Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland

Jordan v the United Kingdom, judgment final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment final on 4 August 2001
McKerr v the United Kingdom, judgment final on 4 August 2001
Shanaghan v the United Kingdom, judgment final on 4 August 2001
McShane v the United Kingdom, judgment final on 28 August 2002
Finucane v the United Kingdom, judgment final on 1 October 2003
and
Hemsworth v UK, judgment final on 16 October 2013
McCaughey & Others v UK, judgment final on 16 October 2013

April 2016

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 (FIDH). Its membership is drawn from across the community.

This Rule 9 communication is for consideration at the 1259th meeting of the Ministers' Deputies in June 2016. CAJ has regularly made Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' that have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments.

In December 2014 the British Government published the Stormont House Agreement (SHA), the result of talks involving the parties in the Northern Ireland Executive and the British and Irish Governments. The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, including a new 'Historical Investigations Unit – HIU' to conduct Article 2 compliant investigations into conflict-related deaths. The SHA also provided for measures to maintain and make legacy inquests Article 2 compliant.
At the time of writing progress is currently blocked on both establishing the SHA institutions and the taking forward of 'legacy inquests' and some Police Ombudsman investigations:

- Legislation was to have completed passage through the UK Parliament to establish the SHA institutions but was derailed by the UK government belatedly inserting an undefined ministerial 'national security' veto over disclosure to families of the findings of HIU investigations;
- Despite a review and overarching plan by the Lord Chief Justice for Northern Ireland to deal with the approximately 55 outstanding legacy-inquests in an Article 2 compliant manner over the next five years –the UK government has not yet released the financial resources to allow this to take place;
- There continues to be a withholding of resources from the Police Ombudsman for legacy investigations.

This submission provides full detail on the above matters, beginning with inquests.

Legacy Inquests into conflict related deaths – a 'long shadow over the entire justice system'

The most recent assessment of the compliance with general measures further to the Ministers Deputies meeting in December 2015 states as follows:

> *Legacy Inquests (inquests into the deaths of persons at the hand of the security forces during the Troubles)*
> In their most recent action plan, the authorities indicate that a number of measures are underway to reduce delays in legacy inquest proceedings. Those are the:
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> · Assumption of the presidency of the coroners courts by the Lord Chief Justice to allow more effective judicial case management;
> · Judicial led assessment of the state of readiness of the 53 outstanding legacy inquests;
> · Establishment of a new Legacy Unit within the coroners service before December 2015;
> · Allocation of complex inquests to more senior judges or coroners;
> · Appointment of additional staff including coroners, legal advisors and investigators.[1]

A number of these matters have been taken forward, the Lord Chief Justice has assumed presidency of the coroners courts, a judge-led review of legacy inquests has taken place and further coroners have been appointed. The new Legacy Inquest Unit however has not been able to commence its work as it awaits the necessary resources from the UK government. Additional coroner investigator posts have been advertised, although controversially criteria proposed by the coroner to prevent persons with a connection to those organisations under investigation taking up roles was changed. In addition new secondary legislation was passed to allow limited access to family members on a confidential basis of papers in the Public Records Office from previous inquests and other legacy court proceedings. Such papers are usually sought during the purpose of evidence gathering to seek a fresh inquest. This submission will detail all of these developments.

Inquests, endemic delays and the Stormont House Agreement

Paragraph 31 of the December 2014 Stormont House Agreement affirms:

> Legacy inquests will continue as a separate process to the HIU. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the [Northern Ireland] Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.[2]

[1] McKerr v UK (Lead) status of execution: https://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=mckerr&StateCode=UK.&SectionCode=
[2] Stormont House Agreement, paragraph 31.

