

# Policing and public order in Northern Ireland - 1996-2000: some CAJ reflections

## 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 issues such as gender, disability, and racism, the organisation works on more directly conflict-related issues such as emergency legislation, prisoners and policing.

Every year since 1996, the organisation has sent independent observers to monitor the policing of public order events across Northern Ireland. Our purpose in doing this was threefold:

- First and foremost, we wanted observers present so that CAJ would have available to it an objective and first-hand assessment of events.
- We hoped that our very presence would make the police and others - whether marchers or demonstrators - aware of the importance accorded to ensuring that policing was carried out in an impartial and even-handed way vis-a-vis all the parties involved
- A monitoring role would provide invaluable data for CAJ in drawing up recommendations about the policing of such events in future.

Thanks to the work carried out by these observers, the organisation has issued several reports and circulars assessing developments on the ground. In 1996, CAJ published a report entitled **The Misrule of Law**, in 1997 the follow up report (and video) was called **Policing the Police**, and in 1998 a circular entitled **Public Order Policing 1998** was issued. Thankfully, despite relatively high levels of tension in both 1999 and 2000, the problems created for and by public order policing were fewer in scale.

Five years on from our first monitoring initiatives, it seemed that it might be useful for CAJ to do a brief retrospective assessment of our observer operation. This assessment cannot, and does not, aim to be a comprehensive account of all our work over this period. Still less, does it seek to be a comprehensive account of the public order problems that have had to be addressed since 1996. It does however reflect upon issues such as: what are some of the problems that Northern Ireland faces in terms of public order policing, what are some of the lessons which have been learnt over the last few years, and what are the key lessons that remain to be learnt?

Public order policing is perhaps the most difficult interface of the police and the public. Our TV screens are regularly filled with examples from around the world of what should not happen. Moreover, wider problems arising from the policing of public order problems feed upon and contribute to general attitudes to policing. Good community police relations can be dramatically soured by bad public order policing, and poor relations often contribute to public order policing problems. As such, CAJ sees public order policing as a relatively small but very significant part of the debate about effective policing generally for Northern Ireland.

In Northern Ireland, as elsewhere, the police have to control football crowds, large concerts, and mass demonstrations. However, often the situation in which the most difficult public order problems arise are those connected with marches and associated protests. In this document, CAJ wants to draw upon some of its past experiences in connection with such events to make concrete recommendations for the future. Accordingly, this paper will only address public order events associated with the 'marching season' even though the lessons learnt may of course have a wider application.

This paper will look in turn at some of the developments (good and bad) over the last few years in terms of:

1. Public Order Policing which includes comments on
  - (a) police tactics and
  - (b) communications
2. Plastic Bullets
3. Police Accountability
4. The decision making context - rights in conflict

## **1. Public Order Policing**

### **a. *Tactics and Police Presence***

#### ***Summer 1996***

CAJ had independent observers at more than 20 contentious parades over the summer and reported that there were many instances when the policing tactics seemed questionable. Our observers commented on many instances of police action or inaction which appeared improper, unjustified or, at the very least, unwise. It was thought that only an independent inquiry could clarify what exactly had happened, and why.

The concerns that CAJ raised included the following:

- Demonstrators being pulled along the road by their legs or arms; police officers using physical grips which risked cutting off a person's breathing; people grabbed by their nostrils; others with their ears pulled, and their ankles, legs, wrists and/or arms twisted. To cite the report: "*in very few instances, did we see the police go in and take hold of all the demonstrator's arms and legs in such a way that the person could be removed effectively, and with minimum damage caused either to the demonstrator or to the police themselves*".
- In other situations, police were seen moving in on sit-down protestors with batons and shields which, given that they had no hands free then to move the demonstrators, left them with no response but to wield their batons. Batons were also seen being used against people trying to move away from a particular protest and, in one particular instance, on an 8 year old boy who was a bystander. In two incidents, photographic evidence suggests that the police went into move sit-down protestors with their guns still in their holsters - thereby creating an additional risk factor for both police and demonstrators.
- Protestors were hemmed in on some occasions, either by sheer force of police numbers and/or with the use of Land Rovers, so that even when people (having made their protest) wanted to withdraw peacefully, it was not always possible for them to do easily.
- On some occasions, Land Rovers were used quite inappropriately - either to forcibly move sit-down protestors or - with a view presumably to dispersing crowds - driven in an excessively aggressive manner at small groups of bystanders. The latter behaviour all too easily resulted in cat-and-mouse taunting 'games' with young bystanders, and merely appeared to stoke up tensions in an area.
- In other incidents, the deployment and aiming of plastic bullet guns was used as a tactic to threaten and intimidate people.

One of the key problems noted in 1996 was that of the need to ensure that the police presence achieves its objective of maintaining the peace and upholding the rule of law, and does not itself contribute to a deterioration in public order. The Misrule of Law summed up the problems of police presence as follows: "*Sometimes the police appeared to remain on the scene beyond the time when their presence was helpful, whereas on other occasions they were not present at all or in insufficient numbers when they probably should have been*" (p.18). Throughout the summer, we observed occasions when the police chose not to intervene and other occasions when they intervened dramatically and in large numbers. The occasions when little action was taken (for example, at Drumcree churchyard) were frequently unionist gatherings, whereas massive police action was witnessed in places like the Lower Ormeau, Derry City and the Garvaghy Road (against nationalist protestors). The differential policing may have been justified in all these specific situations but, if so, the justification was not immediately obvious to observers, and lent itself easily to charges of sectarianism.

Moreover, the problems were not merely ones of when and where to intervene, but also of how best to do this. It was obvious that decisions about whether and when to don riot gear, whether and when to deploy plastic bullet guns, whether to position the police facing marchers or protestors, whether and how to engage in informal contact and banter with the parties in dispute, were all highly controversial. All too often in the summer of 1996, the decisions taken - or not taken - by the police contributed to heightening the tensions they were supposedly there to defuse.

### **Summer 1997**

The summer of 1997 saw fewer examples of people occupying main roads or causing a physical obstruction which required forcible removal. Accordingly, it is difficult to assess to what extent policing tactics in response to such action had or had not changed.

However, there were a few incidents where some of the problems highlighted in the previous year seemed to prevail.

Thus, in Newtownbutler, there was a clearly audible instruction to the protestors to withdraw but it seemed fairly tokenistic in that the police decision to 'rush' the protestors followed almost immediately after the warning being given (one minute, according to the CAJ observer team). If any protesters had felt at that stage that they wanted to peacefully withdraw, the police action made it more not less difficult for them to do so. In the same incident, riot shields were used to move people on.

Very disturbingly, again incidents were reported wherein police officers went into close 'arm-to-arm' combat situations with guns in their holsters. In one incident a CAJ observer noted that "*the officers despite having both batons and shields* (ie having both hands in use and therefore not in a position anyway to use a pistol as well) *carried holstered small arms*". In another incident, a tussle between a police officer and a demonstrator meant that "*During this struggle the gun belonging to the RUC officer fell out of its holster. The RUC officer, not realising this, got up off the ground, and walked several feet before realising that his gun was dragging behind him - it was still attached to the safety cord of the officer's belt*".

It is unclear to CAJ what the Force Regulations are in this regard and this issue should be further pursued with the policing authorities. Note also that, here again, police officers are going into situations with both hands in use and therefore with no tactic available to them other than to use their batons on seated protestors.

