

**The Committee on the Administration of Justice (CAJ)**  
**45/47 Donegall Street, Belfast BT1 2BR**  
**Tel: (028) 9096 1122 Fax: (028) 9024 6706**  
**Website: [www.caj.org.uk](http://www.caj.org.uk)**



*Winner of the Council of Europe Human Rights Prize*

*CAJ's submission to the*

**Office of the Independent Criminal Justice  
Oversight Commissioner**

**September 2003**

**Submission No. S.147**  
**Price £1.50**

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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 for the Elimination of Discrimination against Women, 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.

## ***Background to the Criminal justice Review***

The Good Friday Agreement of 1998 promised significant change to the justice and policing systems in Northern Ireland. Perhaps unsurprisingly however reform of the police service received prime consideration, significantly overshadowing criminal justice reform. This was reflected in both the architecture for reform and the terms of reference set by the Agreement. Accordingly, while police reform was the subject of an international, independent Commission, headed by Chris Patten, criminal justice reform took the shape of a British Government-led Review, with merely an “independent element”. Moreover, the latter suffered from unduly restrictive terms of reference which precluded an evaluation of the continued use of emergency laws and powers. The prohibition on reviewing emergency laws instantly reduced the potential impact of the reform process and the degree of public engagement in it.

In view of these fundamental limitations on the Review’s ability to deliver reform, CAJ concentrated its efforts on ensuring the full and proper implementation of the main recommendations of the Review published in March 2000. We therefore campaigned for an independent oversight mechanism, analogous to that created to oversee police reform. Indeed, in our response to the publication of the Review Recommendations<sup>1</sup> we further recommended that the independent members of the Review should be given a role in the implementation process and would still continue to support this measure.

The recent government announcement to create the office of Criminal Justice Oversight Commissioner was therefore most welcome. At this early stage, we wish to make a number of recommendations which we hope will contribute to the success of the Office and help promote public confidence in it.

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<sup>1</sup> CAJ Submission No. S.101

## **Function and Organisation of the Office of the Criminal Justice Oversight Commissioner**

### *(a) Independence*

Independence must be a core feature of the Office of the Criminal Justice Oversight Commissioner. True independence will earn it legitimacy and credibility. We strongly recommend therefore that the conditions relating to the role and function of the Oversight Commissioner and his Office, should be placed in statute along with a statutory commitment to independence. The new Justice Bill provides a legislative opportunity to do this.

The Office of the Oversight Commissioner should not however be simply deemed to be “independent” but it must also be seen to be so. As such, steps must be taken to secure independent staff and to provide that the Office is adequately resourced so that it can remain financially independent.

### *(b) Size and Resources*

The 294 Review recommendations span an enormous amount of ground, covering all sections of the criminal justice system in Northern Ireland. Independent monitoring will therefore undoubtedly prove to be logistically challenging. The Oversight Commissioner will require considerable assistance, particularly as he has only been appointed in a part-time capacity.

The Patten proposals constituted about half the volume of the Review recommendations and unlike the latter, pertained almost exclusively to the Police. However in setting up the Office of the Oversight Commissioner for Policing, one of the most important tasks was said to be the identification and recruitment of leading academic and law enforcement executives. Indeed that Office now boasts of having “*enlisted the support of some of the world’s leading experts in the area of professional policing and human rights...[as well as]...the assistance of the International Association of Chiefs of Police to provide expert advice*”.

CAJ feels that the Criminal Justice Oversight Commissioner merits resources at least equal to those of the Police Oversight Commissioner. If reports are correct that the first Review by Lord Clyde is due in December 2003, with publication of the report in January 2004, then recruitment of staff and the development of a clear, statutory-based mandate is imperative.

### *(c) Evaluation and Consultation*

It is common that the recipients of any kind of reform will sometimes be expert in giving the appearance of accepting recommendations for reform when in effect, little change is actually being delivered. This highlights how important it is to properly analyse and consider the degree to which the substance of the reform is being implemented by the given measure. Evaluation is key to determining the effectiveness of activities in delivering the substance of reform and whether or not they are succeeding in achieving the desired outcome.

Performance indicators have been used by the Police Oversight Commissioner, Tom Constantine, to assess implementation of the Patten proposals. One of the lessons learnt from

that process must be the importance of careful and considered selection of the relevant indicators. Some of the performance indicators that have been fixed by Tom Constantine in relation to policing reforms have been criticised by CAJ for being superfluous, ill considered and for facilitating a box ticking response rather than advancing a deeper assessment of the substance of the implementing measures.

Wide ranging consultation with expert organisations and individuals, community and voluntary representatives, academics, NGOs and other relevant stakeholders would certainly enhance the work of the Justice Oversight Commissioner and provide a more informed and representative basis for decision-making. This should be particularly profitable in relation to some of the ‘problem’ recommendations for the Review such as: equity monitoring; reflective workforce; the principle of merit; and the practice of giving reasons to prosecute or not.