The background to this commitment was the endemic delays to inquests dealing with deaths during the Northern Ireland conflict (known as 'Legacy Inquests'). Some families have been waiting over 40 years for an Article 2 compliant inquest. The delays are largely attributed to the withholding of necessary resources from the coronial system along with delays and over redaction of official security force records. This has led to a series of Strasbourg and domestic judgements finding the UK in breach of its ECHR obligations. A concurring opinion by Judge Kalaydjieva in *Hemsworth v. UK* which was echoed in *McCaughey & Ors v. UK* concluded:

> …the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Article 2 and 3 seem as a matter of principle to make it possible for at least some agents of the state to benefit from virtual impunity as a result of the passage of time. (*Hemsworth v. UK*, p25).

In May 2014 the High Court in Belfast found that the delays in six inquest cases had been so protracted they were unlawful as a breach of convention rights.[3] In September 2015 the Lord Chief Justice for Northern Ireland (LCJ) noted that only 9 cases had been disposed of in the previous five years, and only 13 in the past decade.[4] In a judgement in the previous year the LCJ commented that "If the existing legacy inquests are to be brought to a conclusion under the present system someone could easily be hearing some of these cases in 2040."[5]

There are currently approximately 55 outstanding legacy cases (relating to around 95 deaths). The Attorney General for Northern Ireland has a power to direct the opening of further inquests, including legacy inquests, where advisable to do so.

Remedying delays – the Lord Chief Justice's review and plan

In 2014 legislation was passed through the Northern Ireland Assembly to make the Lord Chief Justice (LCJ) for Northern Ireland, Sir Declan Morgan, President of the Coroners Court.[6] Following his appointment the LCJ instigated a review of all outstanding legacy cases by a senior judge, Lord Justice of Appeal Reg Weir QC, which took place in January 2016. The LCJ also engaged with the Council of Europe and UN human rights machinery, through the Human Rights Commissioner, Nils Muižnieks, and UN Special Rapporteur Pablo de Grief, who advised on the principles that should underpin an Article 2 compliant model for legacy inquests. During the course of the review Lord Justice Weir was highly critical of the UK Ministry of Defence (MoD) who had cited 'resource pressures' as a rationale for repeatedly missing deadlines for disclosing documents to inquests examining the actions of soldiers. Lord Justice Weir stated:

[3] *Jordan's and five other Applications [2014] NIQB 71*.
[4] 'Judges to preside over Troubles killings inquests', *BBC News Online* 22 October 2015
[5] *Re Jordan's applications for judicial review* [2014] NICA 76.
[6] Legal Aid and Coroners' Courts Act (Northern Ireland) 2014

> The MoD is not short of money. It's busy all over the world fighting wars and it's about to buy some new submarines with nuclear warheads - so it's not short of money.... [The disclosure of official records to legacy inquests] is obviously very low on their list of priorities.[7]

Lord Justice Weir continued that such disclosure *"...is not an option - this is an international obligation on the State*" and took the view that the argument of 'resource pressure' raised questions over the commitment to obligations under international human rights laws stating that the practice "...*doesn't suggest any great intent on the part of government to comply with their obligation*s." The Judge raised concerns in that the "*MoD have been rather inclined to think they can thumb their nose at directions from the coroner and that they were quite free to abandon the promises they made*" and told legal representatives of the Ministry that "*You want to avoid any suspicions that this approach is designed to prevent the matter being aired in a public arena, that it's a deliberate attempt to delay and obfuscate.*" Lord Justice Weir was also critical of the practice within the Police of delaying disclosure stating that it was 'disgraceful' that not a single sheet of paper had been disclosed to the next-of-kin in relation to one inquest.[8]

The review also dealt with the question of the sequencing or prioritisation of cases. CAJ was concerned to learn that during this exercise the legal representatives of the UK government advocated that inquests involving 'non-sensitive' materials should be prioritised, essentially as they could be dealt with quicker. CAJ is concerned at this position given the implications that cases examining potential human rights violations, particularly in the areas of covert activity by the security forces, almost always involve 'sensitive' materials, and hence would be further delayed and placed at the back of the queue under such an approach.