This year also saw some examples of Land Rovers being used in a manner to cause concern. "*Police Land Rovers continue speeding around in a provocative manner... still not clear what the purpose of their continued presence is... the use of Land Rovers to disperse crowds is clearly of concern, especially given the lack of prior warning regarding police*

*intentions". Another observer reported that "a number of jeeps moving backwards and forwards, some at speed, providing opportunities for target practice (by young children throwing stones)... RUC officers inside could clearly be seen (from the passenger window side) laughing". Of particular concern was the fact that some Land Rovers were seen with no license plates clearly visible, which of course would render later identification difficult should anyone want to register a complaint.*

In a single statement from someone present on the Garvaghy Road on the night of 5/6 July, several of these concerns about police behaviour, IDs etc. were brought together. In CAJ's report Policing the Police, we quote the witness statement noting that: "*There was no announcement from the police that they were going to clear the road or that the sit-down protest was illegal. The police were not wearing any numbers. One policeman came out of a Land Rover....swinging his baton and he came over to us and said "surprise, surprise". They were all wearing balaclavas and we could only see their eyes. When one policeman said that, I asked him for his number and he laughed. He put his shoulder forward (where the number should be pinned) and there was nothing on it.....There was constant verbal abuse from the police.*"

More positively with regard to the very presence of the police, it was clear already by 1997 that some important lessons had been learnt from the mistakes of the previous year. CAJ observers noted that, presumably because tensions immediately rose when the police were seen to don riot gear, this practice was now increasingly taking place out of sight of the different protagonists. Riot gear was donned by officers in rear positions, and police in riot gear were held out of sight until the situation warranted their forward positioning. Several instances of the riot police being withdrawn in a speedy and timely manner were also noted. Even when riot police were brought towards front lines, they were on occasion willing to deliberately lower their shields - and, when this happened, the immediate lowering of tension was palpable.

### **Summer 1998**

Again, the situation on the ground was different, and police tactics varied in response to that situation.

The most obvious and major change lay in the fact that the decision-making process had changed. No longer would the police be responsible both for taking and for policing decisions about whether or not a particular parade could take place. Accordingly, when the Parades Commission determined that the parade could not proceed down the Garvaghy Road in 1998, the sole responsibility of the police was to ensure that this decision be upheld. Learning from the disastrous failure of policing in 1996, when the police were over-run and were obliged to over-turn their initial stance, the emphasis this year was on pre-planning and keeping a safe distance between the protestors and the security forces. The precautions which were taken ensured that the rule of law was by and large upheld and the number of injuries were kept

relatively low (though several serious plastic bullet injuries did occur nevertheless).

There were, however, some inexplicable developments. Security control over those joining the protestors at Drumcree was sufficiently lax to allow implements such as wire cutters, tree fellers, catapults, ladders, ball bearings and indeed bomb-making equipment and guns with live ammunition, to be brought on site. While CAJ was made aware of complaints from Orangemen of being stopped at checkpoints, we ourselves saw no systematic car-boot checks or even basic security precautions being taken on any of our numerous trips to and from the churchyard area. These security lapses were compounded by the perception created of differential and unequal policing - when police searches were seen being regularly carried out on people and cars going into or travelling around the nationalist Garvagh Road area.

But the public order problems were obviously not limited to the Drumcree/Garvagh area. This year, there were also a large number of illegal demonstrations carried out by people supporting the Orange marchers in Drumcree. Traffic was stopped or re-routed on major roads albeit for relatively short periods of time. It seemed to us that the police response was fairly sensitive and probably wise: subject to the form and nature of the protest being negotiated, the police were willing to allow peaceful - albeit illegal - actions to take place without direct physical intervention on their part. Obviously, logic and maintenance of the rule of law over the longer term requires that any serious illegal activity should not be ignored, but a heavy-handed police intervention at the time of the protests themselves might well have sparked off greater disorder at a tense period.

A somewhat different problem which arose in 1998, and subsequently, was that of the difficulty of effectively policing an isolated community without creating a "siege" feeling. The nationalist community on the Garvagh Road became increasingly isolated as the protest by Orangemen at Drumcree extended in duration, and this led to different policing challenges than in previous years. On the one hand, if the police are not present at a time of heightened tensions and physical attacks, they are understandably criticised for their absence. On the other hand, a police presence on an almost daily basis at certain flash-points can, in and of itself, add to the tension and to the sense of intimidation that exacerbates rather than defuses tension in the locality. This is a good example of what was said earlier about public order policing providing a microcosm of the wider policing debate.

By 1998, the approach had become much more one of "laissez faire". The police created clear "control zones" which minimised the risk of death and injury to themselves and the various protagonists, and once clear parameters were created attempted to reduce the potential for any kind of conflict. While this meant that some of the issues of previous years (where the police deferred their withdrawal for too long, or withdrew too early) were less obvious, issues of police control came more centre-stage. What is the proportionate balance between police being present in large numbers and for extended periods of time (albeit with a view to providing some community

protection), and the need to 'normalise' situations as quickly as possible without leaving anyone unprotected and at serious risk of injury?

## b. ***Communication***

### ***Summer 1996***

In CAJ's report (The Misrule of Law) on the events of summer 1996, little reference was made explicitly to the issue of communication - either bad or good - though it was a matter of some concern underlying other comments.

Certainly observers noted that "*even they - who were monitoring closely what the police were saying and doing - were often confused as to what the police expected people to do. On occasion, the forward propulsion of a Land Rover against the back of seated demonstrators seemed to be the only indication that movement was being insisted upon. Such a sudden movement, at close quarters, from a truck weighing nearly three-and-a-half tons, could have had fatal consequences".*

Thus, the fact that the police chose to hem people in, and on occasion move them, with Land Rovers is as much a failure of effective communication as anything else. At some venues, our observers noted hearing no advance warnings being heard prior to the firing of plastic bullets. Elsewhere, there were contradictory accounts about police behaviour. For example, on the Garvaghy Road, when the police moved in on protesters to move them out of the way, some eye-witnesses claim that no warning was given before a baton charge was initiated. Other witness statements, on the other hand, suggest that such an order was probably given but that there was no way that anyone could have heard it above the noise and confusion. CAJ argued that "*in any overall review of policing public order situations, attention needs to be given as to how to improve police liaison with parade stewards and community representatives, and to improved communication systems*".

### ***Summer 1997***

In 1996, communication skills were crucially lacking at important moments, and the 1997 experience of our observers only reinforced this finding. Indeed, in some regards, there was a sense that communication between police and local people might have been worse than in 1996.

As previously, warnings about impending police action were either not given or were not heard. We argued that "*rapid police deployment to move people on, or the resort to plastic bullet firing, needs at the very least to be preceded by ample and clear warnings, if one is to minimise the physical danger to all concerned*". On occasion the police even seemed willing to impart information to observers and journalists but not to engage with those more directly

involved in the dispute, and on at least one occasion CAJ observers were given information which they felt was intended to deliberately mislead people. On other occasions, contentious marches had been cancelled but the police appeared to make no attempt to defuse the situation by informing the protesters of this fact. The report also cited some positive examples of police communicating with local people so as to contribute directly to a lessening of tensions.

### ***Summer 1998***

The importance of effective communication seemed to be being learnt this year with several positive examples being noted by CAJ observers. However, there were still some outstanding problems and the overall picture was patchy. Thus, on the Ormeau Road there were examples of good and bad communication. On the one hand, on the morning of a march the police kept the residents informed about developments beyond their sight, and immediately removed themselves from the area once the march was over. However, this positive approach was preceded by a decision to seal off the whole area by flooding it with police and army officers in riot gear, surrounding the residents' office with several Land Rovers, and after having deployed the controversial Royal Irish Regiment in the area for the whole week beforehand. All these police measures had been seen as unnecessarily provocative, and as stoking up tensions unnecessarily.

