CAJ
Committee on the Administration of Justice

Promoting Justice / Protecting Rights

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

October 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 1273rd meeting of the Ministers' Deputies in December 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.

In our previous submission of April 2016[1] we entered into considerable detail that the UK government had delayed legislating for the establishment of the institutions under the Stormont House Agreement and had also delayed legacy inquests through the withholding of funding. These issues remain into October 2016. The Police Ombudsman has continued legacy work, however the work of the office is also held up by a withholding of necessary funding.

This submission will provide further detail on these issues.

[1] S454 Submission to the Committee of Ministers from CAJ in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland April 2016.

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General Measures

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

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 to 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.[2]

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. Previous CAJ submissions in May 2015[3] and November 2015[4] record in detail the developments in relation to the December 2014 Stormont House Agreement (SHA). 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 did not happen.

In July 2015 the UN Human Rights Committee 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*

[2] McKerr v UK (Lead) status of execution.
[3] CAJs submission to the Committee of Ministers, May 2015
[4] S448 CAJ Submission to Committee of Ministers November 2015

outstanding cases and ensure its access to all documentation and material relevant for its investigations." [5]

In September 2015 the UK published a 'position paper'[6] 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 legislation 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, 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 finance 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.

[5] UN Human Rights Committee, ICCPR, Concluding Observations on the UK's Seventh Periodic report, July 2015, paragraph 8.
[6] Northern Ireland Office Northern Ireland (Stormont House Agreement) Bill 2015 Policy Paper - Summary of Measures 23 Sept 2015

Northern Ireland's then First Minister, Peter Robinson MLA, 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.[7]

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.[8]

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.[9]

The UK reply (20 November 2015) to a previous CAJ Rule 9 Submission makes the following astonishing statement, in relation to the HIU, which misinterprets the positive duties under Article 2:

> The UK Government, like other member states, is subject to a positive duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those

[7] Charlie Flanagan critical of national security 'smothering blanket' *Irish News* 27 November 2015.
[8] 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.
[9] As above.

within its jurisdiction. *To permit the disclosure of information which would prejudice national security would be incompatible with this duty* (emphasis added).[10]

In relation to the stalled implementation of the SHA the April 2016 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 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.[11]

However, at this time there were no formal process to resolve the matter, and there has been little progress since. For a number of months the UK has stated public consultation is to take place. At the time of writing no date or format has been confirmed.

The UK response to the April 2016 CAJ submission

The UK response to the CAJ submission in April 2016 boldly sought to portray the impasse over SHA implementation as one created by disagreements between the unionist and nationalist parties in Northern Ireland. The response emphasised that:

> The most difficult outstanding issue in those political talks was onward disclosure of sensitive information by the Historical Investigations Unit (HIU). As a result of the lack of agreement among participants to the talks, legislation was not taken forward last autumn....[the UK emphasises that]...these matters are extremely sensitive for many people in Northern Ireland, and their elected representatives. Whilst some real progress was made in the cross-party talks which have taken place over the last three years, there are groups from both sides of the community in Northern Ireland for whom making further progress on these matters will involve difficult compromises.[12]

The suggestion by the UK that it is the unionist and nationalist parties holding up the process over disagreements over the national security veto over disclosure is however flatly contradicted by Northern Ireland's First Minister of the Democratic Unionist Party (DUP),

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[10] 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) (Application No. 28883/95), p16.

[11] 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).

[12] DH-DD(2016)528: Communication from a NGO (Committee on the Administration of Justice (CAJ)) (19/04/2016) in the McKerr group of cases against the United Kingdom (Application No. 28883/95) and reply from the authorities (26/04/2016)

Arlene Foster MLA. Ms Foster has consistently maintained that the impasse on this matter is one between the UK government and the nationalist parties.

The April 2016 UK response to CAJ did set out that the UK government had "*proposed a dedicated appeals mechanism that would allow families or the HIU Director to appeal the Secretary of State's decision directly to a High Court judge*."[13] No further details of this mechanism, its thresholds, powers or costs, were however set out. Implicit in the proposal was that the Secretary of State, and not the head of the HIU, would still be the primary decision-maker. Implicit also was that the UK intended to still maintain the undefined blanket concept of 'national security' as the criterion for non-disclosure of information to families. In CAJ's view any resolution of the impasse would involve both specifying any criteria for non-disclosure to families, and decision making by a competent independent body for doing so at all levels.[14]

The UK response indicated that there was not currently agreement "on the detail of an appeals mechanism" but that discussions would continue after the spring 2016 elections to the Northern Ireland Assembly.

The Spring Assembly elections in Northern Ireland in May 2016

Following elections in Northern Ireland and a new mandate in May 2016, there has been little visible progress.