In an unparalleled move in February 2016 the LCJ and Lord Justice Weir met with all the families awaiting legacy inquests to present the conclusions of the review. The outworking of the review is set out in the most recent UK 'Action Plan' to the Committee of Ministers as follows:

> The Lord Chief Justice of Northern Ireland (LCJ) became President of the Coroner's Court on 1 November 2015. The LCJ has appointed a High Court Judge as the Presiding Coroner to oversee the management of cases and consider issues relating to scope and disclosure. The Presiding Coroner in conjunction with the Lord Chief Justice will determine which cases will be listed for hearing and when. Following a review of the state of readiness of the outstanding legacy cases, which was undertaken by Lord Justice Weir in January 2016, and a series of meetings in Strasbourg on 15 January 2016, the LCJ has proposed that, with the support of a properly resourced Legacy Inquest Unit in the Northern Ireland Courts and Tribunals Service and co-operation from the relevant justice bodies including the PSNI and the MoD, operating in conjunction with the other reform measures he has recommended, it should be possible to complete the existing legacy inquest

[7] MOD is not short of money for work on inquests into historic killings – Judge" Newsletter 28 January 2016. http://www.newsletter.co.uk/news/northern-ireland-news/mod-is-not-short-of-money-for-work-on-inquests-into-historic-killings-judge-1-7186645#ixzz46BGIDnv7

[8] As above.

> caseload within a period of five years, subject to the required resources being made available. [9]

In a speech given at a conference of the Victims and Survivors Commission in Belfast in March 2016 the LCJ stated that:

> I am satisfied that the plan I have developed represents the best way forward for these cases and satisfies the criteria that need to be met in order to discharge the UK Government's Article 2 obligations.[10]

Resources for the Legacy Inquests Unit:

In his address to the families awaiting legacy inquests the Lord Chief Justice stated:

> It is my assessment that provided the necessary resources are put in place and we obtain the full co-operation of the relevant state agencies - principally the Police Service of Northern Ireland and the Ministry of Defence - it should be possible to hear these cases within a reasonable timeframe, which I see as being about five years [emphasis in original].[11]

In his address to the Victims and Survivors Conference the LCJ provided further detail of the timeframes, stating that with the provision of resources the new Legacy Inquests Unit could commence a full work programme in September 2016:

> My plan is predicated on the creation of a new Legacy Inquest Unit, since it is evident that the existing Coroners Service is simply not designed to carry the weight of legacy cases. If there is no response before the [5 May 2016 Northern Ireland Assembly] election, we will almost certainly not be able to achieve a September [2016] start date, which would be extremely disappointing. We might at best be able to get one or two cases on before Christmas [2016], but we would be unable to achieve the step change that is required to deal with all of these cases in an Article 2 compliant way.[12]

Essentially the caseload of Legacy Inquests Unit being taken forward in September 2016 is dependent on resources being provided by early May 2016. However at the time of writing in April 2016 there is no commitment to provide such resources. There is also a worrying sign that the UK government may consider introducing a pre-condition with the likely purpose or effect of preventing the release of the monies. This is namely that all political parties in the Northern Ireland power-sharing Executive must first agree to the resources

[9] (1259 meeting (7-9 June 2016) (DH) - Updated action plan (13/04/2016) - Communication from the United Kingdom concerning the McKerr group of cases against the United Kingdom (Application No. 28883/95) [Anglais uniquement])

[10] Commission for Victims & Survivors Conference, Titanic Belfast, Wednesday 9th March 2016, The Rt Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland.

[11] Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan.

[12] Commission for Victims & Survivors Conference, Titanic Belfast, Wednesday 9th March 2016, The Rt Hon Sir Declan Morgan, Lord Chief Justice of Northern Ireland.

being released, when the UK government knows there is opposition among a number the political parties to certain legacy investigations, including inquests.

The ECHR is an international obligation and it ultimately falls to the UK as state party to ensure resources are provided, where necessary. It is notable that the resources required for inquests and related disclosure are relatively small for the UK, particularly when compared to the estimated £1,200GBP million provided in packages to the security forces during the Northern Ireland peace process.[13]

There is unfortunately a pattern of the present UK government trying to delegate ECHR obligations to the power-sharing Northern Ireland Executive which it knows is both under resourced and unlikely to collectively agree. Nils Muižnieks, Commissioner for Human Rights, Council of Europe, speaking in Belfast, 6 November 2014, addressed the issue of 'delegating responsibility' and 'resource constraints' in the following terms:

> It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'. The UK Government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the Government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK Government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general.

