence in the criminal justice system faces a tough challenge. At present it is difficult to see where such pressure exists. Arguably, the devolution of criminal justice and policing powers, and the local scrutiny and accountability that this will entail, could increase such pressure. Equally, however, failure to embrace the real and meaningful cultural change envisaged by the Criminal Justice Review could mean that other recommendations and reforms run the risk of becoming redundant, and indeed the devolution of criminal justice and policing powers would be of limited affect.

6. CAJ recommends that criminal justice only be devolved once there is a clear delineation of the exact powers that are to be 'devolved' and those that are to remain 'excepted'. It is particularly important that there is clarity in the area of emergency powers and national security. There will be arguments as to whether to devolve more or less authority to locally elected bodies in these particularly contentious areas, but this must be

determined in advance of the transfer of powers. It is extremely worrying that the Northern Ireland Office has not complied with requests from CAJ and others to provide a factual list of the various powers, who holds them currently, and which of these powers might or might not be devolved in future. It is CAJ's view that ambiguity surrounding the nature and extent of authority and powers being transferred from Westminster to Northern Ireland would be very destabilising for the peace process, and could seriously undermine the efficiency and legitimacy of the eventual arrangements. Decisions underway currently, for example, regarding the transfer of key intelligence functions from the Police Service for Northern Ireland to MI5 will determine to a great extent the nature of criminal justice and policing powers to be devolved. In the past, problems of communication between internal branches of the police service – Special Branch and the regular units of either the RUC or PSNI – has led to grave errors (see, for example, the Ombudsman's inquiry into the Omagh bombing). The transfer of some of these functions to an agency outside of the Police Service of Northern Ireland makes the likelihood of such errors more not less likely in future. Very importantly, it removes some key functions – ones which traditionally lend themselves most easily to abuses of human rights – from effective local oversight. A devolution of powers that is seen by people in Northern Ireland to be devolution in name only will only be counter-productive.

7. The current process of reform of the criminal justice system in Northern Ireland, and the potential of local accountability via the devolution of criminal justice and policing powers, presents us with an opportunity to consider innovative thinking in relation to the ways that we treat and respond to crime. In particular, further examination is needed of the extent to which the traditional criminal justice model delivers public safety in Northern Ireland.Such an examination can of course only take place in a wider context of recognising that Northern Ireland is undergoing a process of institutional change that poses particular challenges and opportunities, many of which are explored in this report.

APPENDICES

Appendix 1

QUESTIONS AND ISSUES ON THE DEVOLUTION OF CRIMINAL JUSTICE AND POLICING FUNCTIONS

INTRODUCTION

Reform of the criminal justice system and police service in Northern Ireland is a central component of the Belfast Agreement. In this respect, the Agreement established both a Police Commission and a Criminal Justice Review Group, each tasked with producing a report of recommendations for reform, within agreed and specified terms of reference. The ensuing recommendations of both groups (the Patten Report and Review of the Criminal Justice System in NI) have given rise, in the case of policing, to the Police (NI) Act 2000 and two Implementation Plans and for criminal justice, to the Justice (NI) Act 2002 and a single Implementation Plan. It is anticipated that the Government will publish a revised implementation plan on the Criminal Justice Review in early 2003.

A key element and arguably the ultimate goal of both the criminal justice and policing reviews is the intention to give real consideration to devolving justice and policing powers from Britain to Northern Ireland. This is expressed in the Agreement, in the Patten Report, the Criminal Justice Review and in their associated implementation plans. Indeed a number of practical measures have since been taken to make a reality of this intention. For instance, preparatory legislative arrangements have already been put in place by means of the Justice Act, to give statutory effect to those recommendations of the Review which have been formulated and will only come into force in the context of devolution. While this and other such measures, demonstrate clear commitment to devolving justice and policing powers at a future date, there are still many questions remaining as to how this transfer of powers should take place.

There are many different institutional models which could potentially accommodate devolved justice and policing powers. While valuable lessons may certainly be learnt from the criminal justice structures currently existing

in our neighbouring jurisdictions, there is no single model which can directly be transferred to Northern Ireland. The continued existence of cultural, political and religious complexities in Northern Ireland distinguishes it from its neighbours and necessitates a model which has been fully assessed in terms of its implications for human rights, equality and broader public policy considerations. The need for a rigorous and comprehensive analysis of how justice and policing functions might best be devolved cannot be over emphasised, given that it must secure widespread public confidence.

