Winner of the 1998 Council of Europe Human Rights Prize

Comments from the Committee on the Administration of Justice (CAJ) on the Implementation Plan for the Criminal Justice Review and the Justice (Northern Ireland) Bill

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What is the Committee on the Administration of Justice (CAJ)?

CAJ is an independent non-governmental organisation, which is affiliated to the International Federation of Human Rights (IFHR). CAJ monitors the human rights situation in Northern Ireland and works to ensure the highest standards in the administration of justice. We take no position on the constitutional status of Northern Ireland, seeking instead to ensure that whoever has responsibility for this jurisdiction respects and protects the rights of all. We are opposed to the use of violence for political ends.

CAJ has since 1991 made regular submissions to the human rights organs of the United Nations and to other international human rights mechanisms. These have included the Commission on Human Rights, the Sub-Commission on the Promotion and Protection of Human Rights, the Human Rights Committee, the Committee Against Torture, the Committee on the Rights of the Child, the Committee on the Elimination of Racial Discrimination, the Special Rapporteurs on Torture, Independence of Judges and Lawyers, Extra judicial, Summary and Arbitrary Executions, and Freedom of Opinion and Expression, the European Commission and Court of Human Rights and the European Committee on the Prevention of Torture.

CAJ works closely with international NGOs including Amnesty International, the Lawyers Committee for Human Rights, Human Rights Watch and the International Commission of Jurists.

Our activities include: publication of human rights information; conducting research and holding conferences; lobbying; individual casework and legal advice. Our areas of expertise include policing, emergency laws, children's rights, gender equality, racism and discrimination.

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

In 1998 CAJ was awarded the Council of Europe Human Rights Prize in recognition of our work in defence of rights in Northern Ireland. Previous recipients of the award have included Medecins Sans Frontieres, Raoul Wallenberg, Raul Alfonsin, Lech Walesa and the International Commission of Jurists.

Introduction

CAJ worked extensively on the Criminal Justice Review itself. We made a lengthy submission and then met with the Review for a discussion of the issues we had raised in the submission. We subsequently made two additional submissions concentrating on the Finucane case and the Treacy/Macdonald judicial review. In conjunction with the International Commission of Jurists (ICJ) and the Queen's University of Belfast, we organised a private seminar for members of the Review with a number of respected international legal practitioners and human rights lawyers. This took place over two days in Belfast.

When the Review published its report we submitted further lengthy comments to the government during the consultation period which it established.

Our submissions concentrated on four main areas: human rights, the prosecution service, the judiciary and the courts. Our comments on the draft Implementation Plan and the Bill also focus on these areas.

Generally we are disappointed at the contents of the Plan with regard to these four areas. Some of the weaknesses we have identified are related to the failure of the Review to make particular recommendations. However, more worryingly the Plan appears to mirror substantially the initial Patten Implementation Plan in that its main purpose seems to be to undermine some of the more significant proposals made by the Review particularly in the area of the prosecution service.

Structurally we have identified two main problems which may be due to omissions on the Review's part but which will create ongoing problems now. The first is that, unlike in Patten, there is no independent mechanism for oversight of the changes envisaged. The case for such oversight in this process is perhaps more compelling than in Patten given that the change will affect many different agencies and institutions. It is therefore crucial to have someone charged with ensuring that change occurs and at the appropriate pace. Leaving this to the NIO or the different agencies will not inspire confidence that change will actually occur given that it was the unsatisfactory performance of those very different agencies which presumably motivated the parties to the Good Friday Agreement to establish the Review.

The second major problem which is closely related to the first is that in the vast majority of the recommendations there is no timescale for implementation. Anyone familiar with the process of change in any organisation will immediately recognise this as a major block to delivering change. Firm deadlines must be set if this Plan is to be considered as a contribution to the process of changing the criminal justice system.

Combined, these two problems mean that those who have been most resistant to change, who have caused many of the problems which have plagued the system, have now been placed in charge of the process of transformation and can implement the changes almost entirely at their own pace.

We are particularly concerned about the above failings because in our response to the report of the Criminal Justice Review in August 2000 we said we were "disappointed

that the implementation of the report's recommendations has been left solely in the hands of the civil service. The absence of any independent element in the implementation of the report makes its recommendations all the more vulnerable to dilution and to the opposition of elements within the existing criminal justice system which are firmly opposed to some of the more far-reaching changes suggested."

We also pointed out that leaving implementation in the hands of government was all the more unsatisfactory given that the Review was government-led and that the recommendations of the Review were subject to comment by relevant government departments and others in advance of publication.