CAJ would wish to emphasise our concerns that the failure to allow the coronial system to function in relation to legacy inquests is causing significant damage to public confidence in the rule of law in general. This is detrimental and regressive to the significant investment made in the context of the peace process of institutional reform of the criminal justice institutions. In a similar vein in his address to families awaiting inquests the Lord Chief Justice stated that "the failure to deal with your cases has cast a long shadow over the entire justice system."[14]

It is concerning that the current UK action plan appears to suggest a pre-condition that the UK Minister for Northern Ireland (Secretary of State) will only 'consider' an initial bid for the Legacy Inquest Unit, if it is supported by the entire Northern Ireland Executive.[15] If the UK government takes this position it essentially could hand a veto over legacy inquests to any one of the main parties in the Northern Ireland Executive. It should be noted that there are no legal constraints within the constitutional settlement which we are aware of that would prevent the UK government providing these monies without the approval of all parties to

[13] See figures from Relatives for Justice in CAJ Apparatus of Impunity? (January 2015), p28.
[14] Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan.
[15] 1259 meeting (7-9 June 2016) (DH) - Updated action plan (13/04/2016) - Communication from the United Kingdom concerning the McKerr group of cases against the United Kingdom (Application No. 28883/95), p 5.

the NI Executive. Indeed the Secretary of State has a power to direct Northern Ireland Departments to take any action necessary to comply with international obligations.[16]

The Northern Ireland Department of Justice did seek to submit a financial bid for approval to the last meeting of the NI Executive before the commencement of the election period in April 2016. However there was not 'agreement' to include the bid on the agenda of the NI Executive meeting. This means that one or more of the political parties would not discuss the bid. The NI Minister of Justice, David Ford MLA, nevertheless raised the bid under Any Other Business at the meeting, and subsequently wrote to the First and deputy First Ministers for Northern Ireland under an urgent clearance procedure to gain approval to submit the bid to the Secretary of State.[17] To date we have had no indication that this has happened and the deadline to provide resources to prevent further delay is now approaching.

The Ministers Deputies may wish to ask the UK to ensure the timely release of resources to allow the Legacy Inquest Unit to begin its work in September 2016. The Ministers Deputies may also wish to impress upon the UK that the ECHR is an international obligation that cannot be avoided by delegating responsibilities to regional Executives.

Other Inquest issues in reporting period:

Access to historical inquest and court files at the NI Public Records Office:

During the reporting period the NI Government Department for the NI Public Records Office, the Department for Culture, Arts and Leisure (DCAL), consulted on then enacted secondary legislation,- The *Court Files Privileged Access Rules (Northern Ireland) 2016,* in the Northern Ireland Assembly.[18]

This statutory rule commenced at the end of March 2016 and codifies into law a mechanism whereby persons directly injured or bereaved in relation to an incident recorded in a court file held by the Public Records Office for Northern Ireland (PRONI), could seek limited access to a copy of the court file on a confidential basis.[19] It should be noted that the court documents and inquest papers which would be regulated by this rule are proceedings which were usually held in open court and may have been reported in the media at the time and hence should not be considered 'sensitive' materials. CAJ understand that PRONI holds such records until at least the 1990s.

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[16] s26(2) Northern Ireland Act 1998: http://www.legislation.gov.uk/ukpga/1998/47/section/26).
[17] CAJ correspondence with the Department of Justice 4 April 2016.
[18] See Statutory Rule, made under the Public Records Act 1923 at: http://www.legislation.gov.uk/nisr/2016/123/article/1/made.
[19] The Rule provides a separate mechanism to existing procedures under the Freedom of Information Act (FoI) 2000 (which puts documents into the public domain), and the Data Protection Act 1998 (DPA). Under FoI court records are usually exempt information and not disclosed, but this does not apply to documents defined as 'historic records' namely those over 30 years old. Hence at present court records from on or before 1986 would potentially be available under FoI, subject to any other exemptions applied under that Act. Under s35 of the DPA personal data can be exempt from the non-disclosure provisions where the disclosure is necessary for legal proceedings. We understand the DPA has only been used in a small number of requests.