Nor did the communication problems arise only in the context of relations between the police and protestors in perceived nationalist areas. There were communication problems for protestors from the unionist community too. So, whereas, there appeared to be many instances where the police liaised closely with unionist protestors (see earlier comments about impromptu, illegal but peaceful loyalist protests), it was also clearly unfortunate that no provision was made for anyone to be present to receive a formal protest from the Orangemen prevented from walking beyond Drumcree church. The need to create space - and safety - for all concerned had apparently blinded the authorities to the tensions that might be unleashed if there was no easy way for the protestors to communicate with the police (this error was rectified in the 1999 planning, but apparently changed again in 2000, without any obvious explanation).

### **Public Order Policing: lessons learnt?**

While many important lessons remain to be learnt (see on), it is useful, looking back over the last five years of public order policing, to record that a number of lessons about police tactics appear to have been learnt:

- a. The police appear to have increasingly exercised their discretion regarding when to intervene and when not to intervene, when to don riot gear and when not to, and how publicly to do so. They have on

occasion been able to de-escalate situations of very grave tension. A wider array of flexible techniques of response seem to have been availed of by the police in recent years.

- b. Whereas, CAJ observers frequently indicated a problem with the wearing of IDs in the early years of the observing operation, recent years have seen a more systematic approach, with identification numbers appearing not solely on police uniforms, but on landrovers, shields etc.
- c. Though far from consistent, advance warnings of action by the police have been issued and have been heard, which was often not the case previously (see on for - warnings and plastic bullet firing).
- d. The change in the decision making process has been very influential - so that the police are now only responsible for policing the decisions taken by others (ie by the Parades Commission). They no longer act as both 'judge and jury' in the matter, as was the case in 1996 and, to some extent, 1997. This change in approach makes it clearer what the police are responsible for, and clarifies lines of accountability.

## **Public Order Policing: lessons still to be learnt**

The imponderable question must be whether or not the above assessment is in fact accurate - have all these lessons in fact been learnt? Some might, for example, argue that the improvements noted between 1996-2000 merely reflect the fact that the 'marching seasons' of 1998, 1999 and 2000 were all dramatically less contentious than in 1996 and 1997. Can we be sure that, should public disorder dramatically increase in coming years, the apparent improvements in police response will be maintained? Can we be sure that if close physical contact between police and protestors occurs again, the problems of the past - for example, in moving peaceful and non-peaceful protestors - will not re-occur? Worse still, some might argue that the improvements in public order policing arise because the pressure on the police has come essentially from loyalists in the last few years. Accordingly, this argument would run, it is due to inherent sectarianism in policing that lower-profile and more responsive policing has been considered appropriate in the last few years. There is no easy answer to such charges apart from continuing to monitor the situation carefully.

Assuming however that there is a determination on the part of the police to ensure good policing practice on the ground, it is clear that any positive trends need to be reflected in future police training. Officers need to be trained in good communication skills; they need to learn how to move protestors with the minimum of force; and they need to be taught how their own behaviour can contribute to exacerbating or defusing tension on the ground. Good practice needs to be reinforced; bad practice needs to be disciplined. While the proper use of discretion by individual officers is to be welcomed, individual discretion is very open to abuse. Accordingly, police training must look

closely at issues of problem solving, the exercise of discretion, and conflict management, if the lessons above are to be internalised by new recruits and long-serving officers alike.

## **2. Plastic Bullets**

All of the following comments should be read against the background of CAJ's total opposition to the use of plastic bullets in public order situations. The loss of seventeen lives (mostly young children and adolescents) to rubber and plastic bullets is entirely unacceptable. Regular court and other official findings which have shown that the weapon has also been used in violation of basic safety precautions and minimal human rights standards, makes their withdrawal an urgent necessity. The concerns highlighted merely serve to exemplify why this weapon is a totally inappropriate response to public order situations.

### ***Summer 1996***

The major focus of the marching season in 1996 was on developments in Portadown. The RUC (which then was responsible for determining whether parades could proceed or not, and for policing the decision subsequently) initially decided that the Orange Order would not be allowed down the largely nationalist Garvaghy Road in Portadown. Major disorder broke out in unionist areas across Northern Ireland - the international airport was temporarily blocked to vehicular traffic, 150 roadblocks were reported on the night of 10/11 July alone; 758 attacks on the police were reported with 65 police and 53 civilians injured; 83 vehicles reported hijacked; and major damage was done to property. In the tense situation, a Catholic who was working as a taxi driver, Michael McGoldrick, was killed by loyalists.

Apparently unable to maintain order in the immediate area around Drumcree church (where there had been a mass build up of Orange Order supporters), the then Chief Constable ordered the blockade lifted so that the Order could proceed down Garvaghy Road. Almost immediately, public unrest broke out mainly in nationalist areas, with rioting, car hijacking and major property damage. Police reported 519 attacks on the police involving 84 injuries to the police and 139 to civilians. In the whole period, between 7 and 14 July, the Compensation Agency estimated some £20m of damage was caused.

- After several years (throughout the 90s) of less than 500 bullets being fired annually, 1996 witnessed the firing of over 8000 plastic bullets<sup>1</sup>
- 3006 of these plastic bullets were fired over three nights in a confined area in Derry city centre

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<sup>1</sup> The figures used here are drawn from official sources, but those sources are notoriously unreliable - for fuller discussion of this problem see page 16.

- Extensive first-hand accounts report that plastic bullets were fired at non-rioters. People coming out of fast-food restaurants, bystanders, and journalists reported being fired at, and in some cases injured.
- 662 plastic bullets were fired between 7 and 11 July (the period of unionist protests) and 5340 between 11 and 14 July (the period of nationalist protests), sparking allegations of sectarian deployment of the weapon

### **Summer 1997**

This summer saw several major problems with plastic bullets again:

- Some 2,500 plastic bullets were fired between Saturday 5 July and Friday 11 July 1997, and some young children received very serious injuries. As noted, prior to 1996, the annual average was little more than 500, so though much lower than in 1996, the figure was still very high.
- Again, incidents were reported where plastic bullets were allegedly fired when there was no serious threat to life or property (the defence of property was still a valid justification for the firing of plastic bullets this summer; this criterion has since been dropped)
- Not one, but two, defective batches of plastic bullets were deployed. The first batch was found to be defective by the Ministry of Defence but the information was apparently not conveyed to the RUC until 15 months later, so presumably it was this batch which was largely relied upon in 1996. A second defective batch was later discovered (it is not clear if it had been used during 1997). The Police Authority has never satisfactorily explained how these defects were not detected prior to them going into service, and what procedural and testing changes have been introduced to ensure that this never happens again.
- Having access to the guidelines for the first time in 1997, CAJ learnt that warnings prior to the firing of bullets were obligatory and we sought to verify with our observers if any of them had ever heard a warning being given prior to the firing of such bullets. They had not.

### **Summer 1998**

This year witnessed a further drop in the use of plastic bullets. 837 were fired between 4 and 14 July, to a great degree at unionist protesters in the field below Drumcree church. The main problems can be noted as:

- There were many allegations that "pot-shots" were being taken at drunks and other disorderly elements in the crowd, rather than in response to any specific threatening action by demonstrators

- Quite a number of people standing further back from the trenches (and not posing any obvious threat to the security force installations) received upper body injuries, with one female student bystander losing an eye
- Since most of the firing took place in the hours of darkness it was impossible to tell which individual baton gunners were firing, or even whether it was the police or army. Correspondence to this effect has been exchanged with the Independent Assessor of Military Complaints Procedures.