Human Rights and Guiding Principles

Recommendation 1 & 11
Human Rights Training
The human rights training of criminal agency staff considered necessary by the Review is essentially left to the discretion of the relevant agency. No timescale is set by which this will be done. We believe this training should be centralised and a definite timetable should be set.

The training of lawyers in human rights principles, which is also dealt with under this section of the Plan, is the responsibility of the Institute of the Professional Legal Studies as is general legal training for all trainee lawyers. Such students at the moment receive perhaps one day of human rights training. Audits are not necessary. A human rights course at the Institute should be commenced. Who will ensure this happens and when will it happen?

Recommendation 2
Criminal Justice Aims
The text in the Plan in relation to this recommendation is unclear. Will the Strategic Statement of Purpose and Aims be subject to public consultation?

Recommendation 4
Reflective workforce
While this recommendation is accepted, nothing concrete is promised to make the workforce more reflective. CAJ remain concerned that efforts in this regard appear to be dependant on devolution. There is no reason why this should be so. While technically in line with the recommendation of the Review, work should begin now to make the workforce in the criminal justice field more reflective of the community. A target date should be set by which this should be achieved.

Recommendation 5 & 6
Equity Monitoring
The issue of equity monitoring is critical in terms of public confidence in the criminal justice system. However, we are very concerned that this issue is left in the hands of the criminal justice agencies with no timetable for implementation. We would also be concerned that this research is carried out by independent research institutions rather than internally by the various agencies or the Criminal Justice Board and that a timetable be set.

Recommendation 7
Statement of Ethics
The Plan provides no timetable for the publication of statements of ethics. There is also no commitment to consultation on the various statements. This recommendation arose in the course of a discussion in the review document about membership by members of the judiciary of secret oath bound organisations. However, the Plan does not highlight this as a particular issue to be considered by each agency in drawing up

its statement of ethics and there is no indication as to who will draw up the statement of ethics for the judiciary themselves and if it will be subject to consultation. These deficiencies should be remedied.

Recommendation 8
Membership of Organisations
The Plan indicates that this recommendation will be subject to further consideration. However it appears that the Plan confuses proscribed organisations and those which may act contrary to the interests of the criminal justice system but which are not illegal. The Review is not completely clear on this issue but its recommendation followed the discussion related to secret oath bound organisations.

It is indicated in the Plan that "further work" is needed in this area. Who will do this work? If the concern is that there may be problems with freedom of association why can there not be a register of interests particularly for those who are members of the judiciary, the senior bar or the prosecution service? Surely it is highly relevant in a judicial review concerning, for instance, the right to march to determine if any of the key players involved are members of the Orange Order.

Recommendation 9
Defence Lawyers
It is simply unacceptable to leave the sensitive issue of intimidation of defence lawyers to be dealt with on a piece meal basis by each agency as and when (and if) they see fit.

In addition it is clear that if threats are being directed at defence lawyers, the Special Rapporteur was of the view that an independent investigation needed to take place. Police investigations do not meet this test. Some new mechanism needs to be put in place to deal with this type of case.

Recommendation 10
Bursaries for Legal Training
This recommendation is accepted only in principle. If this is for purely funding reasons, this is unacceptable. Particularly for those students who wish to go to the Bar, assistance is necessary as the majority of judges are of course drawn from the ranks of the Bar. Not to provide bursaries will tend to restrict prospective Bar students to certain narrow social backgrounds.

Recommendation 12
List of Experts
It is unclear from the Plan if the Law Society has yet compiled such a list or when it will do so. The Law Society needs to do so and by a certain date.

Recommendation 16
Complaints mechanisms
It is simply unacceptable to leave such a vital recommendation to the discretion of the individual criminal justice agencies with no timescale in place and apparently no guidelines issued as to what the mechanisms should look like. It is also insufficient to leave review of these matters until after devolution which in effect means at the earliest mid 2003. The creation of complaints mechanisms should be centralised and subject to a deadline.