Family members have requested access to such papers to inform present-day requests for investigations into deaths to be re-examined. In particular such files can be used as evidence to ask the Attorney General for Northern Ireland to exercise powers to order a fresh inquest into the death in question.[20]

CAJ made a detailed submission to the consultation in January 2016, in this we stated that:

> CAJ is conscious that the context and backdrop to the current subject matter are well documented efforts by the state and security agencies to restrict disclosure of documents required for legacy investigations. We are not aware of any instances whereby past release of public records has put persons' lives in danger, prejudiced the interests of justice or created other similar human rights concerns. We are however aware of instances whereby the release of material from the archives has exposed human rights violations, including instances of collusion by state agencies. In this context we are concerned that the primary motivation by security bodies in limiting disclosure is to cover up state wrongdoing rather than to ensure compliance with positive human rights obligations.[21]

We provided a number of examples of this and also drew attention to the emerging body of international standards in relation to entitlements to access the type of official documents the rule regulates, which included a high presumption of disclosure of documents that may contain evidence of human rights violations, provisions for review of decisions not to disclose by a competent independent body, and emerging entitlements to disclosure for the next of kin, family members and others with a 'public watchdog' function (such as the press and NGOs) to information on legacy investigations that can be derived from Articles 2, 10 and 13 ECHR.

The UK has previously cited to the Ministers Deputies both *McKerr v UK* and *Ramsahai v Netherlands* as an authority for stating that the next of kin/families do NOT have a right to information from a police investigation.[22] However, in the latter more recent case the applicants were in fact given access to the full investigative file, and the court's conclusions are limited to indicating that there is no *automatic* entitlement to such information *whilst the investigation is ongoing.* Hence the ruling appears to address questions of timing rather than stating there is no entitlement to files:

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[20] Section 14 of the Coroners Act (Northern Ireland) 1959, Section 14 (1) states: "Where the Attorney General has reason to believe that a deceased person has died in circumstances which in his opinion make the holding of an inquest advisable he may direct any coroner (whether or not he is the coroner for the district in which the death has occurred) to conduct an inquest into the death of that person, and that coroner shall proceed to conduct an inquest in accordance with the provisions of this Act (and as if, not being the coroner for the district in which the death occurred, he were such coroner) whether or not he or any other coroner has viewed the body, made any inquiry or investigation, held any inquest into or done any other act in connection with the death."

[21] Submission from the Committee on the Administration of Justice (CAJ) to the Department of Culture, Arts and Leisure (DCAL) consultation on the draft proposed PRONI Statutory Rule The Court Files Privileged Access Rules (Northern Ireland) 2016, January 2016, paragraph 5. http://www.caj.org.uk/contents/1402

[22] Communication from a NGO (Committee on the Administration of Justice (CAJ)) (24/11/2015) in the McKerr group of cases against the United Kingdom and reply from the authorities (30/11/2015).

> The disclosure or publication of police reports and investigative materials may involve sensitive issues with possible prejudicial effects for private individuals or other investigations. It cannot therefore be regarded as an automatic requirement under Article 2 that a deceased's victim's surviving next of kin be granted access to the investigation as it goes along. The requisite access of the public or victim's access may be provided for in other stages of the available procedures [347].