### **Summer 1999**

While CAJ's position is that one plastic bullet fired is one too many, it is good to be able to report that for the fourth year in a row the number of bullets fired had decreased and 99 were fired in total. Unfortunately, though warnings continued to be given and to be heard, there were still instances where bullets were fired in circumstances contrary to the guidelines, and in a way that was very likely to exacerbate rather than resolve the tension.

### **Patten: 1999 & 2000**

The Commission into Policing (called Patten, or the Patten Commission, after its chairperson, Chris Patten) was mandated by the Good Friday Agreement to look, among other things, at public order policing, and a section of the final report focused on plastic bullets.

CAJ was disappointed that the Patten Commission made no reference to the fact that court records indicate that plastic bullets have been fired in non-riot situations, and at non-rioters. Nor did the report note that children have disproportionately suffered from a decision to resort to plastic bullets - with more than half of those dying from plastic bullets being 18 or under. Nor did the report mention the frequent allegations of the guidelines being breached.

Despite these very important omissions, the Commission clearly indicated its concern about the lethal nature of the weapon and urged government to invest more resources in looking for alternatives.

Indeed, Patten was very critical of the work done to date in the area. The report said - "*In view of the fatalities and serious injuries resulting from PBRs (plastic baton rounds) and the controversy caused by their extensive use, we are surprised and concerned that the government, the Police Authority and the RUC have collectively failed to invest more time and money in a search for an acceptable alternative*". The Commission proposed specific steps to be taken to remedy this deficit, most importantly "*immediate and substantial*

*investment in a research programme to find an acceptable, effective and less potentially lethal alternative to the PBR" (para 9.14-9.15)*

Patten went on to recommend that the guidelines for their use in Northern Ireland be brought in line with those in England and Wales (which would imply a narrowing of the guidance operating to date), proposed more specialised training and deployment, and recommended a series of steps to improve public accountability for their usage (p.56). The first measure noted here was already underway as part of a wider review by ACPO (the Association of Chief Police Officers) of the plastic bullet guidelines. It is not known to what extent the latter two recommendations have yet been pursued, apart from as part of the work of the Steering Group (see on).

However, the reaction by government to Patten's trenchant criticism of research to date has been disappointing to say the least. In response to a series of parliamentary questions, government indicated that they had set up a Steering Group consisting of representatives of ACPO, Her Majesty's Inspector of Constabulary, the Home Office, the Ministry of Defence, the Police Authority, the Police Scientific Development Branch of the Home Office, the RUC and the NIO. This list included no independent researchers, no one with a specific human rights expertise, and indeed no one beyond the authorities that Patten was so critical of, and who have failed to tackle the problem energetically in the past.

CAJ's concerns appeared justified when the first report of the Steering Group was issued this month. In the nine months of the first phase of the research, no contact had been made with CAJ or, to our knowledge, other NGOs interested in the issue. Nor apparently, to judge from the report, was contact made with many independent academics, apart from a number of US institutions who are working closely with their military. Reflecting the lack of reference to human rights in the Steering Group's Terms of Reference, the report gives little attention to this question, and the literature review contains little or no human rights material. At the same time, a new version of the plastic bullet has been developed which is claimed by the government to be safer. However, press reports indicate that the government has had contradictory expert advice to this effect, and that the new bullet poses a much greater risk of head injury than earlier versions.

CAJ will be following these developments very closely in the coming months. We find it a scandal that the government claims that the bullets are safer, when its own experts are raising very serious concerns. We are also deeply disappointed at the lack of transparency surrounding work in this area. How can government expect people to believe its claim that there is no alternative to the plastic bullet, and the threat it poses to life and limb, when it refuses to open its studies to external and expert scrutiny? We are particularly concerned at the failure of the government to recognise the risk this weapon poses to basic rights, and its resistance to frequent calls for it to give closer attention to the human rights standards relevant to public order policing.

### **Plastic Bullets: lessons learnt?**

**a. publication of the plastic bullet guidelines**

Despite frequent appeals over many years, and the very large public outcry engendered by the experiences in the Summer of 1996, the guidelines for plastic bullet usage were not made public until August 1997. This move towards more openness was however warmly welcomed since for the first time ever people could begin to try to hold the police to account effectively in regard to their usage of plastic bullets. It became apparent, for example, that the police had been (wrongly) criticised for not allowing bullets to bounce before hitting someone, when this was expressly ruled out in the guidelines as much too dangerous. On the other hand, the guidelines revealed that the police were to give warnings prior to firing plastic bullets, and the fact that this came as a surprise to commentators suggested it had not generally been done previously.

**b. narrowing of the guidelines**

The publication of the RUC guidelines, alongside those used by the police in England and Wales, and by the security forces, also allowed people to see that the guidelines for use by the RUC in Northern Ireland were much less rigorous than the others. In England and Wales plastic bullets (which have in fact never been fired, despite very serious crowd control incidents) could only be fired to protect life; in Northern Ireland five possible justifications were cited - ie to protect life, protect property, preserve the peace, prevent or detect crime. Moreover, whereas the RUC guidelines used to permit individual gunners to determine when plastic bullets might be fired, a senior officer had to take such a decision in Britain. Last but not least, warnings were to be issued in Northern Ireland "when circumstances permit", but in England and Wales "unless circumstances do not permit". So, ironically, the guidelines for plastic bullet use were least strict in the only jurisdiction that resorted regularly to their use.

As one of the proposals arising from his study of plastic bullet usage in 1996, Her Majesty's Inspector of Constabulary (HMIC) recommended that the more restrictive guidelines applying in England and Wales should be applied in Northern Ireland. This recommendation took some time to be put into place, but eventually in July 1999, after an ACPO review, new guidelines were issued which effectively narrowed the circumstances in which plastic bullets could be fired thereafter (see endorsement for this approach from Patten also - para 9.17). In particular, the new guidelines emphasise that plastic bullets should only be used where there is a serious risk of loss of life or serious injury; they emphasise the need to consider whether other methods of policing to restore or sustain public order have been tried and failed, or are considered unlikely to succeed if tried.

**c. accountability for the use of plastic bullets**

Some lessons have been learnt regarding making officers and the police generally more accountable for their use of plastic bullets, though there are still many lessons to be taken on board (see on). First and foremost, there has been a tightening up of the system of officers carrying clear IDs. In recent years, early problems about failure to carry clear identification, made it next to impossible to hold individual officers to account for improper use of plastic bullets. Secondly, a series of recommendations from HMIC were made pursuant to the problems of 1996 to tighten up the command levels and training of plastic bullet gunners. Thirdly, the Patten report emphasised that a greater "range of equipment would allow a more graduated response to a public order situation, with PBRs used only as a last resort, short of the use of firearms". A number of recommendations were made about training and reporting systems which should tighten up accountability in this domain. It will be a matter for the new Policing Board, the Police Ombudsman and the Oversight Commissioner to monitor these developments closely and reassure police and public that effective accountability is in fact being ensured.

**d. *abiding by the plastic bullet guidelines***

While non-compliance with the guidelines has still been observed, it is worth noting that it has been officially recognised that resort to plastic bullet use should at least be invested with greater responsibility. Patten says that officers "should be trained to think of the weapon in the same way as they would think of a firearm, that is a weapon which is potentially lethal". It is also worth noting that CAJ observers heard for the first time ever in 1998 clear warnings being given prior to the discharge of plastic bullets. While experience suggests that these warnings could be improved, the fact that they are now being heard at all is an advance.