Prosecution

Recommendation 17 and 58
Single independent authority and renaming DPP

The Review's recommendations in relation to the DPP were among the most far-reaching made. While the Review indicated that the work of the new office would build on the work of the existing office they also said their recommendations entailed "taking on new work, a different approach to aspects of its existing work and substantial organisational change". Also at the press conference to launch their report they refused to deny that their proposals in this regard meant the abolition of the DPP. The Review said they envisaged "major changes in the prosecutorial arrangements in Northern Ireland, which we believe will enhance the system and public confidence in it." However, what the Implementation Plan suggests is essentially a new name for the office but very little substantive change. Indeed the Plan recommends the same title for the professional head of the office. In this recommendation the Plan clearly undermines the process of change in this key area. Indeed the Review recommended the importance of change in relation to the description of the professional head of the office, when they said that "[A] new title for the head of the organisation would help to demonstrate to those outside it, as well as those inside, that the remit and responsibilities of the organisation have changed considerably." The Director who made the much questioned decisions in relation to a number of controversial cases including the Finucane murder investigation will have "overall responsibility for creating the new service." How will new mechanisms for accountability, outreach and recruitment function without clear signals that this organisation, which has been so unaccountable to date, is finally being made subject to real and effective change?

Recommendation 19
Powers in article 6(3)

Article 6(3) of the Prosecution of Offences (Northern Ireland) Order 1972 allows the DPP to prompt police investigations. This recommendation was informed by the comment at 4.19 of the report that "In practice article 6(3) is formally invoked on rare occasions." The inclusion of this recommendation by the Review is therefore clearly intended to ensure that 6(3) is used more widely and indeed it has the potential to provide the prosecution service with a much more pro-active role. The Plan gives no sense that this will be the case. It simply amounts to a restatement of the existing provision in the new Bill and a reference to it in the new Code of Practice. Once again there is no timescale beyond it all being dependent on devolution of criminal justice. The Code of Practice should indicate a willingness to use the power more regularly and also a timetable should be set by which the Code of Practice should be published.

Recommendation 22
Advise to police on prosecutorial issues

The Review did not make the clear distinction the government do between prosecutorial and investigatory advice. Indeed if one looks at para 4.135 it is clear the Review envisaged a much more proactive role for the prosecution service. The Review stated that while "we do not envisage prosecutorial supervision of investigation, we were impressed by the strength of the arguments for early

involvement of a prosecuting lawyer in police investigations in the more complex and serious cases." The Implementation Plan leaves the decision as to whether the prosecution should be involved at an earlier stage completely at the discretion of the police.

Recommendation 46
Relationship between prosecution and attorney general
In relation to this recommendation, the Review recommended that there be statutory provision for consultation between the Attorney General and the head of the prosecution service. The Review clearly envisaged consultation between the two in relation to individual cases because in para 4.162, they discuss what would happen if the two disagreed on a case. However section 38 of the Bill which makes provision for statutory consultation appears to indicate that such consultation can only take place in relation to matters for which the Attorney General is accountable to the Assembly. This of course, by virtue of section 23 of the Bill, probably does not include individual cases. Section 23 allows the Attorney General to refuse to answer questions in the Assembly in relation to individual cases. We believe consultation between the two should not be limited to matters for which the Attorney General is accountable to the Assembly.

Recommendation 49
Giving of reasons
The emasculation of this key recommendation is completely unacceptable. The practice of the DPP in NI to refuse to give reasons in controversial cases has been one of the key factors in undermining public confidence in the criminal justice system. We provided the Review with detailed case studies in the Finucane murder, the Hamill murder, the murder of Nora McCabe and others which suggested that the reluctance to give reasons had little to do with concerns about possible injustice to an individual but was more about protecting the interests and reputation of the agencies of the state. The recommendation of the Review was balanced and positive and argued that the balance should shift towards the giving of reasons but accepted that there may be instances where this was not possible because it could conflict with the interests of justice. Essentially the government response is a refusal to accept this recommendation. Nothing is proposed to implement the shift towards giving reasons which the Review recommended.

Not only does this go against the recommendations of the Review but it also potentially violates the Human Rights Act. As a result of Kelly et al v United Kingdom (4th May 2001) the prosecution service will be obliged to give reasons in cases which involve suspicious or controversial deaths.

Recommendation 56
Complaints procedure
This recommendation suggested an independent element in any complaints procedure. To say, as the government response does, that this already exists because complaints are examined by a member of staff other than the person whose actions have given

rise to the complaint, is risible. Complaints should be investigated by an agency outside the prosecution service.

Recommendation 62
Recruitment
This has already begun despite the fact that this Plan has yet to be published. The hope of the Review was clearly that in the aftermath of the establishment of a new prosecution service, applications would be received from those traditionally under-represented in the office. This is unlikely if the recruitment occurs now.

The judiciary

Most of the recommendations in this section suffer from the fact that they are dependant on the devolution of criminal justice functions. CAJ believe that Northern Ireland cannot await devolution of these functions at some unspecified future date in order to make progress towards a more accountable bench which will command more widespread public confidence.

