

**The Committee on the Administration of Justice (CAJ)
45/47 Donegall Street, Belfast BT1 2FG
Tel: (01232) 232394 Fax: (01232) 246706**



Winner of the 1998 Council of Europe Human Rights Prize

CAJ's submission to the
**Progress Review of the work of the
Parades Commission**

November 1999

**Submission No. S.95
Price: £2.00**

**Submission No. S.95
Price: £2.00**

Progress review of the work of the Parades Commission¹

Introduction

The Committee on the Administration of Justice (CAJ) is a cross community voluntary organisation which has worked since its inception in 1981 on a wide array of human rights concerns. The organisation takes no position on the constitutional status of Northern Ireland but monitors the extent to which the jurisdiction is administered in accordance with international human rights norms. Alongside its work on equality, gender, disability, racism, and juvenile justice, the organisation works on issues more directly related to the conflict such as emergency legislation, prisoners and policing.

CAJ's interest in the parades issue has been twofold. On the one hand, the organisation believes that there is a genuine conflict of rights involved. Some people assert the right to freedom of assembly and expression, and at the same time there is an assertion of the right to freedom from discrimination and/or harassment and the freedom of movement. Both of these sets of claims have roots in international and domestic law. However, none of the claims constitutes an absolute right, and both claims are subject to the requirement that they be exercised with due respect to the right of others. A second and very important interest for CAJ in the marching issue has been the whole question of policing. Regardless of the decisions taken as to how the conflict of rights is to be balanced and determined, it is vital that the policing of the eventual decision should be (and be seen to be) impartial and even-handed.

In pursuit of this twofold interest, the CAJ has:

- Made a formal submission to the North review (October 1996)
- Commented on the Public Processions etc. (NI) Bill (November 1997)
- Responded to the Guidelines, Code of Practice and Procedural Rules issued by the Parades Commission (February 1998)

and, on the basis of extensive independent observer reports, published commentaries on the policing of the public order situations in 1996, 1997 and 1998 -

- The Misrule of Law (1996)
- Policing the Police (1997) - together with a video of the same title
- Public Order Policing (1998).

All of this material is being sent to the NIO with this submission. Other CAJ publications and materials are of course of relevance (eg a briefing paper on plastic bullets), and are available on request.

¹ This document was prepared in response to an NIO invitation (letter dated 3 November) for contributions to a review they were undertaking into the work of the Parades Commission. The terms of reference of the review were "within the existing framework of law and structures, and taking account of views received from interested parties and the experience of the marching seasons over the last two years, to consider (i) possible ways of achieving even greater acceptance of the approached handling of contentious parades, and in particular (ii) the arrangements for mediation; and to report to Ministers by the end of December 1999."

NIO Review

It seems quite clear from the terms of reference set out by the Northern Ireland Office, and by the questions asked, that the purpose of the review is to focus narrowly, if importantly, on the issues of local accommodation and mediation. While some of CAJ's experience and expertise has relevance for the questions, we are not mediation experts, and therefore would not want to comment in detail on a number of the questions raised. Accordingly, the following commentary focuses on certain aspects of the parades issue which are of concern to us, and which - we believe - fit within the terms of reference of the review.

1. Changes in the situation:

In its first question, the NIO asks how the situation has changed over the last couple of years with respect to achieving local accommodation on possibly contentious parades. CAJ in its commentary on the 1998 "marching season", welcomed the fact that many important changes had come about since we first started to send independent observers to monitor the policing of parades in 1996. Those changes have all, we believe, greatly facilitated a more effective handling of this deeply contentious and divisive dispute.