*(d) Enforcement of the Decisions of the Oversight Commissioner*

In the event that any of the criminal justice agencies fail to meet their own self-imposed targets for implementation of the relevant Review recommendations, they ought to be publicly exposed for their shortcomings and a reasonable explanation should be given. The terms of reference for the Criminal Justice Oversight Commissioner require the Commissioner to lodge bi-annual reports on the process of implementation to the Secretary of State. It is then at the discretion of the latter to determine, having considered the “public interest”, how much of this report to lay before the NI Assembly. CAJ firmly believes that this form of reporting is an important accountability mechanism and indeed the only substantive means of exerting pressure on the NIO and criminal justice agencies to implement the Review recommendations. From this point of view, we would argue that only in exceptional circumstances (which must be defined) should the Secretary of State decide to edit or fail to disclose any element or the entirety of a report of the Justice Oversight Commissioner.

## Scope of the Duties of the Oversight Commissioner

### *(a) Criminal Justice Bill (Amending the Justice Act 2002)*

Implementation of the Review recommendations has been a slow and arduous process; the time lapse between the publication of the recommendations and the present speaks for itself. Furthermore, over that period, the Government has had cause to issue an updated Implementation Plan, in response to grave concerns over the inadequacies of the first Plan and, following significant political pressure, has now given a commitment to introduce amending legislation to the Justice Act 2002 via a Criminal Justice Bill.

The forthcoming Bill at least presents an opportunity to get things right, albeit at a second attempt. The nine proposed provisions of the Justice Bill all stem from the Criminal Justice Review. The majority of these purport to give effect to express Review recommendations which had not been properly translated in the legislation or in the first Plan. The remaining provisions, while not expressly proposed by the Review, are in our view consistent with the text.

For the purposes of clarity however, we will take each of the provisions in turn and locate them within the Review. Our intention in so doing is to indicate to the Oversight Commissioner that it is incumbent on him, by virtue of his terms of reference, to provide *“independent scrutiny of the implementation of changes in the criminal justice arrangements and structures flowing from the Government’s decisions on the Criminal Justice Review and the provisions of the Justice Act.”* This clearly includes the duty to scrutinise the Justice Bill, both pre-publication and as it goes through parliament to ensure that it truly reflects the Review recommendation and that its provisions are not diluted in any way. Failure to do this, would in our view be a missed opportunity.

### *Bill Provisions*

- ***“To establish a Judicial Appointments Commission prior to the devolution of responsibility for criminal justice matters”***

The Review did not expressly comment either way on when the Judicial Appointments Commission (JAC) should be established. Their views are unclear and they defer to political judgment on the issue of timeliness: *“We recommend the enactment of legislation enabling responsibility for judicial appointments in Northern Ireland to be devolved on an agreed basis at a date to be determined by the Government in the light of the prevailing circumstances”*.<sup>2</sup> They acknowledge moreover that *“...it may be some time before our recommendations on the devolution of justice matters and the establishment of a Judicial Appointments Commission are implemented.”*<sup>3</sup>

For the full implementation of the judicial appointments process, involving the JAC and the First and Deputy First Ministers, as envisaged by the Review, responsibility for justice would of course have to be devolved. However there is nothing in the Review that would oppose

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<sup>2</sup> Criminal Justice Review, pg 133.

<sup>3</sup> Ibid. pg 141.

the idea of introducing the JAC before devolution and having the Commission issue its recommendations to the Secretary of State or relevant UK Minister prior to these powers being transferred to the NI Assembly. On the contrary, it is fully within the parameters of the Review for the Government to decide to expedite the introduction of the JAC in this manner.

- ***“To place time limits on the length of service for all of its members, both lay and judicial”***

There is no express or implied reference in the Review to the duration of service of any members of the JAC. Despite this, the Justice Act placed, in a seemingly discriminatory manner, time limits on the length of service of lay members of the JAC only. This proposed provision should redress this imbalance.

- ***“To provide that a key objective of the Judicial Appointments Commission will be to engage in a programme of action to secure a judiciary in Northern Ireland that is as reflective of Northern Ireland society as can be achieved consistent with the requirement of appointment on merit”***

This is one of the original Review recommendations which did not receive statutory recognition in the Justice Act 2002. While it is true that the Review did not state that it must be given statutory effect, nor did it prescribe this for many other recommendations which nonetheless found their way into the Justice Act. We cannot find any reasons why such an important recommendation would be deliberately omitted from statute. It is clear from the Government’s response to this recommendation in the first Implementation Plan<sup>4</sup> that it did not intend to afford to it the status of a statutory guarantee. Rather a much weaker response was provided, whereby the NI Court Service would merely be responsible for taking forward the recommendation in co-operation with the Equality Commission. The result of this has been that, (as noted in our communications with the Judicial Appointments Commissioner, John Simpson and Director of the Court Service, David Lavery) nearly two years after the first Plan, only a small amount of discussion has yet taken place between the Court Service, the Equality Commission, the Office of the Judicial Appointments Commissioner, the Bar Council and the Law Society and little progress has been made on advancing this issue. We would hope that by placing this recommendation on a statutory basis, the relevant agencies and stakeholders will be under pressure to debate it and develop an agenda to respond to its requirements.