Recommendation 67
Judicial Independence
While the Review recommended explicit reference to the independence of the judiciary in Westminster legislation, they did not call for the use of the word "continued". Given the controversy there has been in relation to alleged instances of judicial bias, the inclusion of this word is gratuitous.

We also believe the legislation should place an obligation on the judiciary themselves to dispense justice independently.

Recommendation 68
Merit Principle
The response to this recommendation fails to reflect the discussion which the Review engaged in on the competencies included in the merit principle. It is noteworthy that all of these recommendations in relation to eligibility continually emphasise the government's delight that the Review affirmed the merit principle. The Plan should articulate those competencies which the Review identified as making up merit and these should be reflected either in the Bill or relevant Codes of Practice for the Judicial Appointments Commission and indeed those others involved in the appointment of the more senior bench.

Recommendations 69, 89-92
Judiciary to be reflective of society
The two key principles underpinning confidence in the judiciary are independence and representativeness. Given that there is statutory provision in relation to independence, we cannot understand why there is no obligation in the legislation to ensure that the bench is representative of society. Similar clauses have been included in legislation governing the Human Rights Commission, the Police Board and the Parades Commission. While of course the outworking of such clauses has rarely been successful, at least it should provide parameters of fairness for the appointments process.

Once again no timescale is included by which the recommendations in relation to representativeness will be complied with. While this is a general problem with the plan, it is a particular problem with recommendations which go to the heart of establishing a representative judiciary and thus confidence in the criminal justice system. Why can the NIO not give a timescale for establishing a database of qualified candidates or having discussions with the Bar Council and Law Society along with the Equality Commission?

Recommendations 77-80
Judicial appointments
We believe Northern Ireland should not have to wait for devolution for the establishment of a Judicial Appointments Commission.

We believe lay membership of the Commission should at least equal legal membership. Otherwise it is very likely that the representatives of the judiciary and the profession will dominate the discussions. This is particularly so given that the chair is going to be the Lord Chief Justice (LCJ). In addition the Review envisaged that there would be five judicial members, two from the professions and four or five lay members. Under section 12 of the Bill, there would in fact be six judicial members. This is tipping the balance even further in favour of the judicial representation.

In addition the Review indicated that the LCJ should consult with each tier of the judiciary before appointing the relevant representatives. We cannot find any provision in the Bill for such consultation to take place. If the proposals go through as they stand, we believe this process will be completely dominated by the Lord Chief Justice.

We do not understand why the lay members should be representative of the community in Northern Ireland but the there is no similar obligation in relation to the judicial or legal appointments. At the very least there should be a statutory obligation that the Judicial Appointments Commission as a whole should be representative of society.

Recommendation 75, 85
Appointment of Lord Chief Justice and Lord Justices of Appeal
We are aware the Review recommended that the appointment of the most senior judges should be not be done through the Judicial Appointments Commission as with the other judicial appointments but should continue to be made on the recommendation of the Prime Minister. We do not understand why this should be the case. CAJ believes that all appointments to the bench in Northern Ireland should be made by the Judicial Appointments Commission.

Recommendations 81, 82, 83, 84 and 107
Judicial Appointments Commission
As indicated above, we believe that the Judicial Appointments Commission should be able to make appointments rather than just offer advice in relation to all judicial appointments including the most senior. If not, the process remains wide open to the criticism that it is politically biased.

In response to recommendation 84, the Bill does not make clear that the First and Deputy First Minister would be bound by the second recommendation of the Judicial Appointments Commission, where they had asked them to reconsider the first recommendation.

Once again the response to 107, in relation to drawing up a code of ethics for the Judicial Appointments Commission, leaves everything to the agency involved which is as yet not even established.

Recommendations 86, 87, 88 and 94
Judicial Appointments Unit
The Review recommended the establishment of a Judicial Appointments Unit "separate from the Court Service … but staffed by official drawn from it." The government response does not appear to suggest that there will be any distance between this Unit and the Court Service. Indeed it appears the Unit is already functioning within the Court Service.

Recommendation 95
Appointment of judicial appointments commissioner
It is once again of concern that the government have gone ahead and recruited this person without waiting even for publication of this Plan.

Recommendation 96
Oath
The purpose of this recommendation was clearly to neutralise the oath which members of the judiciary have to take on appointment. In these circumstance we believe the word "realm" should be replaced with the word "jurisdiction".