In the case of legacy court and inquest files held by PRONI we are by definition referring to past investigations which have been completed. The consultation document set out a policy intention to make available the majority of information to eligible applicants, but indicated that some information will be withheld such as names or other information which would identify jurors, witnesses etc. We suggested in our response that that essentially the power be codified on the face of the legislation in accordance with ECHR and other international human rights standards to allow a presumption of disclosure of most information.[23] As enacted the Rule confers discretion on the NI minister for public records, albeit that all public authorities must in any case act compatibly with ECHR rights.[24]

As is routine following the conclusion of the consultation exercise a response document was produced by DCAL summarising the views of those who had made a submission to the consultation.[25] CAJ was concerned to learn the level of resistance to access to such information from the UK government and the policing and justice institutions. The response to consultation document from the UK Minister for Northern Ireland is to state concerns that the rules bypass 'national security' which requires such decisions to be taken by "the expertise of a [UK] Cabinet Minister" and that she wished for the rules to be 'redrafted' or 'withdrawn.' In response DCAL states that:

> The materials covered by these rules are specifically "court files." This is defined as meaning records created by or originating from any court in Northern Ireland. It does not cover police files, or [prosecution] files, etc. Court files are extremely unlikely to include "intelligence information." They consist of material which has been through a court process, some details of which are already in the public domain. The fact that the files have been transferred to the Public Record Office is not consistent with such files being thought to contain sensitive intelligence. Furthermore, all such material is subject to consultation with relevant authorities...[26]

The response to the consultation from the Police Service for Northern Ireland expresses "extreme concerns" about the rule – stating that it 'cuts across' the existing provisions within the Freedom of Information Act 2000 and will create an unwelcome 'separate

[23] "CAJ believes this power should be qualified in accordance with the framework provided by the EHCR and other international standards. In addition to specific provisions for disclosure of human rights violations we would urge consideration of a presumption of disclosure unless certain specified conditions are met. A test could for example provide for the withholding of information in particular to the extent it may endanger lives or reveal operational methodologies of the security forces which were lawful and still used, or in the interests of justice etc."

[24] By virtue of the Human Rights Act 1998.

[25] Department of Culture Arts and Leisure, Analysis of Consultation Responses, The Court Files Privileged Access Rules (Northern Ireland) 2016, 4 March 2016.

[26] As above pages 23-25.

regime'.[27] It should be noted however that court records are not usually covered by the Freedom of Information Act – with exceptions for those which are over 30 years old. The Freedom of Information Act also essentially publishes information which many families will not wish to happen, rather than allowing private access to it.

The Ministers Deputies may wish to seek assurances from the UK that it will respect the ECHR entitlements of interested parties to legacy information from previous court processes, given such information may be utilised in seeking the effective discharge of procedural duties under Article 2 in relation to inquests and other legacy investigations.

The change in the recruitment criteria for Coroner's investigators

The requirements of ECHR Article 2 require that persons involved in investigations do not have connections with those persons or institutions who are the subject of investigations. In this instance legacy inquests investigate the actions of state agencies including the former police service (the RUC) and the military. In order to meet Article 2 requirements a policy of excluding former RUC and military who served in their support has been adopted for the legacy work of the Police Ombudsman, and is the practice elsewhere.

There has been recent controversy in Northern Ireland over advertisements for independent investigators to work on legacy inquests. Whilst the posts are for the Coroners Service for Northern Ireland the advertisements had to be placed by the NI Department of Justice. Documents released to investigative journalists under the freedom of information act reveal that a business case was submitted from the Coroners service in March 2014 underlining the need for "independence of the individuals carrying out the investigation on behalf of the senior coroner". Taking the case law into account the Coroners Service had, to ensure due independence, proposed that "formers members of the RUC, current or former members of the PSNI or anyone with connections to the military" be excluded from eligibility from coroner's investigators posts. However, by the time the NI Department of Justice had advertised the posts not only was this requirement not listed, but to the contrary job criteria had been introduced to one requiring "extensive experience of managing serious crime investigations in the context of Northern Ireland". Essentially a requirement precluding former members of the RUC and security forces from taking up such posts into inquests investigating the conduct of the RUC and security forces, had been changed into one favouring former RUC officers.[28]

The Ministers Deputies may wish to seek assurances from the UK that those involved in Article 2 legacy investigations will have no connection with those under investigation.

