

CAJ's Submission no. S429

**Written Evidence to the Northern Ireland Affairs Committee on its
inquiry into the 'Administrative scheme for "on-the-runs"' (April 2014)**

April 2014

About CAJ

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights.

CAJ however would not be in a position to do any of this work, without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON.

The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Written Evidence to the Northern Ireland Affairs Committee on its inquiry into the 'Administrative scheme for "on-the-runs"' (April 2014)

Committee on the Administration of Justice ('CAJ')

1. 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.
2. CAJ welcomes the opportunity to provide Written Evidence to the Committee on its inquiry into the Administrative scheme for "on-the-runs".¹ CAJ views any assurances and processes which limit investigations as engaging issues of compliance with the duty for effective investigations under Article 2 ECHR and international standards for the protection of the rights of victims and prevention of impunity.² In light of the Committee's plans to further hear from witnesses in the PSNI and government, CAJ would like to draw attention to the following questions which would provide further clarity on the OTR scheme and 'other related matters', as provided for in the Terms of Reference:
 - Clarity, in light of information in the *Downey* judgement, on the process and criteria used by PSNI Serious Crimes Branch (C2) to make decisions on arrest and further investigation following Historical Enquiries Team (HET) reviews;
 - Whether assurances, undertakings or guarantees, written or unwritten, have been given to any other categories of persons that they will not face prosecution or investigation;
 - Clarification as to whether the OTR scheme was designated a 'national security' matter and how the NIO operated it;

PSNI processes: C2 criteria and processes for 'further action' post-HET reports

3. In 2009 a PSNI protocol formalised a system where by the PSNI Serious Crime Branch (C2) would take decisions in relation to further action on the back of HET findings and provided a power for the Assistant Chief Constable (ACC) of Crime Operations to bypass the HET process altogether.³ The protocol sets out C2 had "assumed responsibility for any case where the HET process uncovers evidence requiring arrest and prosecution." The PSNI have set out that once the HET had completed a review which "identifies evidence that a person may have committed a serious offence then that case is referred to C2 (Crime Operations) and then it is a decision for C2 to take further action."⁴

¹ See' NI Affairs Committee '[Committee launch Administrative scheme for "on-the-runs" inquiry](#)'

² Article 6 International Covenant on Civil and Political Rights; UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; UN Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions ('Minnesota Protocol'); UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; UN 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; UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity

³ PSNI 'Memorandum of Understanding between HET and C2 Serious Crime', a copy of this MoU was submitted to the Council of Europe Committee of Ministers in relation to the execution of the *McKerr v UK* judgement [and published by them](#).

⁴ [PSNI FOI response F-2010-03028](#).

4. The *Downey* judgement references the ‘restart’ of the ‘administrative scheme’ following the fall of the *Northern Ireland (Offences) Bill 2005* and the commencement of the PSNI’s *Operation Rapid*, responsibility for which sat with C2, with the ACC Crime Operations providing C2 the list of individuals for review.⁵
5. What is not clear from the information in the judgement is what happened to a 2008 HET review which had sought Mr Downey to again be placed on the PSNI wanted list, in relation to a bombing in Enniskillen in 1972. The judgement subsequently indicates that Downey was *not* on the PSNI wanted list in October 2009.⁶ This in itself prompts broader questions about what happens when HET reviews are passed to the PSNI’s Crime Operations branch and what criteria are applied as to whether ‘further action’ is instigated by C2 on the back of HET reports.

CAJ would urge the Committee to seek clarification on the criteria and process within the PSNI whereby C2 takes decisions.

Were assurances given, or processes established, for other categories of persons?

6. The Terms of Reference for the Committee’s Inquiry include ‘Other Related Matters’. For CAJ a question of particular relevance is as to whether any other categories of person, beyond ‘OTRs’, have been given assurances they are not wanted, or will otherwise not face prosecution or investigation. If this is the case the resultant question is which systems or processes have been put in place to implement such assurances. Any such assurances may or may not have been in writing. In his evidence to the Committee, former PSNI ACC Peter Sheridan, in response to a question from Lady Hermon, stated (in relation to OTRs) “as I understand now, not everybody got letters; some people were told by word of mouth or other ways of telling them.”⁷
7. A question as to whether state actors, informants or other paramilitaries had been given undertakings was recently asked at the Justice Committee of the Northern Ireland Assembly. Patsy McGlone MLA asked the Permanent Secretary of the Department of Justice, Mr Perry “are you aware or have you since been made aware of any undertakings of an amnesty, immunity or implied immunity from prosecution having been given to any former or serving member of the security forces, any person who has acted as an agent of the security forces or British Government intelligence services or any other member of any other paramilitary organisation?” Mr Perry responded he was not aware. Given however as the Department of Justice has stated it was not involved in the OTRs scheme, there would be merit in putting such a question to the NIO, PSNI and other agencies.⁸
8. Under the ill fated *Northern Ireland (Offences) Bill 2005* introduced shortly after IRA decommissioning the British Government intended the legislation to establish a scheme

⁵ R v John Anthony Downey, paragraphs 72 & 75

⁶ R v John Anthony Downey, paragraphs 125-136.

⁷ Oral evidence: Administrative scheme for ‘on-the-runs’, HC 1194, 2 April 2014, q167.