What follows is a list of some of the kinds of questions which we hope will engender debate on many of the legal, political, financial and policy implications of devolution, in all of its potential, institutional forms.

Institutional Models

As mentioned in our introduction, there are many potential institutional models to accommodate the devolution of justice and policing powers to NI. Which of these models could be recommended on human rights grounds and on what basis can such an evaluation be made?

Some of the possible models follow below.

- A single department of justice.

This could house all powers with the exception of the prosecution service, which would be the responsibility of the office for the attorney general. The Irish and Scottish systems follow this approach and it is also the preferred choice of the Review, having researched a number of justice systems in various jurisdictions.

A single department could, among a number of possibilities, be headed by:
- a single minister in line with the current arrangements for existing government departments under the devolved administration;
- a minister and deputy minister equivalent to the OFMDFM model; or
- a rotating minister and deputy.

What are the implications of any of these arrangements? If we have a rotating ministry, what impact may this have on efficiency and continuity? If we adopt the OFMDFM model would any consideration be given to the idea of separating

responsibility for justice and policing and giving one area each to the FM and DFM? In a single ministry, would it be considered necessary to develop special safeguards, such as, for example, introducing a requirement that certain decisions are approved by the whole Executive? What relationship would the potential office of the attorney general have with the justice ministry?

- A department which is divided into two main divisions.

This is the case in Canada and the Netherlands where there is a Ministry of Interior which deals with policing and internal security and a Ministry of Justice. If this model were to be adopted in NI, what relationship would exist between the minister for policing and minister for justice?

- A department which is divided into many divisions.

This has recently been done in New Zealand where a Ministry of Justice, Department of Corrections, Department for Courts, Crown Law Office and New Zealand Police have been created? If this model were accepted, would the D'Hondt formula be a suitable means of allocating responsibility for the separate divisions?

- Will the relevant departmental and standing committees of the NI Assembly function in the same way for justice as for other areas of devolved government? What safeguards may they provide? Is there any need to consider restructuring the departmental committees?

- How would youth justice issues potentially be managed under a single justice department? Is this an opportunity to consider the merits of creating a separate Children's Office, with its own Minister and Deputy or to transferring youth justice issues to the Department of Health?

- To what extent will Recommendation 245 of the Review, proposing an assessment of the scope for harmonisation of the criminal law and procedure in the four jurisdictions of England and Wales, Scotland and the Republic of Ireland, impact upon devolution of justice decisions?

Relationships

- In the case of a single department of justice what would be the relationship between the ministry and the Lord Chief Justice who, by virtue of section 12 of the Justice (NI) Act 2002, will take over from the Lord Chancellor as head of the judiciary in NI? What will be the relationship between the Lord Chancellor in his new reduced capacity (responsible only for senior judicial appointments) the Ministry and the Lord Chief Justice?

- The Justice (NI) Act creates two new offices: Attorney General for NI and Advocate General, both of which are exercisable only on devolution. The powers granted to the new AG for NI by the act are not comparable to those formerly vested in the AG for England and Wales (who previously had responsibility for NI). Specifically, all powers which relate to "national security" and international relations are now conferred on the new Advocate General who will be a UK Officer. If the prosecution service is made the responsibility of a potential office of the attorney general, how then will that office be run, in terms of the division of responsibilities between the newly created AG for NI and the Advocate General?

- How will the devolution of justice and policing powers affect the nature and substance of existing relationships between the Police Board, the Chief Constable, the Police Ombudsman and the Secretary of State? (For example, will decisions which relate to the funding of the Office of the Police Ombudsman become the responsibility of a minister for justice or remain a matter for the Secretary of State?).

- The Judicial Appointments Commission, created by the Justice Act will take over responsibility from the Lord Chancellor in terms of making recommendations for appointments up to the level of high court judge and will also provide the FM and DFM with advice on candidates for senior judicial appointments. In both instances it will present its recommendations to OFMDFM, so what relationship will exist between that office and a future department of justice in this respect?

Human resources

- If the current criminal justice system is replaced by a new institutional model, what implications will this have for the staff of the existing agencies? For example, what will happen to pension provisions?

- Would a potential department of justice be staffed by transferring personnel from the NIO policing and criminal justice divisions? Could this create any particular difficulties?