Owing to the natural overlap, we should also comment at this point on Recommendation 4 of the Review on the need to secure a “reflective workforce in all parts of the system”. This recommendation was not drafted into the Justice Act and unsurprisingly the consequence has been that little or no action has been taken by the responsible agencies to address the matter. Of course it may be argued that the wording of this Review Recommendation suggests that it would only be operational on devolution since it places responsibility for achieving a reflective workforce on “*whatever machinery is devised for administering criminal justice matters after devolution*”. We submit however, that even if interpreted in this light, this does not constitute a valid reason for having omitted this recommendation from the Justice Act. Many of the current provisions of the Justice Act will not be commenced until devolution and this recommendation could join that long list. Such a measure would at least acknowledge

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<sup>4</sup> Criminal Justice Review Implementation Plan, pg 40.

the importance of the recommendation and allay concerns that its absence in statute is indicative of resistance from the criminal justice institutions to tackling this area.

With these concerns in mind, we would strongly urge the Oversight Commissioner to press for its inclusion in the new Bill. We feel that this clearly falls within the remit of the Commissioner, given that his responsibility is to ensure the implementation of the Review recommendations.

- ***“To provide that the composition of the Judicial Appointments Commission itself taken as a whole will, as far as possible, be reflective of the community in Northern Ireland”***

This proposed provision goes beyond the Review, which had only expressly recommended that *“the lay members of the Commission should be drawn from both sides of the community, including both men and women”*. There is no indication however of an intentional decision to deliberately exclude the judicial members of the JAC from the “reflective” requirement.

- ***“To provide that in respect of appointments of the Lord Chief Justice and Lord Justices of Appeal, the First Minister and Deputy First Minister acting jointly will make recommendations to the Prime Minister, who in turn will recommend appointments on that basis”***

From our reading of this re-drafted provision it appears to extend slightly beyond the original review recommendation on the subject. Review recommendation 75 reads as follows:

*“For the appointment of the Lord Chief Justice and Lord Justices of Appeal, responsibility for making recommendations to Her Majesty the Queen would lie with the Prime Minister, as now, but on the basis of recommendations from the First Minister and the Deputy First Minister.”*

In the amended Bill version, the addition of the phrase *“who in turn will recommend”* infers that the Prime Minister will accept the recommendation of the First and Deputy First Ministers. This should however be clarified at the drafting stages.

At the very least however it is clear that both the original Review recommendation and the amended version above are both much stronger than the version that was accepted by the Government in the first Plan and inserted into the Justice Act which merely provided that the Prime Minister “consult” with the First and Deputy First Ministers in regard to these senior appointments.<sup>5</sup>

- ***“To remove the requirement for the Lord Chief Justice’s agreement to removal or suspension on foot of a Tribunal recommendation”***

It was not a recommendation of the Review that the Lord Chief Justice should exercise this effective veto power over a decision reached by a properly constituted Tribunal. Indeed the Review recommendation on this point (Recommendation 104) does not even recommend that

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<sup>5</sup> Justice (NI) Act 2002, Section 4(3).

the Lord Chief Justice should convene the Tribunal, as provided in the Justice Act, but suggests the First and Deputy First Ministers as a suitable alternative.

- ***“To place a duty on the Director of Public Prosecutions to refer all cases of suspected police malpractice to the Police Ombudsman”***

This is an important provision, the content and character of which, we hope will be retained through the drafting stages of the Bill. This provision will do no more than fulfil the original Recommendation 21 of the Review which recommended that *“a duty be placed on the prosecutor to ensure that any allegations of malpractice by the police are fully investigated.”* The Government responded to this recommendation in its first Implementation Plan by stating that it would add the DPP to the list of those persons *“able”* to refer allegations of malpractice to the Ombudsman. This clearly fell short of the Review recommendation which stated that a *“duty”* should be placed on the Prosecutor. The Justice Act, which had been drafted on the basis of this consideration, does not include a statutory obligation on the DPP and we would urge the Oversight Commissioner to ensure that the key elements of this original Review recommendation are not diluted in the drafting stages of the Bill.

- ***“To make it an offence to seek to influence the DPP’s prosecutorial decisions without legitimate cause”***

This an original Review recommendation which was rejected by the Government in the first Plan as unnecessary and consequently did not find expression in the Justice Act.