The Historical Investigations Unit (HIU) and 'National Security':

[27] As above pages. 20-22

[28] See Magic Tricks at the Department of Justice? Coroners ask for investigators independent of the RUC but the job advert requires NI policing experience: CAJ asks Justice Minister for explanation. http://www.caj.org.uk/contents/1393

The most recent assessment of the compliance with general measures further to the Ministers Deputies meeting in December 2015 states as follows in relation to the HIU:

> *The HIU*
> The authorities explain that a draft Bill to establish the HIU (and other bodies contained in the Stormont House Agreement) will be introduced to the Westminster Parliament in autumn 2015. This Bill is being developed in collaboration with the Northern Irish institutions, key external stakeholders and civil society. On 23 September 2015, the United Kingdom Government published a policy paper detailing elements of the Bill. According to the policy paper the HIU will:
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> · be an independent body with both a criminal and non-criminal misconduct investigative function to take forward outstanding Troubles-related deaths which occurred between 1966 and 10 April 1998;
> · have dedicated family support staff to involve the next-of-kin from the beginning and provide them with support and other assistance throughout the process;
> · have policing powers and specific powers to obtain full disclosure of all information from the United Kingdom Government and all relevant bodies;
> · be overseen by the independent Northern Ireland Policing Board except in reserved and excepted matters (national security) where it will be overseen by the Secretary of State;
> · be empowered to recruit such employees as appear to it be appropriate without a prohibition from recruiting persons who have previously served in policing or security roles in Northern Ireland; and
> · be required to refer decisions on the disclosure of any information which might prejudice national security to the United Kingdom Government, which may prevent disclosure if necessary.[29]

This latter provision, which is outside the terms of what was agreed under the SHA, has essentially stalled the process and the legislation has not been introduced to date. CAJ's two previous submissions in May and November 2015 record in detail the developments in relation to the December 2014 Stormont House Agreement (SHA) which, among other institutions included provision for the Historical Investigations Unit (HIU) 'an independent body to take forward investigations into outstanding Troubles-related deaths'. The UK committed to consulting on draft legislation in June 2015 and introducing the bill into the UK Parliament in the autumn session in October 2015. This section of our Rule 9 Communication provides further details:

Firstly the UN Human Rights Committee in July 2015 called on the UK to establish and fully operationalise the HIU *"as soon as possible" and to "guarantee its independence in a statute; secure adequate and sufficient funding to enable the effective investigation of all*

[29] McKerr v UK (Lead) status of execution: https://www.coe.int/t/dghl/monitoring/execution/Reports/pendingCases_en.asp?CaseTitleOrNumber=mckerr&StateCode=UK.&SectionCode=

outstanding cases and ensure its access to all documentation and material relevant for its investigations." [30]

In September 2015 the UK published a 'position paper' on the legislation and after this a draft copy of the UK's proposed legislation was widely leaked in the media. It departed dramatically from the SHA by inserting a power, vested in the Secretary of State with no appeal, to redact and withhold material from the findings of HIU investigations from families, on the undefined ground of "national security".

The draft contained detailed national security exemptions never before seen in UK legislation, using the concept of 'sensitive' information. The draft bill provided for this category of 'sensitive' material to include any information which hypothetically could prejudice UK 'national security' interests, but also extends to *any information* which was supplied by the security and intelligence services, or *any intelligence* information from the police or military. The draft bill contains a mandatory duty on any 'Relevant Authority' (government, military, police, ombudsman, ministers, and security/intelligence agencies) to pre-classify any information they have as 'sensitive information'. A 'relevant authority' may also identify information held by another relevant authority as 'sensitive information'. So even if the police decided some information they held was not to be treated as 'sensitive' a minister or the security services could overrule them. There is also a mandatory duty on the HIU to identify any information it holds falling within the category of 'sensitive' information'.

Once materials have been classified as within a class of being of sensitive national security information the HIU is not permitted to disclose the information. The only two exemptions to this are firstly when the information is supplied to the Secretary of State herself, or under certain circumstances criminal justice bodies. The second exemption is when the Secretary of State gives permission for the disclosure. There was no right to appeal.