- In the event of the need for redundancies, on what basis will they be carried out bearing in mind S.75 requirements?

- How will recruitment for new staff operate? How long will it take to fully establish (a) new department/s in terms of recruiting staff? For example, the current reforms to the prosecution service appear to be spread out over a number of years.

Financial questions

- How and by whom will decisions on the allocation of resources be made? What system of funding would best ensure independence? What is the current financial situation in relation to funding and how has this impacted upon the work of the Assembly in devolved areas of responsibility?

- How might equality considerations determine budgetary re-allocation?

- Should there be a more root and branch analysis of the cost effectiveness of the existing approach and priorities attached to the criminal justice system? Could discussions on devolution present an opportunity for a fundamental re-think in this area?

- Will there be any resulting negative impacts on other public policies as a result of devolution of justice in NI, either directly in NI itself or in the UK as a whole?

- Has consideration been given to the need for a degree of fiscal autonomy in NI to accompany devolution of further powers? Under Scottish

devolution, the Scottish Parliament has the power to raise or lower the basic rate of income tax by up to three pence in the pound. If NI cannot exercise such a power, will the Government's control over the budgetary process restrain the newly devolved powers of the local authorities?

Powers held by Westminster/Secretary of State

- Consideration should be given to each of the powers currently vested in the Secretary of State and the impact that retention of such powers will have on the ability to deliver justice and policing reforms. For example under the current arrangements the Secretary of State can effectively veto the establishment of inquiries by the Policing Board on a number of grounds including that of national security. In the event of devolution of policing powers, would this controversial veto power be exercised by a single minister of justice and if so, how would s/he be able to exercise the national security power given that it remains firmly an excepted matter?

- Under the NI Act the UK Government has full discretion in deciding whether a matter of criminal law or a policing issue may be considered a matter of "national security" and therefore beyond the scope of the Assembly's future devolved powers. As national security is an excepted matter, Westminster alone can legislate in this area and the Secretary of State may revoke any act of the Assembly which breaches its jurisdictional competence. Given the contention associated with decisions made in the name of national security and the broad interpretation that this term has been afforded, how might the current situation affect public confidence in the criminal justice reforms?

Role for Bill of Rights

- To what extent can the proposed Bill of Rights for Northern Ireland safeguard and develop human rights standards in the areas of justice and policing; particularly how may it increase accountability?

- Even after the devolution of justice and policing powers, all disputes on jurisdictional competence will fall to be resolved by the Privy Council. In light of this fact, has any further consideration been given to the

establishment of a NI constitutional court which could exercise general jurisdiction over the proposed Bill of Rights?

Rate of Devolution

- Will criminal justice and policing powers be devolved together? The Review recommended that all powers should be devolved simultaneously. If this is not accepted, what approach will be adopted to determine the order of implementation?

Law Commission

- How may the Law Commission, created under S.50 of the Justice Act, be put to best effect in the advent of devolution and thereafter? Once a commencement order has been made in respect of the Commission, it can begin its task of reviewing substantive aspects of the criminal and civil law in NI – particularly those areas which have been the cause of greatest concern.

- In the event that a single department of justice is formed, would it be appropriate for the Law Commission to be incorporated into this new department and take over the functions of the UK Office of Law Reform, as recommended by the Review (recommendation 255)?

Oversight Arrangements

- In December 2002, the Government announced its plans to create the office of an oversight commissioner to monitor criminal justice reforms. When will this office come into effect? Will it have a statutory basis? Will the commissioner and staff be independent? Will they be local or international appointees? How large will the intended office be? For how long will the office be given a mandate? Has any consideration been given to arrangements after the Commissioner's role expires?

- Currently responsibility for implementing many of the reforms set out in the Justice Review lies with the Criminal Justice Board. This board is however composed of senior representatives from the six main statutory

criminal justice agencies in NI. Are there any plans to establish an independent board for criminal justice issues, equivalent to the Police Board?

Suspension Arrangements

If the Assembly is suspended again, after devolution of justice and policing, what arrangements will be made?

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Appendix 2

INNOVATIVE APPROACHES TO PUBLIC SAFETY AND RESPONDING TO CRIME

In the course of the research, several insights were provided into a range of innovative approaches to public safety and responding to crime. The following is far from comprehensive, but brings together a number of interesting ideas that could be usefully pursued in the course of the continuing debate about criminal justice reform.