**e. *safety measures for police officers***

After the disorder problems of 1996, the police learnt that it was important to provide their officers with more adequate safety protection including fire-resistant uniforms. CAJ welcomed this measure, both because it provided greater safety to individual officers, but also because greater security was likely to ensure a more effective response at times of tension. Initial problems with clear IDs being displayed on the new uniforms were identified, but these seem also to have been largely resolved.

### ***Plastic bullets: lessons still to be learnt***

As noted, CAJ will continue to oppose unconditionally the use of plastic bullets, believing them to be a lethal weapon and inappropriate for use in public order situations. We again draw the government's attention to the recommendation of the United Nations' Committee Against Torture which in

1998 urged - "*the abolition of the use of plastic bullet rounds as a means of riot control*".

In this regard, the organisation was particularly disappointed that the Patten Commission did not address the abuse of this lethal weapon, except indirectly. No comment was made about the high proportion of dead victims who were young children and/or who were subsequently determined to have been innocent victims in inquests or other judicial proceedings. The assumption appeared to be made that plastic bullets are only fired in riot situations and are only ever fired at rioters. This is not the case.

However, there are also specific issues relating to plastic bullets that need to be pursued in the light of our work over the last few years.

#### **a. accountability**

Despite the advances noted above, there are still important problems that arise in the context of accountability.

Firstly, it is not clear who can be held to account when serious problems arise - as in the case of the defective bullets that were used in 1996 and in 1997. The Police Authority is often not forthcoming with information and it is still not known to CAJ whether the public expenditure involved (approx. £1.8m) in purchasing faulty baton rounds (twice) was ever reimbursed. It is certainly unclear to the general public what measures were taken by the Authority to ensure that no repetition of the problem would occur. The proposals of Patten to have "a majority elected membership" on the new Policing Board is intended in part to address this question of greater democratic accountability.

Secondly, Patten's proposals to change the composition of the Authority and make it more responsive to local people are welcome, but will not be enough in and of themselves. Patten notes in the report that: "we are surprised and concerned that the government, the Police Authority and the RUC have collectively failed to invest more time and money in a search for an acceptable alternative."(Patten: 54). Yet, the Police Authority, in responding to this, says "It is not the responsibility of either the RUC or the Authority to find a replacement (for plastic bullets)". This claim would come as a surprise to many people and highlights the need for clear legislative provisions to indicate the respective powers of the government (or devolved Assembly), Chief Constable and future civic oversight body. That clarity was not particularly forthcoming in the debates around the new Police (NI) Act 2000.

Thirdly, although the guidelines for the use of plastic bullets in Northern Ireland have been put on a par with English and Welsh guidelines, the Secretary of State for Northern Ireland has been given no equivalent scrutiny role to that of the Home Secretary in England and Wales. The omission of this level of oversight only serves to suggest that plastic bullets will continue to be deployed more routinely in Northern Ireland than in Britain.

**b. army use of plastic bullets**

The issuing of guidelines publicly for the first time highlighted that standards were less rigorous in Northern Ireland than in England and Wales (though this problem was later addressed - see above), but also that the police and army have different guidelines. No change has taken place in the latter area since the authorities inexplicably in CAJ's view insist that this makes no operational difference. This situation, combined with the increased use of the army in public order disturbances, and Patten's proposal that the army continue to be a resource available for the police to draw upon at times of public disorder (Patten: 52), makes resolution of this discrepancy important.

There are also additional problems regarding accountability, since the systems evolved regarding the police cannot be transferred simply to the army. In correspondence with the Independent Assessor of Military Complaints Systems, CAJ asked for some advice in this regard:

- What systems of individual identification are used within the army parallel to the police ID numbers? If there are no such, how can civilians effectively pursue complaints about allegations of improper conduct?
- Are military firing records open to scrutiny for the Assessor and, if so, does he need a formal complaint (from a named person about a named officer) to pursue concerns that may have surfaced in the media, or via statements to groups such as NGOs? The example of the civilian who had lost an eye (in 1998) was given as one which had received extensive media coverage, and might suggest to the Assessor a need for closer examination of the circumstances of the case, regardless of whether or not he received a formal complaint.

**c. record keeping**

In a report issued in 1998 on plastic bullets, CAJ noted that the official figures given for the firing of plastic bullets in Derry city between 11-14 July 1996 had changed several times. As late as mid-1997, there were still disputed figures regarding what had happened in 1996. The Chief Constable told Human Rights Watch in March 1997 that a total of 7,294 bullets had been fired the previous summer; but defence sources quoted in June 1997 gave the 1996 figures as 6,951 fired by the police, and 1,386 by the army. Then again, neither the figure of 7,294 (police or police and army?) nor the figure of 8337 (police and army) tally particularly well with the figure provided by the RUC nearer the time (19 July 1996) of 6002 bullets fired between 7 and 14 July. Few plastic bullets were known to have been fired outside this particular week of intense disturbances.<sup>2</sup>

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<sup>2</sup> For fuller accounts of the events, and the contradictory statistics available, see The Misrule of Law, Policing the Police, Plastic Bullets (details in CAJ bibliography in appendix).

As CAJ asked in its report on plastic bullets "if there is ineffective monitoring of the actual numbers of such lethal weapons fired, how can one be in any sense reassured that there is any detailed accounting of the circumstances giving rise to the use of plastic bullets?".

We are not at all reassured that official statistics have improved much in the interim. As recently as September 1999, the Patten Commission miscalculated the number of deaths as a result of plastic (and rubber) bullets and reiterated the official claim that there have been 615 injuries over the seventeen-year period of 1981 and 1998. However, taking 1996 as an example, it is worthy of note that HMIC recorded some 20 plastic bullet injuries between 1 January and 25 August 1996. Yet, in a subsequent medical article, doctors reported treating 155 patients for plastic bullet injuries during the course of the single week of 8-14 July 1996. Even these statistics would not have taken into account any injured people who sought medical assistance in the Irish Republic and it is known that many of those injured in Derry - where most of the injuries were likely to have occurred that year - went across the border for treatment. Nor indeed, would the figures have included injuries that were insufficiently serious to require hospital treatment. Incomplete as it is, however, 155 is a very different figure from the official figure of 20 for that year. Without clear and reliable statistics, it is difficult to assess the real problem, and it suggests a very worrying, indeed criminal, disregard for the lethal potentiality of each bullet fired.

#### ***d. breaches of the guidelines***

While Patten is prepared to recommend tightening up the guidelines for plastic bullet firing, there is no explicit suggestion in the report that the guidelines might have previously been breached. In fact, it is very notable that the whole discussion is set in the context of police responses to rioting and rioters, disregarding completely extensive evidence (including inquest evidence, and coroners' findings) that plastic bullets have been fired in non-riot situations and at non-rioters. Extensive information was also provided in CAJ's reports (especially The Misrule of Law and Policing the Police) about situations wherein it would appear that plastic bullets were being fired in contravention of the guidelines, but there has been no satisfactory response on the part of the authorities. The fact that there is no link made between breaches in the guidelines and problems in the use of the weapon is very worrying. It is CAJ's strong contention that the frequent abuse of this weapon - even within the parameters laid down by the authorities - confirms the inappropriateness of using this weapon as a response to public order needs.

