Response from the Committee on the Administration of Justice (CAJ) to the draft Coroners (Practice and Procedure) (Amendment) Rules (Northern Ireland) 2002.

Introduction

1. CAJ are concerned that the consultation on the proposed changes to Rule 9 was limited to the Lord Chief Justice, the Coroner and the NI Human Rights Commission. We believe those representing families of the deceased, families themselves, the police, NGOs and others should have been part of this consultation.

2. The proposed changes to Rule 9 of the Coroners (Practice and Procedure) Rules are patently inadequate as a means of meeting the criticisms made by the European Court of Human Rights in the cases of Jordan v UK, Kelly v UK, McKerr v UK and Shanaghan v UK in which judgement was delivered by the European Court of Human Rights on 4th May 2001.

3. In its judgement the Strasbourg court found that in all four cases, the UK had violated Article 2 of the Convention because it had not properly investigated the killings of twelve individuals, some of them killed by the police, some by the army and one killed by loyalist paramilitaries in circumstances suggesting collusion.

4. The UK had argued in the cases that a combination of the police investigation, the review by the DPP, the inquest system and the possibility of civil proceedings satisfied the procedural requirement of article 2. The Court said that while a combination of remedies could indeed satisfy article 2, the remedies available in Northern Ireland did not do so in these cases. They specifically rejected the notion that civil proceedings could assist in the satisfaction of article 2.

5. Eight major criticisms emerge from the four judgements. These are:

- Lack of independence of the police investigation, which applies to police killings (Jordan, McKerr), army killings (Kelly), and cases of alleged collusion (Shanaghan).
- The refusal of the DPP to give reasons for failing to prosecute.
- Lack of compellability of witnesses suspected of causing death.
- Lack of verdicts at the inquest.
- Absence of legal aid and non-disclosure of witness statements at the inquest.
- Lack of promptness in the inquest proceedings.
- The limited scope of the inquest
- Lack of prompt or effective investigation of the allegations of collusion.

6. The judgement, in our view, should have led the government to introduce significant changes to the way such cases are dealt with in the future and to establish proper investigations into the four cases which were the subject of the decisions.

7. The government did not seek to refer the judgement to the Grand Chamber and indicated that it accepted the findings of the Court.

The response to date

8. One of the cases which was subject to the May 2001 judgement is the case of Pearse Jordan. Unlike the other cases, his inquest had not been completed and there have, since the judgement, been a number of preliminary hearings before the Belfast Coroner to try and determine the basis upon which his inquest should now proceed. In light of the consultation now being undertaken in relation to rule 9, the Coroner held another hearing on 9th January 02. At that hearing there was considerable discussion about a number of recent judgments in England relating to the compatibility of the inquest system with the Convention. In particular attention was focused on the Middleton case, which concluded that the inquest system as operated in England, did not violate article 2 of the Convention. This conclusion was based on the remarkable notion that it was always possible, no matter how remote the possibility in practice, that a further ad hoc investigation might take place. The Belfast

Coroner accepted this reasoning and said that he would consequently hold the inquest under the old rules.

9. On 14th January 02 during a judicial review of decisions of the Lord Chancellor in the case of Jordan, counsel for the Lord Chancellor, Declan Morgan QC gave perhaps the fullest explanation of the government's response to the Jordan et al judgements from Strasbourg.

10. He said that in order to comply with the judgements the government had taken a number of steps. Some of these steps were administrative and included the appointment of a second full time Coroner, the appointment of another part time Coroner and the establishment of additional courtroom space. This presumably was at least in part a response to the criticism of the Strasbourg Court in relation to a lack of promptness.

11. Dealing with the substantive response he said that the change to rule 9(2) was the only change envisaged to the inquest system.

12. He said that the criticism of the court in relation to the issue of independent investigations was dealt with by way of the establishment of the Police Ombudsman. He said the criticism in relation to the refusal of the DPP to give reasons for refusing to prosecute would have to be considered by the Attorney General. The problem with certain witnesses not being compellable at the inquest was being dealt with by way of the change to rule 9(2). There was no intention to change the rules relating to verdicts although the government accepted there was a need to have an effective process which could assist in identifying and prosecuting those responsible but that could be provided by some mechanism other than an inquest. He speculated that this might include a reconsideration by the DPP following the inquest. Issues of legal aid and disclosure were being or had been dealt with.