SOUTH AFRICA

Dealing with crime

The South African Government, which in the first years of democracy had concentrated on transformation policies and nation building exercises, was forced from 1997 onwards to readjust its strategies and concentrate on actual service delivery in the criminal justice system. This resulted is a focus on enforcement and a "law and order" approach. The most significant development in terms of responding to the soaring levels of crime was the National Crime Prevention Strategy (NCPS), adopted in 1996.

This marked a shift in policing discourse from crime control to crime prevention. Crime was viewed not solely as a security issue; as a result, a number of government departments, namely, Justice, Safety and Security, Welfare, Correctional Services, Defence, and National Intelligence collaborated in developing the NCPS. The four key aims of the NCPS were:

1. Re-engineering the Criminal Justice System
2. Reducing crime through environmental design
3. Developing public values and education (community participation in crime prevention)
4. Dealing with trans-national crime.

However, the NCPS ran into a number of significant problems which ultimately led to its demise. At its most general, the strategy was seen as too ambitious and thus difficult to operationalise. It was a long-term, all encompassing

and could not produce immediate results. In addition, while the inter-departmental nature of the strategy was extremely important for visioning the project, it created operational difficulties.

Community involvement

Nonetheless, the principles of the NCPS were felt to be important and have been absorbed to some extent into subsequent distinct policies on community policing and community safety fora. The former involved only the police with the community and the latter engaged the criminal justice agencies beyond the police. Reactions to these policies were mixed – while some felt they were successful in promoting the accountability and transparency of the police vis-à-vis the community they served, there were problems of lack of support from government, inadequate resources and resistance by the police in some areas.[252] There was also an under-investment in the role of civil society. Much effort was put into the establishment of police fora at the expense of building and bolstering the expertise with the already established non-governmental sector. There was an anticipation that the community fora would become effective within a relatively short period of time of two to three years) and that they would then carry on the work of monitoring the police. That did not happen, however, and the fora become politically dependent as civil society did not have the capacity to make the shift from discussing the process of transition to focusing on law reform.[253] There are comparisons to be made here with the experience of District Policing Partnerships in Northern Ireland.[254]

Business involvement

Some other interesting developments in dealing with crime in South Africa have been experienced in the involvement of organised business in the criminal justice sector. For example, the Business Trust was established in 1999 as a result of dialogue between President Mbeki and the business sector. The Trust raises funds from the business communities and works with strategic partners who implement projects. Business Against Crime (BAC) is another such initiative that was established in response to former President Mandela's call for private sector partnerships with government in the fight against crime. The BAC is a non-profit operation and is funded by private sector sponsorships

[252] Op. cit., Research paper prepared for CAJ, Melanie Lue-Dugmore.
[253] Interview with Sean Tait, Open Society Foundation, Capetown.
[254] See Commentary on District Policing Partnerships, CAJ, May 2005.

The BAC is a non-profit operation and is funded by private sector sponsorships and donations. Some of the programmes in which it is involved in the criminal justice sector are:

- Supporting the Integrated Justice System initiative through project facilitation;
- Supporting the South African Police Service Delivery Improvement Programmes which grew out of a pilot programme which BAC partnered;
- Surveillance – the development of closed circuit television systems now in several major cities throughout South Africa;
- Commercial crime – piloting of cases management systems;
- Organised crime – utilisation of business expertise in addressing issues such as vehicle crime, illicit drugs, corruption and firearm crime;
- Thisa Thuto – a social crime prevention project aimed a strengthening education and creating safer school environments.

The involvement of business in the criminal justice system in South Africa is quite unique. Whilst there have been problems in the relationship, the expertise and funds made available through this sector have made a valuable contribution in many areas.[255]

Other approaches

An additional approach developed in the effort to seek alternatives to traditional criminal justice methods in South Africa is what are known as diversion programmes, which are somewhat similar in nature to the restorative justice approach adopted in Northern Ireland. Diversion seeks to explore alternatives to the formal criminal justice process of arrest, trial, conviction and sentence. It is often applied to less serious offences, where restitution and rehabilitation can be better achieved through measures other than incarceration, such as community service. The research paper commissioned by CAJ comments that diversion is an effective tool in that it acts as an early warning system by identifying delinquent behaviour and offering corrective, rehabilitative interventions. It also seeks to hold offenders accountable and addresses minor offences in a more appropriate manner. In the case of a severely overloaded criminal justice system with limited resources it also offers huge savings. Whilst diversion programmes have been in existence since the 1990s and have grown tremendously, there is a feeling that their full potential has not been exploited.