In June 2016 the Police Ombudsman issued a report into the 1994 Loughinisland massacre, in which the Ombudsman found security force collusion was a 'significant feature' in the massacre by the Loyalist UVF paramilitary group. This included the involvement of police informants "at the most senior levels within Loyalist paramilitary organisations" in the importation of large amounts of weapons from Apartheid South Africa in the mid to late 1980s which were then used, according to police figures, in at least 70 murders and attempted murders.[15]

A speech given by Secretary of State for Northern Ireland Theresa Villiers MP in February 2016 on the way forward for dealing with the past in Northern Ireland, which had essentially denied state involvement in Loughinisland, came back into sharp focus with the Secretary of State standing by her remarks.[16] CAJ and three other human rights NGOs wrote to the Secretary of State in relation to concerns at, in addition to elements of the speech being

[13] As above, page 18.

[14] Only two legitimate criteria for non-disclosure in HIU family reports have been alluded to - 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 first category is already explicitly agreed within the SHA, and the second is also the only additional ground the UK government has itself managed to come up with as a legitimate ground for non-disclosure in public discourse on the HIU. It would only encompass lawful and legitimate methodologies that are still in usage, to prevent the provision being used to conceal an improper purpose.

[15] Police Ombudsman The murders at the Heights Bar in Loughinisland: Police Ombudsman report, Press Statement

[16] Villiers: A way forward for legacy of the past in Northern Ireland, Speech by Secretary of State, 11 February 2016.

indicative of a denial of human rights violations, implied allegations that either victims families or human rights defenders were projecting a 'pernicious counter narrative' with the purpose or effect of either diverting attention from armed groups or even justifying the actions of paramilitary groups. The four NGOs wrote:

> In your [the Secretary of State] speech you make reference to bravery awards to the security forces and then raise concerns that, in contrast "....*today we face a pernicious counter narrative...It is a version of the Troubles that seeks to displace responsibility from the people who perpetrated acts of terrorism and place the State at the heart of nearly every atrocity and murder that took place - be it through allegations of collusion, misuse of agents and informers or other forms of unlawful activity*." This statement not only implies that allegations of such human rights violations are vexatious but also that they are being made, not in furtherance of human rights goals like realising victims rights, the right to truth and non-recurrence, but with the intention of displacing responsibility from paramilitary organisations.
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> In your speech you also state rejection of "*equivalence between the security forces and those who carried out acts of terrorism*" and then appear to link this to a "*real risk that those who seek to justify the terrorist violence of the past risk giving a spurious legitimacy to the terrorist violence of the present*." This implies that uncovering and commenting on security force involvement in actions as serious as extra-judicial killings and torture – which were also carried out by non-state actors - is undertaken to justify 'terrorist violence' past and present.[17]

In our NGO correspondence we drew attention to international standards regarding the non-stigmatisation of human rights defenders, including the Committee of Ministers action to protect human rights defenders (6 February 2008). The Secretary of State responded to our correspondence, but did not indicate to whom she was attributing the allegation of a 'pernicious counter narrative'. She did however state that she considered any narrative which suggested that misconduct in the security forces was rife or endemic was "a deliberate distortion and not justified by the facts."[18] We include this information in this submission as growing evidence of the contention that the UK government is alarmed at the prospect of reputational damage from fully independent legacy investigations. This is particularly the case in relation to patterns of human rights violations linked to police and security force informants. It is this which appears central to the state party's current lack of progress on implementing the Stormont House Agreement.

Shortly after this correspondence the Secretary of State was replaced in a cabinet reshuffle with the incumbent James Brokenshire MP. On the 9 September 2016 Mr Brokenshire gave a speech in Oxford, to the British-Irish Association conference. In this speech the Secretary of State outlined that he had been meeting groups of victims and survivors of the conflict, reaffirmed commitment to delivering the Stormont House Agreement legacy mechanisms, and in relation to disclosure stated "*I am determined to strike the right balance between the obligation to the families to provide comprehensive disclosure, and my fundamental*

[17] CAJ correspondence 20 June 2016, also on behalf of Relatives for Justice, the Pat Finucane Centre and Rights Watch UK, to Secretary of State, Theresa Villiers MP.
[18] Secretary of State correspondence, response to CAJ and others, 14 July 2016.

obligation as Secretary of State to protect lives and keep people safe and secure." The Secretary of State indicated discussions with political parties had been ongoing, and that there would now be public consultation on taking the proposals forward. However, in the speech the Secretary of State revealed that he was still '*reflecting*' on what format the consultation would take. [19]

At the time of writing there has still been no clarity as to when any consultation will start or what format it will take. Even if this is forthcoming given the length of time it would take for legislation to pass through the UK Parliament, it is likely that the HIU and other institutions could not be up and running until at least 2018.