We noted that the decision making process had changed beyond recognition in several key respects:

- The rulings as to whether a parade, march or protest could proceed are now made by a specially created Parades Commission, vested with legal authority for this specific purpose. The police no longer have responsibility for both taking a decision to permit/refuse a march, and for policing that same decision. CAJ believes that this change has meant that the decision making process, and the enforcement of the decisions taken, were usefully disentangled.
- The fact that the criteria upon which such rulings are made, and the weight given to the different criteria, are now more widely known, thanks to the published rulings of the Commission, is also a very positive fact.
- CAJ is very pleased that an examination of the rulings of the Parades Commission in 1998 and 1999 shows a renewed emphasis on the fact that several different criteria had to be examined (eg public disorder, disruption to the life of the community, impact on relationships within the community). While several different criteria had existed before, the threat of disorder had effectively been the sole priority considered. We think that this change in emphasis is very important, since the broader analysis undermines any sense that the threat of disorder (whether by marchers or protestors) might predominate over the rule of law.
- The decisions of the Parades Commission are normally rendered public a full five working days in advance of the event in question. We feel that this practice allows the different parties to the dispute time to determine whether to conform to the decision or to seek redress via the courts.

We feel that all these changes have eased the situation on the ground. In creating separate authorities to adjudicate and police decisions, rendering more transparent the process, seeking to abide by clear criteria, and in encouraging more time for local accommodation and local negotiation, some clear progress has been discernible.

2. Mediation

As noted above, we are not mediation experts and have quite deliberately not allowed our observers to engage in mediation efforts. Our purpose in sending observers to public order situations is to objectively monitor the policing of those events, and to ascertain the extent to which the government meets its international human rights obligations.

We do, of course, by the nature of our work, have frequent contact with a variety of other groups that work in the area of mediation, most obviously Mediation Network. In recent discussions with them we have had some interesting exchanges about the inter-relationship between "rights" work or approaches, and "mediation" work or approaches. Certainly, it is CAJ's perspective that the two disciplines have more in common than might initially appear to be the case, in that it is our view that the protection of rights is a prerequisite for developing right relationships. It has, of course, consistently been our view that human rights abuses have fed and fuelled the conflict, and that a rights-based approach is the only way that we can ensure a peaceful and stable society. We would therefore challenge any government priority given to efforts at "mediation" or "local accommodation" which would compound or exacerbate inequalities or injustices for any of the parties to the dispute. It is for this reason that we have always urged the Parades Commission to base its work (whether in adjudication or mediation terms) on basic human rights principles.

We understand that underlying the questions posed by the review regarding the Parades Commission's mediation role may be a query as to the extent to which the Commission should focus on its mediation tasks or on its adjudication role. Our position on this was set out in November 1997 when we commented on the Public Processions etc. (Northern Ireland) Bill. We argued that the "mediation" element of the work of the Commission be dropped. We had several reasons for suggesting this. Firstly, we felt that there was an inevitable tension between adjudicatory and mediative functions, and it seemed to us misguided to suggest that members of the Commission both seek to mediate a conflict and then sit in judgement on the merits of the same dispute if the mediation failed. Secondly, the Parades Commission is the only body that can adjudicate in such situations, whereas there are a plethora of individuals and groups who could assist in the process of mediation. It therefore appeared to us that if any choice between the two functions were required, the priority in the Commission's work should go to its adjudication function.

The Commission has developed a fairly distinct network of mediators who keep at arms-length from the decision making process, and it may therefore be that our fears about the possible conflict of interest has not been borne out in practice. We feel, however, that others will be able to comment more knowledgeably than CAJ on this issue, and report on the extent to which, if any, conflicts of interest have already arisen. However, we are entirely clear that it is the adjudication function of the Parades Commission that is the primary one to be safeguarded. If, in safeguarding this, it is necessary to hive-off the Commission's mediation efforts, we think that would be entirely appropriate. It would not, however, be appropriate to extend the Commission's mediation role in any way that would interfere with its ability to adjudicate in those instances where mediation is not acceptable or not effective. As noted earlier, one of the greatest advances in this whole area has been the fact that the police have been isolated - in a positive sense - from this highly contentious decision making process. They now must police decisions about marching, but do not have to take the initial decision. Any suggestion that the police - or the judiciary - engage actively in this decision making process again would be entirely retrograde.