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[255] Op. cit., Research paper prepared for CAJ, Melanie Lue-Dugmore.

CANADA

The report commissioned on Canada[256] noted that its Department of Justice encourages and supports innovative approaches, notably in areas such as dispute resolution and aboriginal justice, which explore constructive alternatives to the traditional pattern of courts and prisons. The provincial government ministries responsible for criminal justice matters also engage in alternative justice models. Two particular examples are worth exploring in more detail due to their innovation and possible relevance to the Northern Ireland context. The first is a program in the Province of Ontario to support victims of crime, and the second is the federal Aboriginal Justice Strategy.

Victims of Crime

The Ontario model for supporting victims of crime throughout the criminal process is an excellent one and is administered by the Ministry of the Attorney General of Ontario. The *Victims' Bill of Rights*, proclaimed on June 11, 1996 in the province of Ontario has full statutory effect and was an important step in acknowledging and responding to the needs of victims of crime. There are three central elements to the Bill:[257]

(i) Establishing a legislated set of principles to support victims throughout the criminal justice process. The statement of principles requires that victims:
- Be treated with courtesy, compassion and respect for their personal dignity and privacy;
- Have access to information concerning services and remedies available to victims;
- Have access to information about the progress of criminal investigations and prosecutions and the sentencing and interim release of offenders from custody;
- Be given the opportunity to be interviewed by police officers and officials of the same gender as the victim, when that victim has been sexually assaulted;
- Be entitled to have their property returned as promptly as possible by justice system officials, where the property is no

[256] Op. cit., Research paper prepared fpr CAJ, Dr. Susan C. Breau. The material in this section of the chapter is taken largely from this report.
[257] Taken from the government summary of the Bill.

longer needed for the purposes of the justice system (for example, to carry out an investigation, trial or appeal);
- Have access to information about the conditional release of offenders from custody, including release on parole, temporary absence, or escape from custody; and
- Have access to information about plea and pre-trial arrangements and their role in the prosecution.

(ii) Making it easier for victims of crime to sue their assailants in civil actions. The Bill states that a person convicted of a crime prescribed by regulation is liable in damages for the victim's emotional distress and any bodily harm resulting from the distress. The Bill also makes it clear that a victim of domestic assault, sexual assault or attempted sexual assault is presumed to have suffered emotional distress. Subject to judicial discretion, the following measures are provided for victims in civil actions:
- An offender's sentence should not be considered when awarding compensatory damages;
- Victims who are successful in their lawsuits are presumed to be entitled to reimbursement for most of their legal costs by their assailant;
- Victims are entitled to receive interest on awards from the date of the crime to the date of trial; and
- Victims who live outside Ontario and who are commencing a lawsuit will usually not have to post security at the outset of the proceeding.

(iii) The Victims' Justice Fund in the *Victims' Bill of Rights*, 1995. The Ontario government enshrined the Victims' Justice Fund in the *Victims' Bill of Rights, 1995*, so that money collected under the victim fine surcharge will be solely dedicated to providing services for victims. The money for the Fund is collected through a "provincial victim fine surcharge", which has been applied to all fines under the *Provincial Offences Act* (except parking violations) since January 1, 1995. Federal fine surcharge revenues are also collected into this Fund. The surcharge is calculated on a graduated scale according to the amount of the fine.

The second phase of this initiative was the Victims' Justice Action Plan (VJAP), which was launched in June 2000. The goal of VJAP was to develop an

integrated justice-sector service that is responsive to the needs of crime victims and community service providers. The plan was to be implemented over several years and to co-ordinate victims' services. Key components of the plan included:

- Creation of an integrated Victim Services division in the Ministry of the Attorney General;
- Creation of advisory agency status for the Office for Victims of Crime;
- Expansion of victim services, including the domestic violence court program to improve access across the province; and
- Investment in technology and innovative pilot projects to improve coordination, focus on prevention and address the needs of vulnerable children and adults.[258]

As a result of this action plan, on 1 April 2001, victim services staff from Ontario's Ministry of the Attorney General and Ministry of the Solicitor General came together to form a new, integrated Victim Services Division (VSD). This new division was to implement the action plan to improve and coordinate services to meet the needs of victims of crime in Ontario. The VSD would also oversee the expansion of provincial victim services in communities across Ontario and ensure proper planning and implementation at the community, regional and provincial levels.