The Ministers' Deputies may wish to ask the UK to set out a detailed timetable for progressing the implementation of the SHA institutions in an ECHR compliant manner.

This would include ensuring that any restrictions on disclosure are ECHR-compliant, including legal certainty over ECHR-compatible non-disclosure criteria, and the involvement of a competent independent body.

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.[20]

A number of these matters were then taken forward. The Lord Chief Justice assumed presidency of the coroners courts, a judge-led review of legacy inquests took 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.

[19] Secretary of State's speech to 2016 British Irish Association Conference, 9 September 2016.
[20] McKerr v UK (Lead) status of execution

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.[21]

The background to this commitment were 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 judgments 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.[22] 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.[23] 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."[24] We informed in our previous submission that there were 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.

The Lord Chief Justice's review and Legacy Inquests Unit 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.[25] 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,

[21] Stormont House Agreement, paragraph 31.
[22] *Jordan's and five other Applications [2014] NIQB 71*.
[23] 'Judges to preside over Troubles killings inquests', *BBC News Online* 22 October 2015
[24] *Re Jordan's applications for judicial review* [2014] NICA 76.
[25] Legal Aid and Coroners' Courts Act (Northern Ireland) 2014.

through the Human Rights Commissioner, Nils Muižnieks, and UN Special Rapporteur Pablo de Greiff, 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:

> 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.[26]

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.[27]

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

[26] MOD is not short of money for work on inquests into historic killings – Judge *Belfast Telegraph* 28 January 2016.
[27] As above.

> 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 caseload within a period of five years, subject to the required resources being made available. [28]

In a speech given at a conference of the Commission for Victims and Survivors 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.[29]

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].[30]

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.[31]

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[28] (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])

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

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

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

Essentially the caseload of Legacy Inquests Unit that was to be taken forward in September 2016 was dependent on resources being provided by early May 2016. The UK government however withheld funding through the introduction of a pre-condition that all political parties in the Northern Ireland power-sharing Executive must first agree to the resources being released.[32]

The ECHR is an international obligation and it ultimately falls to the UK as state party to ensure resources are provided, where necessary. If a regional Executive can deliver compliance for the state party, international obligations are complied with, if the devolved body does not deliver however the state party does not escape responsibility. 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 the NI Executive. In addition the Secretary of State has a power to direct Northern Ireland Departments to take any action necessary to comply with international obligations where necessary, but this power, under the Northern Ireland Act has not been exercised:

> s26 International obligations
> (1)If the Secretary of State considers that any action proposed to be taken by a Minister or Northern Ireland department would be incompatible with any international obligations, with the interests of defence or national security or with the protection of public safety or public order, he may by order direct that the proposed action shall not be taken.
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> (2)If the Secretary of State considers that any action capable of being taken by a Minister or Northern Ireland department is required for the purpose of giving effect to any international obligations, of safeguarding the interests of defence or national security or of protecting public safety or public order, he may by order direct that the action shall be taken.[33]

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.[34]

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

[32] The April 2016 Action Plan alludes to a pre-condition that the Secretary of State will only 'consider' an initial bid for the Legacy Inquest Unit, if it is supported by the entire Northern Ireland Executive.
[33] s26(2) Northern Ireland Act 1998.
[34] See figures from Relatives for Justice in CAJ Apparatus of Impunity? (January 2015), p28.

> 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.[35]

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."[36]

In September 2016 and his annual address to mark the opening of the legal year the Lord Chief Justice again raised serious concerns that the funding for legacy inquests had not been provided and called for urgent action to resolve the matter. The official statement issued by the court service stated that coroners within existing resources would only be able to complete two inquests in the current financial year and that at the current rate it would be 'decades' before outstanding cases were completed. The LCJ stated:

> The coroner's courts will not be able to satisfy their legal obligation to deliver these inquests within a reasonable timeframe in the absence of the necessary resources. I do not want us to remain in that position since that would be yet another devastating blow to the families. The judiciary will be facing up to its responsibilities but this is not a matter on which the judiciary alone can deliver. I therefore call again on the local Executive and legislature, and on the UK Government, to play their part as a matter of urgency. We cannot move on while we remain under the shadow of the past. Nor should we. But time is not on our side."[37]

The First Minister's decision to block legacy inquest funding

The Northern Ireland Department of Justice did seek to submit a financial bid for approval to the last meeting of the then Northern Ireland Executive before the commencement of the election period in April 2016, but was blocked by one of the parties to the Executive in doing so. The then Minister of Justice, David Ford MLA, nevertheless then submitted the bid to the First and deputy First Ministers for Northern Ireland under the Urgent Clearance Procedure to gain approval to submit the bid to the Secretary of State.[38]

[35] CAJ, The Apparatus of Impunity? January 2015
[36] Legacy Engagement Event – Friday 12th February 2016, Opening Address by the Lord Chief Justice, Sir Declan Morgan.
[37] Monday 5 September 2016, Lord Chief Justice Calls for Urgent Progress on Dealing with the Past,.
[38] CAJ correspondence with the Department of Justice 4 April 2016.