### **3. Police Accountability**

All of the earlier remarks lead us to the general issue of police accountability. It is not particularly useful here to talk in terms of different "seasons" since the issue is not so much what happened or what should have happened in

particular circumstances (important though this is). The issue is more general - who and how are people being held to account for ensuring that lessons are learnt over time, and that the necessary changes are introduced into police planning and police operations.

Before turning to an examination of this, we should note that it is a feature of all liberal democratic societies that a whole series of checks and balances are set in place to render accountable those in positions of power and influence. The more power and influence one has, the more accountable one needs to be, because the risk to society of abuse is all the greater. The police in any society have to be made subject to a number of control mechanisms, since individual police officers and the institution itself exercise enormous power. After all, who else is allowed to stop and question people going about their business, enter homes forcibly, detain people, or use force to impose their will on someone else?

The accountability mechanisms that exist currently can be listed as follows:

- A complaints process: individual citizens can bring complaints against individual police officers who are thought to be abusing their powers
- Internal disciplinary system: managers can take disciplinary action against officers thought to be behaving improperly
- Internal policy control: The Chief Constable is responsible under law for the "direction and control" of the police and can therefore institute changes in policing policy where that policy is found to be defective in some regard. In certain clearly defined circumstances, the Chief Constable can be challenged through judicial proceedings if it is felt that he/she is not complying with the post's legal obligations.
- Political policy control: The Secretary of State is given certain responsibilities in law for policing oversight, and can be challenged via the court system if it is felt that these duties are being improperly exercised.
- Civilian oversight: In Northern Ireland, there is at the moment a Police Authority which is appointed by the Secretary of State but is intended to be representative of society as a whole and to exercise independent civilian oversight of the police. As a result of the Patten Commission findings, this will in future be replaced by a Policing Board. At the local level there will be District Policing Boards which perform an essentially advisory role.
- Public scrutiny: The press, political parties, community groups, and civil society in its widest sense can all perform an important role in monitoring police work and rendering it accountable.

There are strengths and weaknesses in all of these accountability mechanisms and, since they are to a large extent inter-locking and inter-dependent, the weaknesses can in combination often have a very detrimental cumulative effect. It would be impossible in this one circular to do a detailed

critique of all of the mechanisms and we would refer readers to CAJ publications catalogue for a fuller listing of other CAJ policing material.

**a. *Complaints system:***

The purpose of a complaints system is to ensure that individual officers are held to account for their individual actions. The weaknesses are however also manifold. A complaint requires that an individual officer can be held responsible for the alleged wrongdoing. However, this is not always possible, and it is particularly difficult at times of public order disturbances. In such situations, CAJ frequently brought to the fore concerns about police officers not wearing ID numbers, senior officers not being required to wear IDs, Land Rovers missing their number plates, complainants being uncertain as to whether police or army were firing plastic bullets (still less which police or army officer), and so on. The system also requires that an individual make a complaint, but the inadequacy of the system in finding fault in the past has convinced many people that it is not worth the effort.

By its very nature - of concentrating on individual complaints against individual police officers - the complaints system is not necessarily well placed to deal with concerns around policy issues. Thus, if it is thought that there is a problem with the fact that 3006 plastic bullets were fired over a three night period in a very concentrated space (Derry city centre 11-13 July 1996), it seems inadequate that accountability can only be ensured if an individual complainant can be found who is willing to pursue a complaint against the relevant police commander for the nights in question.

Last but not least, few people had faith in a system which involves police officers investigating other police officers. The complaints system in Northern Ireland had come into such disrepute that steps were taken to change the whole system. An independent Policing Ombudsperson took on full authority for investigating complaints against the police in November 2000. Only this - a completely independent complaints system, with the powers proposed in the Patten report, and sufficient resources - can hope to provide the necessary checks and balances for effective policing in the future. While government did accept the thrust of Patten's proposals about the Ombudsperson, it was not willing to accept the recommendation in the Patten report which called for the Ombudsperson have the power to investigate policies and practices. This was deeply unfortunate.

**b. *Internal disciplinary measures:***

As with most organisations, the police have their own internal disciplinary systems to deal with wrongdoing. The strength of such a system lies in the fact that one's colleagues and supervisors are likely to be even more aware of trends or patterns of problems, and it should therefore be possible to more easily pick up on improper behaviour at an early stage. Moreover, individual

disciplinary problems can lead to a review of general policy and more effective management tools for addressing such problems across a range of officers.

The weaknesses are probably also pretty self-evident. It is internal and cannot serve the important function of reassuring the public that inappropriate behaviour is being effectively penalised. While it continues to be true that a complaint by an officer is much more likely to be upheld than a complaint made by a member of the public (in 1997, out of 5,500 complaints made against the police, only one made by a civilian complainant was upheld), the general public is left wondering how much wrong-doing is going unchecked. There is also a widespread recognition that the pressures of policing lead to a particularly closed and insular collegiality which makes "whistleblowing" highly unlikely. While true of all police forces, one under the level of threat of the RUC in recent years, may prove particularly susceptible to sweeping the dust under the carpet.

Last but not least, criminal charges against police officers often fail because they fail the test of being proved "beyond reasonable doubt". The same burden of proof used to be applied to internal disciplinary action so it was very rare indeed that an officer, once acquitted of a criminal offence - perhaps because of insufficient evidence - found him or herself subject to internal disciplinary penalties subsequently. Where an officer was totally innocent of all charges made against him or her, this total vindication was only proper; but where the officer should have been found guilty of a lesser misdemeanour, and was not, the validity of the process became seriously undermined. Important changes have been made in this realm with the introduction of new complaints regulations and the institution of the Police Ombudsman's Office.

For the general public to have faith in the internal disciplinary system which should accompany an independent complaints system, they need to be reassured that:

- The burden of proof test is not overly onerous. The change from the criminal standard of "beyond reasonable doubt" to the civil standard of the "balance of probabilities" is very much to be welcomed.<sup>3</sup>
- Whistleblowing legislation is introduced to encourage police officers to show loyalty to the oath of office and not misguided loyalty to colleagues engaged in wrongdoing
- New internal regulations and codes of conduct are introduced to accompany the new legislation pursuant to Patten

**c. Political and Legal Oversight:**

This category covers the responsibilities of the Chief Constable, the Secretary of State and the Police Authority, in their different ways, to abide by the law in discharging their policing responsibilities. When it is thought that any part of the tri-partite structure has failed in its duty, it is open to an interested party to take legal action, and - within the parameters laid down in British

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<sup>3</sup> All complaints about police conduct occurring after the 30 April 2001 are subject to this new (less restrictive) burden of proof standard - see RUC Complaints etc. Regulations 2001.

constitutional law - it is the responsibility of the court system (prosecutor, court service, judiciary etc) to ensure that those legal obligations are met.

The strength of this system is largely a theoretical one. It has long been a tenet of policing in the United Kingdom that policing be free of partisan political control. The creation of the tri-partite system is intended to be the institutional mechanism whereby no single authority has excessive power but must work in conjunction with others to carry out their combined function. For the system to work, the respective responsibilities of each party need to be clearly defined in law. However, the most recent legislation pre-dating the Patten changes - the Police (NI) Act 1998 - was described by the Patten Commission as labyrinthine and confusing.

