

CAJ's Submission no. S387

CAJ's Submission to the Second Reading of the Justice and Security Bill on 'Closed Material Procedures'

June 2012

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CAJ is an independent human rights organisation with cross community membership in Northern Ireland and beyond. It was established in 1981 and lobbies and campaigns on a broad range of human rights issues. CAJ seeks to secure the highest standards in the administration of justice in Northern Ireland by ensuring that the Government complies with its obligations in international human rights law.

CAJ issued a detailed submission in response (s374) to the Justice and Security Green Paper (CM8194) this can be accessed at: <http://www.caj.org.uk/submissions>

In this CAJ drew attention to our publication "*The War on Terror: Lessons from Northern Ireland*" and argued that, from our experience, measures which bypass rule of law standards afforded in democratic societies and establish, in effect, a parallel justice system can fuel conflict as well as contributing to the growing marginalisation of 'suspect communities'.

This present submission is to draw attention to a number of serious implications specific to dealing with the legacy of the conflict in Northern Ireland which the introduction of Closed Material Procedures (CMPs) in civil cases would entail:

- In his submission to the Green Paper the Northern Ireland Minister for Justice, David Ford MLA stated his view in relation to Inquests that the proposals "raise significant Article 2 concerns"... "in particular [ECHR Article 2 requirements include] effective public scrutiny and the involvement of the family in relation to access to information."
- The proposal in the Green Paper to consider extending CMPs to Inquests has not been proceeded with. **However, beyond inquests there are still a range of civil proceedings in Northern Ireland dealing with the legacy of the conflict which would be affected by the introduction of CMPs**, including any future:
 - Judicial Reviews of investigations into conflict-related deaths (e.g. challenges to PSNI, Historical Enquiries Team, Police Ombudsman, and challenges relating to Inquests, decisions not to prosecute etc).
 - Civil actions for damages relating to miscarriages of justice, ill-treatment, unlawful killings, failing to take reasonable steps to protect life etc.

- The Green Paper appeared to recognise the potentially far reaching consequences of CMPs on legacy Inquests into ‘Troubles’ related deaths, with Government giving an assurance it was ‘extremely mindful’ of the role of families in such Inquests to date.ⁱ Given this it is not clear why Government would not apply similar considerations to the above and similar matters.
- The introduction of CMP into civil proceedings will also impact on challenges to present day policing in Northern Ireland. CMPs are likely to be used in what are already the most controversial of cases, namely those which engage the actions of informants and agents.
- CMPs conflict with the framework provided by the Belfast /Good Friday Agreement with its emphasis on transparency and accountability to ensure confidence and the legitimacy of the justice system. The Patten Commission stated, in relation to recommendations to on police codes of practice – including on covert policing - being publicly available: “*Transparency is not a discrete issue but part and parcel of a more accountable, more community-based and more rights-based approach to policing*”.ⁱⁱ Closing off the accountability avenue of civil proceedings in open court in this context conflicts with this principle and has the potential to undermine public confidence in the justice system.
- CAJ is already concerned at the impact of existing provisions which allow the use of ‘secret evidence’ in Northern Ireland. Most prominently there are the provisions to recall paramilitary ex-prisoners who had been released on licence under the terms of the Belfast/Good Friday Agreement to prison on the basis of evidence, presumably based on intelligence data, given in a closed procedure.ⁱⁱⁱ Such a process is also available for prisoners released before the Agreement, including the current high profile case of Marian McGlinchey (née Price) who has been imprisoned in controversial circumstances for the last year. There is also the ‘special tribunal’ established to consider challenges to National Security Certificates issued to prevent challenges under anti-discrimination legislation^{iv}

Finally in addition to the consideration of ECHR rights, and the provisions of common law affording a fair hearing, CAJ urges Peers to assess the compliance of the legislation with international standards in relation to measures and obligations for combating impunity^v **and torture, such as those set out under the UN Convention Against Torture** and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

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ⁱ CM 8194 Executive Summary, paragraph 14-15, and paragraphs 2.21-3

ⁱⁱ 'A New Beginning to Policing in Northern Ireland, Report of the independent Commission on Policing in Northern Ireland', Paragraph 6.38.

ⁱⁱⁱ The Green Paper, as well as making reference to similar provision for Terrorism Act 2000 offences further to the *Northern Ireland (Remission of Sentences) Act 1995*, sets out that the *Northern Ireland (Sentences) Act 1998* and associated rules (which provided for early release of paramilitary prisoners further to the Belfast/Good Friday Agreement) allows the Secretary of State to certify information as 'damaging' and to present it to the Sentence Review/Parole Commissioners, prisoners are provided with a 'gist' of the information and provision is made for Special Advocates.

^{iv} *Section 42 Fair Employment (Northern Ireland) Act 1976*, which allowed the Secretary of State to issue a national security certificate to block a discrimination claim without effective recourse to an independent hearing, was found to be incompatible with the right to a fair trial under the European Convention on Human Rights in *Tinnelly and others v UK* (Application no. 20390/92) in which access to the relevant material in the hands of the state was a factor in the judgement. Other cases such as *Devlin v the UK* (Application no. 29545/95) were also successful in Strasbourg, in which recently in *Frances Devlin v the Chief Constable for Northern Ireland* the applicant had his damages claim settled having sued for malicious falsehood and negligent misstatement. [See news report <http://www.u.tv/news/Man-gets-damage-payment-over-IRA-claim/5ded63ca-8f44-4477-8902-3ef4beb7edd9> accessed 6 January 2012]. This is the type of civil case in which an applicant could be disadvantaged by the introduction of CMPs. The *Northern Ireland Act 1998* included provisions for a 'special tribunal' to deal with cases whereby a discrimination claim has been taken and is blocked by a certificate from the Secretary of State claiming that the said discriminatory act was done to safeguard national security, public safety or public order and allows rules to be made for the tribunal whereby evidence is kept secret, the applicant and their representative is excluded and the Attorney General can appoint a 'special advocate' to represent their interests (*Sections 90-92 Northern Ireland Act 1998*) Contemporary Fair Employment legislation made provision for referral to be made to this 'Special Tribunal' (*Fair Employment (Northern Ireland) Order 1998, article 80.*) CAJ has asked under the Freedom of Information Act how many certificates have been issued and how often the 'special tribunal' has convened – only to be told that the Northern Ireland Office 'did not record' such information

^v Including the International Covenant on Civil and Political Rights, the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights law and Serious Violations of International Humanitarian law, the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, E.S.C. res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989, and the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Access to Justice and Fair Treatment, A/RES/40/34,