Changes to Rule 9

13. The proposed changes to rule 9 relate solely to the issue of compellability of witnesses believed responsible for the death. They do not engage with the

other weaknesses of the inquest system identified by the European Court of Human Rights, and indeed the Lord Chancellor has confirmed that the issues of scope and verdicts will not be dealt with within the confines of the inquest system.

14. While therefore the changes in rule 9 are welcome, they are a limited and inadequate response to the European judgements.

15. They also of course give rise to the real concern that those summonsed will simply refuse to answer questions which impinge in any way on the circumstances surrounding the death. The balance struck in those circumstances would mean that article 6 rights (even assuming they are engaged in an inquest context) would trump the article 2 rights of the family of the deceased. This is likely to raise continuing arguments about incompatibility and lead to regular challenges to decisions of the Coroner.

16. Options which have been discussed in this regard would be to oblige witnesses to answer all questions and essentially do away with the right against self-incrimination in the inquest context. Alternatively witnesses could be obliged to answer questions, the answers to which could not be used as evidence in any subsequent prosecution against the witness. We are aware that the second option was adopted in the Saville Inquiry.

General Concerns

17. It would appear that the government response to the European judgements is piecemeal and being left to individual departments or agencies rather than being co-ordinated by a lead official or department. Given that the judgements have significant implications for the police, the police ombudsman, the DPP, the inquest system and the Ministry of Defence, such an approach is bound to be inadequate in terms of properly implementing the judgements. Indeed it is likely to lead to further unwarranted delay, thereby potentially violating the Convention in the process.

18. There is however a more immediate concern. The judgements in the cases of Jordan, Kelly, Shanaghan and McKerr found that the investigations in those cases were so poor that they violated the procedural aspect of the right to life. In other words twelve deaths caused in the most controversial circumstances in Northern Ireland have not been properly investigated. In the absence of such investigations, it is clear that the government has a responsibility to now conduct investigations which do meet the requirements of article 2. We, as lawyers representing the families in Kelly and Shanaghan, have written to the Secretary of State for Northern Ireland, the DPP and the police seeking information about their intentions in light of the judgements. We are aware that the lawyers acting for the Jordans and the McKerrs have done likewise. To date we have received no substantive response except from the police who have effectively indicated they do not intend to do anything in response to the judgements.

19. Apart from Jordan, the other three cases have no ongoing proceedings save civil proceedings in respect of a number of families.

20. The response of the government to the European Court of Human Rights judgements in relation to the proper investigation of these killings is therefore as follows:

21. In the case of Jordan, the Coroner is going to hold an inquest under the old rules, which of course were the subject of much adverse comment by the Court in its judgment. The Coroner may be able to compel witnesses responsible for the death but this is not yet clear and if they do attend, it is likely they will avail of the right against self-incrimination when they are asked about the circumstances of the death.

22. In the cases of McKerr, Shanaghan and Kelly the families will not receive reasons for the failure to prosecute in these cases; cases which the Court described as crying out for an explanation. There will apparently not be independent investigations into the deaths. There will not be new inquests

with additional powers examining the full circumstances of the deaths. Those responsible for the deaths will not be identified or prosecuted.

23. In our view the government, through a lead department or official should respond comprehensively to the European judgements. Each major criticism identified by the Strasbourg Court should be met in the course of this response. As noted above, this would entail changes to the policy and practice of the inquest system, the DPP, the police and Police Ombudsman, and the Ministry of Defence.

24. In addition the government should immediately establish inquiries into the four cases subject to the judgements, which are compliant with article 2.

25. The proposals in relation to Rule 9 engage only with one of the criticisms made of the inquest by the European Court of Human Rights. At the very least the Lord Chancellor's Department should have ensured that any changes made in the aftermath of the judgements also remedied the problems in relation to the issues of scope and verdicts.

26. In our view, the UK government is displaying contempt not just for the European Court of Human Rights but also for the Convention itself.