Also in accordance with the plan, on 11 June 2001, the Office for Victims of Crime (OVC) became a permanent advisory agency to the Attorney General on ways to ensure that the principles set out in the *Victims' Bill of Rights* are respected. The OVC is to offer advice with respect to:

- The development, implementation and maintenance of provincial standards for services for victims of crime;
- The use of the Victims' Justice Fund to provide and improve services for victims of crime;
- Research and education on the treatment of victims of crime and ways to prevent further victimization; and
- Matters of legislation and policy on the treatment of victims of crime and on the prevention of further victimization. [259]

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[258] See *http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/*

[259] See *http://www.attorneygeneral.jus.gov.on.ca/english/about/vw/ovc.asp*

The Ontario government strategy is probably a model for victims' services and could be studied for use in any criminal justice system. The fact that these are legislated services illustrates the importance attached to victims' rights.[260] It is reportedly very expensive to implement due to the necessity for agencies in many locations; however, in a much smaller geographical area such as Northern Ireland, where three is a legacy of insufficient attention to victims' needs and rights, these initiatives are well worth studying in more detail.

The Aboriginal Justice Strategy

The Canadian justice system has had a historical problem with the proportion of aboriginal offenders, and the Aboriginal Justice Strategy (AJS) was largely developed in an attempt to address this. High levels of aboriginal incarceration[261] were aggravated by inadequate government funding, limited rehabilitation options and severe social and economic disadvantages. The AJS is one way the federal government is attempting to deal with this serious problem. The strategy is composed of three components: community-based justice programs that are cost-shared with provincial and territorial governments, the Aboriginal Justice Learning Network, and self-government negotiations in the field of administration of justice. The Department of Justice, which administers this project, sets out the objectives and activities of the strategy. The objectives are:

- To support aboriginal communities as they take greater responsibility for the administration of justice;
- To help reduce crime and incarceration rates in the communities that administer justice programs; and
- To improve Canada's justice system to make it more responsive to the justice needs and aspirations of aboriginal people. [262]

The key activities are:

- diversion or alternative measures;
- community sentencing circles and peacemaking;

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[260] Breau comments that this might well be due to the publicity attached to the horrific crimes of Paul Bernardo who sexually assaulted and murdered two Ontario schoolgirls.

[261] At one stage 90% of the inmates at the Federal Prison for Women were native.

[262] See *http://canada.justice.gc.ca/en/ps/ajln/strat.html*

- mediation and arbitration in family and civil cases; and
- justice of the peace or tribal courts. [263]

An excellent example of the innovations this strategy permits are sentencing circles, which involve the accused, his or her family, judiciary representatives, members of the accused aboriginal community and the victim, if he or she wishes to participate. The circle approaches the conflict in a culturally appropriate manner, engages in a wide ranging examination and exploration of the issue to seek to change the circumstances of the offender, brings together the resources of the community to find a solution and makes recommendations to promote law-abiding behaviour rather than punishment for the criminal act.[264]

The *Corrections and Conditional Release Act* contains provisions for the delivery of aboriginal correctional programs and services. The innovations in this area include the hiring of liaison officers, the provision of elders' spiritual services in institutions and the operation of correctional facilities and "healing lodges" by aboriginal communities. The Okimaw Ochi Healing Lodge is a federal facility for women offenders and the Pe Sasketew Centre is for male offenders; both are designed to incorporate aboriginal approaches to healing, personal growth and safe reintegration.[265]

In the provincial setting, Ontario, Alberta and British Columbia have designated justice branches or directorates to deal with aboriginal issues. Several programs are operated in these provinces on the same principles as the federal government. The innovative aspect of the Aboriginal Justice Strategy is the use of alternative methods of justice delivery including diversion and community involvement in sentencing. This strategy has become the model of an important concept in criminal justice, that of restorative justice. It could be argued that in the Aboriginal Justice Strategy, Canada has pioneered the concept.

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[263] See *http://canada.justice.gc.ca/en/ps/ajln/strat.html*

[264] Canadian Criminal Justice Association, *Aboriginal Peoples and the Criminal Justice System,* [Ottawa: 2000]

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