Apart from the legal ambiguities, there was the problem that in a tri-partite model, much depends on the partners all being equally important and working in co-operative tension with each other. Yet, as Patten noted, the division of work in Northern Ireland has meant that "it is not surprising if at times chief constables have tended to develop a more direct relationship with the (partner) who appeared more influential" (ie the Secretary of State, in preference to the Police Authority). The conclusion that the Patten Commission drew was that "neither through the Police Authority nor through government are the people of Northern Ireland - whether unionists or nationalists - able to hold the police of Northern Ireland to proper democratic account" (para 5.7). The Commission went onto argue for an entirely new Policing Board with powers which ought to be "clearly defined and robust" (para 6.15).

During the parliamentary debate which followed Patten, and which was intended to put the Commission's recommendations into law, CAJ and others were particularly critical of apparent attempts by government to resist changes proposed by Patten to the power relationship between the civic oversight body, the Chief Constable, and the Secretary of State. We remain concerned that the final legislation - the Police (NI) Act 2000 - will not be able to deliver the improvement that the Patten Commission clearly thought essential. Much, however, depends on the composition of the new Board, and their determination to effectively hold the police to account. Powers are crucially important, but much can be done even in the absence of formal legal powers, if the new Board sets itself and the police high standards, and seeks to work in an effective partnership arrangement to deliver a police service that everyone can respect.

**d. *Public scrutiny:***

In Northern Ireland public scrutiny is both a potentially very useful and also a potentially divisive mechanism for police accountability. There is a very widespread interest in policing that would not be true in many other societies. Policing has been at the heart of the conflict - victim and perpetrator of abuses - and many many people care about creating a police service that will work

well in a peaceful scenario. The fact that Patten received over 2000 written submissions and gathered more than 10,000 people at public meetings to discuss the future of policing indicates the level of concern and interest in the topic. So, in principle, people are prepared to scrutinise policing.

Moreover, there are human rights groups like CAJ and others (especially now the newly created NI Human Rights Commission) which have an expert interest in the issue of policing, and which can bring international good practice to bear on the domestic debate.

However, precisely because policing has been at the heart of the conflict, opinions about policing are often deeply divided. And the divisions - though not always political - are nearly always portrayed as being politically motivated. This makes agreement on the way forward particularly difficult and contentious.

## **4. The decision making context - rights in conflict**

### ***Summer 1996***

From the very outset of our work in this domain, and in all of CAJ's public utterances, we emphasised that there were rights on both sides of the marching dispute, and that the real challenge was how to adjudicate and then police this genuine conflict of rights.

CAJ explored the conflict of rights theme more fully in our submission to the Independent Review of Parades and Marches in October 1996. Looking at international law to try and establish a standard of "best practice" and to reach for an objective measure of what is and is not respectful of everyone's rights, we asserted: "*International law provides no easy answers. But its study does serve two useful functions. Firstly, it clarifies that there is a genuine conflict of rights here which has to be adjudicated fairly and impartially. Secondly, it provides some principles which should inform that decision-making process*".

On the basis of this study of international law, we were able to note that:

- a. the rights to freedom of assembly, expression and religious belief are all protected, but are subject to certain limitations, one of which is the need to protect the rights and freedoms of others. Accordingly, the "right to march" flows from international law, but cannot be understood to be absolute.
- b. the government has an obligation to protect minority interests and defend them from threats, hostility or violence, and the rights to privacy, family life, and movement are all protected by law. There is,

however, no basis in international law for any claim that "consent" is required from the community through which a parade passes.

Accordingly, we concluded that "*since all the protagonists have rights requiring protection, some process of balancing and accommodating these rights is necessary, whenever they are found to conflict.*" A study of international law suggested that in carrying out this balancing operation, appropriate weight must be given to issues such as - the importance of the protected right, the need for tolerance and broad-mindedness, the weight and significance of the interests that the state is seeking to protect in interfering with the protected right and the principle of proportionality.

The summer of 1996 highlighted many crucial problems:

1. Government had shown a total lack of political leadership - it had failed in its primary duty of ensuring the rule of law, and protecting the rights of everyone equally. The reason was twofold. On the one hand, it had not created a legal or institutional framework within which attempts could be made to try and regulate the conflict of rights. Moreover, the government itself was unwilling to balance the competing rights, so the then Secretary of State insisted initially that it was an entirely local issue. On the other hand, government had failed to create a police service which, even at times of great stress and intense pressure, would act in a totally impartial and even-handed way.
2. The police were in an impossible situation, in that they had both to take decisions as to whether or not a parade/protest could take place, and they then had to police the same event. In some of the most contentious and divisive political disputes imaginable, they were obliged in practice to act as both 'judge and jury'.
3. There was no general acceptance of the fact that the disputes revolved around a conflict of rights and that dialogue and accommodation would be needed on all sides to resolve the issue. Moreover, when the North review was established by government to look into mechanisms for resolving the conflict, there was no human rights expertise built into its composition or its terms of reference.

### ***Summer 1997***

This year, certain advances were made in terms of trying to address the underlying problems of conflicting rights. The North Review reported and noted that: "*We believe that in any study of the parades issue the question of rights is indeed of fundamental importance, and must be addressed as an essential part of the framework.*"<sup>4</sup> The review, like CAJ before it, concluded that "*neither the right characterised as the 'right to march' nor what some have*

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<sup>4</sup> Report of the Independent Review of Parades and Marches (1997) chaired by Dr Peter North (chapter 9)

*characterised as a 'right to withhold consent' is absolute".* As importantly they went on to say that:

- ◆ Reaching an accommodation between competing, or at times conflicting, rights is required
- ◆ There is a specific provision in the European Framework Convention aimed at promoting "mutual respect and understanding and cooperation among all persons" which is very much in line with the approach they were proposing, and
- ◆ International legal obligations must be taken into account when formulating proposals for change - whether of a legislative nature or otherwise, relating to public order, and their report accordingly endeavoured to do just that.

In pursuit of their findings, the North review proposed the creation of a Parades Commission, decided that in future the Parades Commission rather than the RUC would take decisions on disputed parades, and recommended a series of detailed proposals which should be placed on the statute book. Most of these recommendations were accepted by government and in due course the Parades and Processions (NI) Act 1998 was promulgated.

One of the most important advances brought about by this measure was the fact that decision-making and policing were from now on to be separated. This has meant that "public safety" is not treated as essentially the sole criterion on which decisions were made. Moreover, it has proved of inordinate importance for the police shielding them somewhat from the political controversy that has always surrounded these events (but see on).

### ***Summer 1998***

Although the Parades Commission was established in 1997, it was only fully operational with the passage of the parading legislation, and so it was only in 1998, that the benefits or problems arising from the new system could begin to be discerned. In December of that year, CAJ produced a circular<sup>5</sup> commenting in detail on our conclusions about the events of the preceding years, and the assessment was somewhat more positive. We noted, for example:

- a. That in 1996 and in 1997 fear of violent disorder was the overwhelming criterion for decisions. Thus in 1996, it was disorder that led to the police allowing a march down the Garvaghy Road (despite nationalist wishes) and the threat of disorder that led the police to deny a march down the Ormeau Road (despite unionist wishes). Our conclusion in the past was that such a stance "*undermines the concept of the rule of law, encourages resort to violence in order to achieve one's aims, and leaves the rights of a minority (whoever they might be) unprotected*". By 1998, the Parades Commission took a broader view of the legal

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<sup>5</sup> CAJ's Commentary on Public Order Policing 1998, S.80, December 1998

framework than had the police before them, and considered themselves legally obliged to bear a number of important considerations in mind alongside concerns about public safety (eg a balancing of rights, proportionality, disruption to the community etc).