Recommendations 97-102
Judicial Training
The Review recommended that induction training should be mandatory. While the government says it accepts all of these recommendations, there is no mention in the Bill of the requirement for mandatory training. We also believe that training for all judges should be mandatory. The Bill should make this clear.

Recommendation 103
Tenure
We made the case to the Review that the statutory retirement age for judges in future should be 65. We remain of the view that this should be the case.

Recommendations 104-106
Complaints
We believe the response to the recommendations in relation to complaints is inadequate. It is clear that the Review recognised there was a problem in relation to judicial accountability and made limited recommendations in order to remedy this. However, the relevant provisions in the Bill qualify the official acceptance to such an extent, that it is unlikely they will satisfy even the most modest concern about whether the judiciary are held properly to account.

The tribunals which are envisaged in the Bill can not in any sense be described as independent. Two of the three members will be appointed by either the Lord Chancellor or the Lord Chief Justice and will be current or retired judges. The third member of the tribunal will be appointed by the First and Deputy First Minister and will be a lay person. That person cannot be chair of the tribunal. Even in the unlikely event that such a tribunal recommends the removal or suspension of a judge, the Bill prevents the removal or suspension without the agreement of the Lord Chief Justice. The Review made no reference to giving this power of veto to the Lord Chief Justice.

The Lord Chief Justice is also given sole responsibility for devising the codes of practice relating to the handling of complaints against the judiciary.

Given the unfortunate history in Northern Ireland of institutions such as the police being allowed to investigate their own wrongdoings, it is strange that the government has chosen largely to replicate such a system in relation to the judiciary.

Courts

Recommendation 123
Inquests
The review established in relation to inquests is insufficient to meet the concerns expressed by the Review team. Indeed when it was initially mooted by the Home Office, its terms of reference did not cover Northern Ireland. Although Northern Ireland is now included, nevertheless the terms of reference for the review are very technical and cover matters such as the issuing of death certificates. This will not deal with the situation in relation to inquests in Northern Ireland. The Review said that it recognised "serious concerns about the way the [inquest] system" was operating.

It is also relevant that in the wake of the decisions of the European Court of Human Rights in Jordan, Kelly, Shanaghan and McKerr the Lord Chancellor's Department have informed Belfast Coroners Court that there is an ongoing internal consultation within government about how to respond to the judgements. This consultation is expected to conclude in January and will have to result in serious changes to the inquest system in order to comply with the judgements.

However, the European judgements provide the baseline for the reform of the inquest system. Any review must be tasked with changing the system in order to comply with those judgements and other relevant international human rights standards.

Recommendations 124 – 128
Public outreach and information
While the government says these recommendations endorse existing practices and policies, CAJ has seen little evidence of this and we would be more aware of such steps than most. Crucially, yet again there is no timetable.

Recommendation 135
Simplification of dress
Unusually the Plan indicates that this recommendation is not wholeheartedly accepted. This may be because the implementation of this recommendation is essentially left to the judiciary and the legal professions. This is unacceptable because it is highly unlikely that the judiciary or the professions will implement the recommendation. There is also no timetable for implementation.

Provision to simplify dress in court should be included in the Bill.

Recommendation 141
Symbols
The rationale of the proposals for change inside the courtroom was the necessity of creating "an environment in which all those attending court can feel comfortable." We believe that by retaining symbols on the outside of courthouses and allowing the continued flying of the Union flag, the Review will not achieve the desired environment. This is particularly so when one considers that the Review also refused to make recommendations in relation to the name of the Royal Courts of Justice and

the Crown Court, or the term Queens Counsel. This reticence on the part of the Review is made all the more difficult to understand by the comment that "[I]n time it may be more fitting to move towards symbols that emphasise the separation of the courts from the executive." In our view the appropriate time for such symbolic separation is now in the aftermath of the Agreement. We believe making such changes in the context of a mechanism, which received widespread support from the electorate, has more legitimacy and will be less divisive than if such changes are left to court action or unilateral action on the part of the government.

In addition while the Review recommended that the interior of courtrooms be free of any symbols, the relevant provision of the Bill only outlaws the Royal Arms from the interior or courthouses. Other symbols will not be affected.

The Bill of course allows the Royal Arms to remain in place on the exterior of a court house if it was there immediately before the coming into force of the relevant section. We have therefore been very concerned to learn that it is proposed that the Royal Arms be placed on the exterior of the new court house in Belfast just before the Bill comes into in force, thereby technically avoiding falling foul of its provisions. Given that this new court house will be the primary court house in Northern Ireland in terms of public usage and prestige, this decision can only be viewed as highly unfortunate.