Essentially therefore the decision maker as to what 'sensitive' information is disclosed to families in relation to findings of investigations is a government minister. Should a member of the HIU, past or present, disclose sensitive information to a family without the permission of the Secretary of State, they commit a criminal offence for which they could face up to two years in prison. By contrast, unusually, there is no offence created if public authorities fail to disclose requested documents to the HIU.

The 'Fresh Start' SHA implementation agreement

Further talks continued between the British and Irish governments and Northern Ireland parties. A new SHA-implementation agreement published on the 17 November 2015 entitled "*A Fresh Start*", whilst covering other elements of the SHA (most notably those on finances and social security) did not include any agreement on the SHA legacy institutions. There is wide consensus that the stumbling block was the UK Government's then insistence on maintaining the ministerial national security veto within the legislation.

[30] UN Human Rights Committee, ICCPR, Concluding Observations on the UK's Seventh Periodic report, July 2015, paragraph 8.

Northern Ireland's First Minister, Peter Robinson MLA, has stated that the national security caveat on disclosure was the only issue on which consensus had not been achieved in the negotiations on changes to the draft bill. The Minister for Foreign Affairs for the Republic of Ireland, Charlie Flannigan TD stated:

> The issue that remains unresolved is the issue of disclosure and national security and I don't believe it's acceptable that the smothering blanket of national security should on all occasions be used in the manner you've seen in Northern Ireland over a number of years.[31]

On 18 November 2015 the United Nations Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence issued preliminary observations and recommendations at the conclusion of his 10 day visit to the UK. He spent several days in Northern Ireland as the aim of his visit was to offer an objective assessment of the various initiatives undertaken to address the legacy of the violations and abuses during the 'troubles' in Northern Ireland. In his concluding remarks he noted that 'the legacies of the past have not been successfully or comprehensively addressed on any of these four dimensions (truth, justice, reparations and guarantees of non-recurrence).' He also recommended that:

> Any future arrangements for truth-disclosure and for justice will need to take on board the fact that none of the stakeholders can assume the position of neutral arbiters of 'the troubles' and therefore will have to incorporate procedures to guarantee both the reality and the appearance of independence and impartiality.

On the matter of national security he noted:

> Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use 'national security' as a blanket term. ...In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations.[32]

The current UK action plan notes:

> The Government continues to support the establishment of new bodies identified in the Stormont House Agreement, and the NIO has continued to work with Northern Ireland's political parties, Executive and victims groups. The Government considers that these institutions present the best way forward for Northern Ireland to deal

[31] Charlie Flanagan critical of national security 'smothering blanket' Irish News 27 November 2015, http://www.irishnews.com/news/2015/11/27/news/flanagan-critical-of-national-security-smothering-blanket--334991/?param=ds441rif44T

[32] Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland, London, 18 November 2015, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E

with its past, and to ensure better outcomes for victims and survivors. The ongoing engagement process, especially with victims' groups, has affirmed that there remains significant, broad support for new institutions to deal with the past. The Government will continue to work with Northern Ireland parties, victims' groups and other stakeholders to achieve the needed consensus for legislation.

Whilst at the time of writing there are no formal inter-party talks, there have been a number of indications that the UK government may wish to reconsider this position, which in any case would not be ECHR compliant. A reconsideration would involve specifying criteria for non-disclosure to families, and the decision making mechanism for doing so. As well as their being a number of options for initial decision making and appeal mechanisms, there also appears to be general consensus that non-disclosure criteria should focus on precluding: 1) the inclusion of information in family reports that would risk putting individuals lives at risk and 2) information on legitimate security force methodologies which are still used.

The Ministers Deputies may wish to ask the UK what process it will initiate a process to progress the SHA legacy bill and, inter alia, ensure that restrictions on disclosure are ECHR-compliant, including legal certainty over ECHR-compatible non-disclosure criteria, and right of review by a competent independent body .

Committee on the Administration of Justice
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