3. Other Comments

The NIO letter invited any other comments relevant to the terms of reference of the review. We would, accordingly, like to draw attention to the following issues:

- a. **Composition of the Parades Commission:** The review was announced at the same time as applications for appointment to the Commission were also being invited. We therefore assume that it would be appropriate to remind decision-makers again of our concerns in this regard.

There is as yet no judicial ruling given as to the meaning of "independence" in the terms of reference of the Parades Commission. Nonetheless, there is clearly a widespread expectation that this concept must at least mean that the Commission is independent of government, and the immediate political exigencies governments have to contend with. (One can point here to the public uproar - from nationalists and unionists - in 1998 when it was imputed that the Commission's decision not to issue a preliminary determination relating to Drumcree was made at the behest of the Prime Minister concerned about the upcoming referendum vote).

Nor is it clear if the term "independent" was intended to apply to the composition and operation of the Commission overall, or also to its individual members. It is CAJ's contention that it would be appropriate for the Commission either to reflect its independence by consisting of members who represent all the different parties to the dispute, or none of such candidates. Anything else, as we have seen, leads to judicial challenge and only serves to reflect very badly on the Commission and its work. It is vital that the members of the Commission - individually and collectively - inspire confidence in their ability to operate fair and impartial criteria in this disputed area.

More generally, it is our understanding that several members of the current Commission, as well as the chairperson, may be standing down. Given this fact, CAJ thinks that it is vital at this time that priority be attached to ensuring some continuity at a senior level within the Commission.

- b. **Criteria for decision making:** In our assessment of the Parade Commission's rulings in 1998, we concluded that (in brief) -
- The published determinations for the most part indicate careful reflection of the various criteria and the strongly held views of the different protagonists
 - Criteria other than the fear of disorder seem to largely predominate, which reinforces the concept of the rule of law
 - The Commission gave a lot of weight to concerns around disruption to the life of the community and the impact on community relations, and therefore to the need to respect the rights of all involved
 - A predominating factor in the criteria seemed to be the extent to which, if at all, serious efforts had been made to broker some mutually satisfactory arrangement at the local level. Again, CAJ welcomed the priority accorded to this, since it obliges people to engage with and respect the fact that there are competing rights involved.

Overall, we think that the criteria are fair ones and draw on good international practice and principles. CAJ has no fixed position as to how local accommodation or mediation should best be brought about. We do, however, believe that at root this dispute is about a conflict of rights and, over the longer term, can only be resolved by the parties to that dispute learning to work together to make decisions which will respect everyone's rights.

Having undertaken a preliminary analysis of the Commission's rulings for 1999, we have no reason to alter the comments made above.

- c. **European Convention case-law and its relevance to the work of the Parades Commission:** At a meeting with the Commission some time ago, they asked CAJ for some more detailed legal comments regarding the international human rights principles relevant to this area. We are currently preparing a note for the Commission and can make it available upon request. We should take this opportunity to emphasise a point that we made at the meeting itself, about the significance of international human rights law and human rights principles for the work of the Commission. CAJ believes that international law is an extremely important framework within which to place the marching debate. It clearly recognises that there are rights at issue - that there is a right to march and to assemble peacefully, and a right to freedom of movement and non-discrimination. It furthermore recognises that none of these rights is absolute; and it recognises that states must adjudicate between conflicting rights and seek to ensure that the rights of all are protected. Last but not least, international law gives certain principles which states can draw upon to assist in resolving the conflict (eg the importance of the protected right, the need to promote tolerance, the weight and significance of the interests being protected, proportionality, balance of rights etc).² So, at one level, there is much that we can draw upon from the expertise and experience of others. However, it is also the case that there is an important margin of appreciation left to local interpretation.
- d. **Accountability:** In our commentary in 1998, we concluded in relation to the work of the Parades Commission that "no-one suggested that the establishment of an independent decision-making body to adjudicate about marches and protests would solve NI's marching conflict, or that it would render all the protagonists happy all the time. The concerns around (...) decisions, however, highlight the necessity of the Commission trying at all times to apply fair and clear criteria, and rendering their decision making process open to public scrutiny at every stage. While the Commission's individual decisions may be subject to intensive criticism, a public debate around the issues involved will ensure that all the various parties are clearer as to the principles being followed. This will in turn help them make their own case more effectively and/or accept the wisdom of greater accommodation on their part". The annual report of the Commission goes some way in this regard, but we feel that more efforts could be made to use it, and other mechanisms, to encourage a broader debate of the issues underlying the work of the Commission.