⁸ Committee for Justice Official Record (Hansard) On-the-runs Administrative Scheme and Letters: Mr Nick Perry, Department of Justice 25 March 2014, p12.

with application beyond OTRs to others including state actors. It is not clear how Government's desire to protect state actors was addressed following the withdrawal of the 2005 bill.

9. In July 2013 HM Inspector of Constabulary, in its inspection report on the HET found it 'striking' that since 2010, after the introduction of the above 2009 HET-C2 protocol, "not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution."⁹ The PSNI have confirmed, as of the start of the 2013 financial year, 39 cases – involving 119 victims – with 26 for which republicans were responsible and 13 loyalists, had been referred to the rest of the PSNI.¹⁰ Whilst academic research, NGO submissions and the HMIC report have shined a light on the HET processes regarding the above British Army cases, there remain a range of grey areas in relation to HET processes.

10. This includes how the HET handles cases involving informants and agents who were operating for the police and other agencies. The HET is not permitted to investigate police officers but *is* permitted to investigate informants working for the police and others. In 2007 The UK told the international community that a 'parallel investigation' would take place by both HET and the Police Ombudsman when both 'police and external collusion was alleged'.¹¹ An appendix to the MoU between the Ombudsman and 'PSNI Crime Operations HET' sets out a flow chart as how 'mandatory or discretionary referrals from C8' to the Ombudsman are to be handled.¹² In so far as can be determined from this document the PSNI/HET, rather than any independent process, will make the referral but only when there is 'an allegation of police collusion' present. It is not clear how this is determined, and many families will have no idea whether an informant is potentially implicated in their case. CAJ knows little further about the HET referral mechanism on informant cases as the PSNI have declined (on grounds of both 'national security' in general and the involvement of the Security Service specifically) to confirm or deny whether they hold any further information on the matter. The PSNI have also declined to provide an overall statistics both the number of cases referred for parallel investigation and the overall number of cases which have involved informants.¹³ There has however been long term controversy as to whether informants have been protected from investigation and prosecution for crimes they are implicated in.

CAJ urges the Committee to seek clarification as to whether other categories of persons have been offered assurances they will not face prosecution.

⁹ HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' June 2013, page 94.

¹⁰ Bradfield, Philip 'Why did HET not probe Sinn Fein, asks Ulster Unionist' Newsletter 7 September 2013.

¹¹ UK Position to Committee of Ministers, Interim Resolution CM/ResDH(2007)73.

¹² Dated 11 May 2005, [available at http://www.psni.police.uk/policies_procedures_het.pdf], appendix issued under PSNI FOI F-2013-03386.

¹³ PSNI FOI reference F-2013-03386.

Clarification as to whether the OTR scheme was designated a ‘national security’ matter and how the NIO operated it;

11. There has been some discussion as to whether the OTR administrative scheme, which does not appear to be explicitly referenced in the schedules to the Northern Ireland Act 1998 as being excepted or reserved, should have passed to the Department of Justice from the NIO when most policing and justice powers were devolved in 2010. The Committee’s terms of reference also seek to clarify which other agencies were involved in the scheme.¹⁴
12. The Committee has already noted OTR letters were released by the NIO, an executive branch of government. It still remains unclear however as to the structure and process within the NIO facilitated this. In evidence to the Justice Committee, Mr Nick Perry, confirmed he had held the post of the NIO ‘Director General of Criminal Justice and Policing’ but stated that despite this: he “had no involvement in the scheme. I have no idea who applied to it. I have no idea who got letters. I have no idea what any of those letters may have said.”¹⁵ The former Secretary of State, Mr Woodward in his evidence indicated that he took responsibility for the letters but they were not signed by him.¹⁶ It is not clear what the structural arrangement and process was within the NIO was in relation to the issuing letters and whether they went through the formal hierarchy of the office or involved other agencies. This could be clarified.
13. There is also a lack of clarity as to whether the OTRs scheme was designated a ‘national security’ and hence excepted matter. This question was put to Mr Perry by the Chairperson (Paul Girvan MLA) of the Justice Committee. Mr Perry responded that he did not know whether the OTR scheme had been designated in such a way but that it might have been.¹⁷ There is presently no statutory definition of ‘national security’ and CAJ has long held concerns that matters are being re-designated as ‘national security’ matters with the purpose or effect of placing them beyond the reach of the accountability bodies established further to the peace process.

CAJ urges the Committee to recommend that greater legal certainty is introduced as to the meaning and application of ‘national security’ as a concept, and to seek clarification of the processes within the NIO in relation to the ‘administrative scheme’ and similar matters.

Committee on the Administration of Justice, April 2014

¹⁴ “Involvement by HM Government, other Governments, the Attorney General’s Office, the Armed Forces, Police services, The Public Prosecution Service for NI, and any others, and any advice sought by them”

¹⁵ Committee for Justice Official Record (Hansard) On-the-runs Administrative Scheme and Letters: Mr Nick Perry, Department of Justice 25 March 2014, p18.

¹⁶ Oral evidence: Administrative scheme for ‘on-the-runs’, HC 1194, 9 April 2014, q340

¹⁷ Committee for Justice Official Record (Hansard) On-the-runs Administrative Scheme and Letters: Mr Nick Perry, Department of Justice 25 March 2014, p4.