- b. Rulings as to whether a parade, march or protest could go ahead lie with the Commission which is vested with legal authority specifically to take such decisions. This, as noted earlier, very helpfully disentangles the decision making process from the enforcement of the decision
- c. The criteria on which the decisions were made were more widely known; the weight given to different criteria were made a matter for public scrutiny; and the findings were all in the public domain
- d. Decisions were normally rendered public a full five working days in advance of the event in question so that dissatisfied residents or marchers could, if they so choose, have some form of remedy by way of judicial review.

At the same time we noted some issues which might be problematic and which would need to be carefully monitored over time. Firstly, does the Commission have the authority and independence to carry out its role effectively? The continued unwillingness of the Orange Order to seriously engage with the Commission renders its work extremely difficult. Secondly, is the Commission abiding by its remit and giving fair consideration to the criteria laid down in its procedures for decision making and balancing rights? CAJ believed that the Commission was giving a lot of emphasis to concerns around the "impact on community relations" and the extent to which there had been an attempt to broker a satisfactory agreement. We thought that this emphasis was justified from a rights perspective, but it should be monitored fairly closely. Last but not least, how transparent is the work of the Commission, and could it be doing more to educate people so that the underlying tensions and conflicts begin to be addressed in a more fundamental way? The answer to this is probably "no" but that begs the question as to how much the educational process can be left to the Commission alone, particularly given comments made earlier about its relationship with one of the key protagonists. All of these areas need to be carefully and routinely scrutinised.

## **1999-2000**

Patten did not address the issue of marching to any great degree, apart from remarks relating to public order. Certain concerns were raised about plastic bullets, and - in a more fundamental way - if the Commission's recommendations about community policing and human rights come into force, they will have an impact on the situation locally.

On 8 October 1999, the government announced a review of the Parades Commission but the terms of reference were quite narrow. The purpose was

to focus on the responsibility of the Parades Commission to engage in mediation - and to discuss how this might be done more effectively in future. CAJ reiterated concerns it had raised in the legislative debate about the role of the Parades Commission that "mediation" and "adjudication" might be or might appear contradictory. We felt strongly that - if a choice had to be made between the two roles - the Commission should continue to adjudicate disputes since it alone had the authority to do that, whereas there are many groups that might assist in mediation efforts.

We noted, however, that our experience of the work of the Commission did not necessarily highlight any problems, probably because the mediation function was kept quite distinct from the decision making process. However, we also noted that we were not in the best position to judge if there was any perceived conflict between the two roles. Again, it was CAJ's position that if there was a conflict of roles, adjudication should have priority over mediation for the Commission.

As to other issues, we reminded the NIO of the importance of the concept of the Commission being "independent". It was not clear from the legislation what that term meant, apart from members being independent of government. We noted that it would be appropriate for the Commission to reflect its independence by consisting of members who represent all the different perspectives involved, or none of such candidates.

The Northern Ireland Affairs Committee subsequently determined to study the issue of parading and their report has just recently been issued. CAJ was invited to testify but was unable to do more than provide a bibliography of some relevant reading material and a list of some of the many individuals and groups who would have something to contribute to the Committee's deliberations, and might be asked to testify.

In determining its response to the Committee's report, CAJ will be looking to see that:

- ◆ Mediation is not privileged over adjudication
- ◆ Any renewed emphasis on mediation efforts at the local level not ignore or exacerbate the inequalities or injustices currently faced by any of the parties to the dispute
- ◆ There is no move towards a situation where the police again engage actively in the decision making process around parading
- ◆ That any role envisaged for the judiciary be at the stage of appeal thus ensuring complainants have an effective remedy
- ◆ That the Commission's "independence" be better defined
- ◆ That the main thrust of the Commission's work and its attention to the rights of all parties be endorsed.

## **Decision Making Context: lessons learnt?**

The lessons learnt have been highlighted already in the text:

- ◆ There is a growing recognition that while rights are central to the marching issue, rights are not absolute on either side of the argument, and that they are in fact in conflict<sup>6</sup>
- ◆ There has been official government recognition that there needs to be a formal dispute resolution mechanism which can adjudicate between the conflict of rights and those decisions must be based in law, and must be upheld impartially by the police
- ◆ The criteria for deciding that marches can go ahead unrestricted, be restricted, or be re-routed, are now much clearer, more transparent and more subject to public scrutiny (with consultation in advance and published and argued conclusions). Concerned parties must also be able to judicially review the decisions.
- ◆ Policing of the parades dispute must remain entirely divorced from the initial decision about whether, and if so how, to let the march proceed.

## **Decision Making Context: lessons still to be learnt**

The Parades Commission has put a lot of emphasis on getting the parties to the dispute to seek a direct accommodation of their different positions. This has proved next to impossible to date because of the unwillingness of some of the members of the loyal orders to engage with the Commission, still less some of the residents' groups that they are in dispute with. Until there is more willingness to engage in dialogue, at all different levels, and in a variety of ways, the conflict of rights will not be resolved. A pre-condition of resolving any conflict of rights in a satisfactory way is to recognise that there *is* a conflict of rights (ie that both parties have rights that must be protected) and that no-one has any greater claim than anyone else. Accordingly, a balancing of those rights needs to be undertaken and all the parties to the dispute must engage honestly in that endeavour.

For this reason, it would be very unwise if the Parades Commission were to fall into the trap of earlier decision-making processes that allowed the threat of public disorder to take on a privileged position in the decision making. Close scrutiny of decisions must be maintained to ensure that the legislation, the Code of Conduct, and the specific decisions all reflect the human rights considerations that underpin the decision making process. A balancing of rights, proportionality, the importance of the right to be protected, are all

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<sup>6</sup> See recent study entitled "Parades, Protests and Policing" published by the Northern Ireland Human Rights Commission, April 2001.

crucial to fair decision making. The Parades Commission will continue to be measured against these benchmarks.

The Parades Commission must continue to work at exhibiting a transparency in its procedures and an independence of judgement. There should also be an increasing effort put into the educational effort necessary to encouraging local dialogue.

As and where appropriate, the Parades Commission should highlight to the Chief Constable, the Policing Board (in due course) and the Police Ombudsman, any issues which arise in the context of policing public order situations. It has been CAJ's experience in the past that policing of public order has been both helpful and inimical. Police action has both diminished the risk of serious public disorder, and has on occasion given rise to it, or exacerbated tensions which already existed.

## **Conclusions**

As noted at the outset, this circular is not an attempt to be a comprehensive assessment of changes in public order policing over the last few years. It is simply a snapshot of some of the changes that have occurred, and some of the remaining questions and problems that remain to be addressed.

As the next marching season approaches, CAJ will be looking to see:

- ◆ Whether some of the improvements in the area of police tactics, wearing of IDs, and communications have been maintained, whether the outstanding problems in these areas have been addressed, and whether any new problems have come to the fore. In particular, we will be looking at the experiences of policing on the ground - whether "laissez-faire" or "siege", and indeed immediate and longer term policing policy decisions. We will want to comment on any issues which arise as a result of differential practices in response to different situations on the ground.
- ◆ What is happening with the deployment and use of plastic bullets? If they are used, is there any sense that they are being used less frequently, particularly in situations where the police might have resorted to them previously; are the guidelines being breached; and has the record keeping (and therefore the process of accountability) improved at all?
- ◆ How the Police Ombudsperson's office is working; CAJ, as part of its wider work on policing will want to monitor the police complaints system closely to see to what extent the new arrangements are meeting the expectations vested in them.
- ◆ How the Parades Commission operates and to what extent human rights considerations are to the fore of their decision making process.

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