- ***“To place a duty on the criminal justice agencies in Northern Ireland to have due regard to relevant international human rights conventions and standards in carrying out their functions”***

This was not enumerated as an express Review recommendation. However the Review states that in the view of the members of the Review Group *“...human rights are central to the criminal justice system”*.<sup>6</sup> The Review further explains:

*“The minimum international standards have guided us throughout our deliberations and we cannot stress too strongly their applicability to all parts of the criminal justice system in Northern Ireland.”*<sup>7</sup>

#### *(b) Devolution of Justice and Policing to Northern Ireland*

The Belfast Agreement contained a conditional pledge by the British Government to devolve justice and policing powers at a future date, subject to security normalisation and implementation of the other relevant requirements of the Agreement. This was recently restated in the Joint Declaration, reached by the parties in April.<sup>8</sup> The terms of reference for the Criminal Justice Review were based on this premise and the Review was expressly requested to consider:

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<sup>6</sup> Criminal Justice Review, para. 3.1, pg 25

<sup>7</sup> Ibid. para. 3.6, pg 26

<sup>8</sup> Joint Declaration, para.20, pg 6.

*“..the structure and organisation of criminal justice functions that might be devolved to an Assembly, including the possibility of establishing a Department of Justice, while safeguarding the essential independence of many of the key functions in this area.”<sup>9</sup>*

As a result, many of the Review recommendations were formulated on the contingency of devolution of justice and policing powers. It is certain therefore that the substance of the criminal justice reforms can clearly be influenced by the shape and structure of devolution arrangements and we would encourage the Oversight Commissioner, through his work in overseeing the Review, to advance the prospect of devolution.

If however, the prospect of devolution does not appear to be a short-term political reality, we believe that it is the duty of the Oversight Commissioner to ensure that all aspects of the Review, which are not legally dependent on devolution, are brought forward for implementation. Recommendation 4 of the Review on the issue of a reflective workforce is such an example. CAJ are determined that implementation of crucially important reforms to the justice system such as this, should not be subject to fragile and uncertain political developments.

Even in relation to those Review recommendations which, for constitutional reasons cannot operate in the absence of devolution, efforts should be made to ensure that all possible preparatory steps are currently being taken to prepare for the event. Good preparation could significantly reduce delays on implementation. CAJ believes that the Oversight Commissioner should ensure that efficient and progressive preparatory steps are taken in readiness for devolution.

### *(c) Areas of Concern in Regard to Implementation of the Review*

The pace of implementation of the Review, as indicated in the first Implementation Plan, was a serious concern for CAJ and many others. In this respect we are generally encouraged by the improvements in timescales in the updated Implementation Plan. Timetables and deadlines, while still self-imposed by the very agencies at whom the reforms are directed, have nevertheless been set. This is a welcome development from the first Plan, but it will be the responsibility of the Oversight Commissioner to ensure in the first instance that these deadlines are reasonable and in the second instance that they are complied with. If delays in implementation are attributed to inadequate resources (as was the implication in relation to the delay in establishing the Law Commission) we would encourage the Commissioner to seek assurance from the Secretary of State that sufficient and proper funding will be made available.

In both the updated Implementation Plan and from our meetings with a number of the criminal justice agencies, we have noted that certain crucial recommendations present particular problems for implementation and indeed appear to be greeted with a degree of resistance from some quarters. These recommendations are as follows:

Recommendation 4: Reflective Workforce  
Recommendation 68: Merit Principle

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<sup>9</sup> Belfast Agreement, *Policing and Justice*, Annex B.

Recommendation 69: Reflective Judiciary  
Recommendation 5: Equity Monitoring  
Recommendation 90: Encouragement of Applicants to the Judiciary  
Recommendation 2: Human Rights Training  
Recommendation 20: Power to Refer to the Ombudsman  
Recommendation 21: Duty on DPP to Refer Malpractice Allegations  
Recommendation 17: Single Independent Prosecuting Authority  
Recommendation 49: Giving of Reasons  
Recommendation 23: Scrutiny of Decisions to Prosecute or Not  
Recommendation 16: Complaints Mechanisms  
Recommendations 77-80: Judicial Appointments Commission

We would like to refer you to the enclosed copy of our commentary on the updated Implementation Plan where we discuss each of these areas in detail. Interestingly these areas all fall under the categories of the Review to which the Government has pledged to give “particular weight”.

Paragraph 24 of the Joint Declaration states:

*“The British Government has announced its intention to appoint an independent Oversight Commissioner to provide independent scrutiny of the implementation of the Government’s decisions on the Criminal Justice Review. This constitutes a major programme of transformational change and will give **particular weight** to modernisation, accountability, protection of human rights, ensuring a reflective workforce and the effective performance of the criminal justice system.”*