² See Law of the European Convention on Human Rights, D.J.Harris, M.O'Boyle, C.Warbrick, Butterworths, 1995; cited in The Misrule of Law, CAJ, 1996.

4. Policing

It would be inappropriate to fail to comment on CAJ's second major concern in the realm of public order - above and beyond the issues around the conflict of rights - which is that of policing. While this issue is not explicitly referred to in the terms of reference of the review, it is quite clear to us that the police behaviour in advance of, during, and subsequent to, local disputes around parades and protests, has a major influence on the behaviour of the other parties to the dispute. It is inevitable that the police are part of the dynamic of inter-action, and to ignore this is quite mistaken.

CAJ has consistently argued that the policing of public order situations can defuse or exacerbate problems on the ground. This year (1999), we were pleased to see some important changes, relevant to the concerns of the review. Certainly the first experiences of our observers (in Portadown in late June) did not bode well, with plastic bullets being fired in response to stone-throwing in a built up residential area with children all around. And, at one of the last major incidents of the "season", on the Ormeau Road on 14 August, observers reported that "at one point it became clear that the minimal force employed at the beginning of the protest by the officers had been abandoned and...it was clear that batons were being used liberally". However, in the intervening period, our observers were able to give almost consistently good reports about the lessons learnt from previous years.

Communication on the ground is of vital importance in defusing situations (and its absence can heighten tensions). In previous years, we have been highly critical of many instances of poor or apparently non-existent communication between the police and residents/marchers, but this year we saw many instances of excellent communication. We also saw many instances of sensitive policing - whereby the donning of riot gear was deferred until it was thought unavoidable; extra police and army were kept out of sight so that unnecessarily high levels of security force presence did not contribute to the tension; and ID numbers were - almost without exception - prominently displayed. All of these advances are important for a variety of reasons but, amongst other things, good policing on the ground will facilitate positive attitudes on the part of all the parties to the dispute, both in the short and long term.

Of particular significance this year, of course, was the fact that many, many fewer plastic bullets were fired. In 1996, the number was 8,165, in 1997 - 2,527, in 1998 - 1,237, and in 1999 - 99.³ It is of course good that the statistics are moving in this dramatically downward trend, but any study of the figures show peaks and troughs over the years, so that there is obviously no guarantee that this trend is going to continue. Indeed in 1995, the figures were only 273 and no-one expected such a dramatic rise to the 1996 figure. We were obviously disappointed that the Patten Commission did not choose to recommend the complete withdrawal of this weapon, in line with the November 1998 recommendation of the UN Committee Against Torture. We were also very surprised that there is so little direct reference to the charges of improper use of the weapon, particularly in non-riot situations. Needless to say, whatever protection these weapons are meant to afford the security forces, credible allegations of their improper use only succeed in alienating whole communities, and worsening the security situation for everyone.

CAJ remains concerned at the continued use of plastic bullets and contends that this weapon is an unacceptable response to crowd control.

³ These statistics show the clear downward trend in usage since 1996, even though official statistics on numbers of plastic bullets fired have often been challenged for their accuracy.

**Committee on the Administration of Justice
45-47 Donegall Street
Belfast BT1 2FG**

*Extra copies of this document can be obtained from the above address
A publications catalogue and details of CAJ membership
are also available on request from the above address*