It subsequently was widely reported in the media that the First Minister, Arlene Foster MLA blocked the bid. An article in the Belfast Telegraph of the 5 May 2016 entitled *"DUP leader Arlene Foster: Why I blocked plans to speed up Troubles probes"* sets out the First Minister's reasons for policy decision as relating to the categories of victims covered and not covered by current outstanding legacy inquests. The article is subtitled that 'inquests are skewed towards killings by the state'. The First Minister is quoted as implying inquests do not deal with 'innocent victims', as is her DUP party colleague Nigel Dodds MP. *The Belfast Telegraph* cites remarks made by Ms Foster on a BBC election debate in relation to the decision not to approve the funding bid as follows:

> Unfortunately a lot of innocent victims feel that their voice has not been heard recently and there has been an imbalance in relation to state killings as opposed to paramilitary killings... I wanted the opportunity to discuss further with the Lord Chief Justice around the issues with innocent victims and how we can deal with their issues and I make no apologies for that. I think the rights of innocent victims are very key in this and I will not allow any process to rewrite the past. [39]

A BBC report also cites a statement from Ms Foster stating that the Legacy Inquest Unit would adversely affect the ability of the Northern Ireland Executive to address the needs of 'innocent victims'.[40] In September 2016 it was again reported that the bid continued to be blocked by the First Minister.[41]

In relation to specifying the scope of the DUP's definition of innocent victims, the party tabled an amendment to legislation in the UK Parliament in 2013 which would have redefined victim as, *inter alia*, "*a person who had suffered harm caused by an act related to the conflict in Northern Ireland, for which they are not wholly or partly responsible, that is in violation of the criminal law*.[42] This latter provision would likely have the effect of excluding almost all victims of the state from the definition of a victim, including for example a child killed by a plastic bullet, as such acts are rarely held to be in violation of the criminal law. Such state involvement cases are however included within the current legacy inquests list.

It is also the case that whilst families who have had inquests in relation to conflict related deaths come from across the community (and include members of the security forces) the current backlog of legacy inquest relates largely to victims from Catholic and nationalist backgrounds. The decision in question may therefore constitute indirect discrimination, on the recognised grounds of religious belief and political opinion in Northern Ireland equality law. Whilst CAJ is clear that this matter is ultimately the responsibility of the UK government we are nevertheless concerned at the First Ministers decision and basis for it and have called on the Equality Commission for Northern Ireland to use its enforcement powers under the statutory equality duty, to investigate the matter.[43]

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[39] *DUP leader Arlene Foster: Why I blocked plans to speed up Troubles* *Belfast Telegraph* 5 May 2016

[40] *Legacy inquests: Lord chief justice disappointed over funding bid* *BBC News Online 4 May 2016*

[41] see: Legacy inquests: Judge calls for 'urgent action' BBC News Online 5 September 2016 and Senior judge urges politicians to find funding for legacy inquests Irish News 5 September 2016

[42] Hansard, HC 16 July 2013 Northern Ireland (miscellaneous provisions) bill , amendment by Jeffrey Donaldson MP, column 18-19, clause 22)

[43] Further to the Belfast/Good Friday Agreement there is a statutory equality duty under Section 75 and Schedule 9 of the Northern Ireland Act 1998 that, inter alia, obliges designated public authorities to adopt

The First Minister's decision also engages compliance with the following provisions of the Ministerial Code:

- to serve all the people of Northern Ireland equally, and to act in accordance with the general obligations on government to promote equality and prevent discrimination;
- to promote the interests of the whole community represented in the Northern Ireland Assembly towards the goal of a shared future;
- to uphold the rule of law based as it is on the fundamental principles of fairness, impartiality and democratic accountability, including support for policing and the courts as set out in paragraph 6 of the St Andrews Agreement;
- to support the rule of law unequivocally in word and deed and to support all efforts to uphold it;[44]

Without prejudice to section 24 of the Northern Ireland Act 1998, which precludes a minister from any act incompatible with ECHR rights, under section 28A a minister is to act in accordance with the ministerial code. Into September 2016 a number of families announced their intentions to take legal action over the delays to starting legacy inquests.[45] The issue has led to a series of questions at the Northern Ireland Assembly.[46]

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.

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.

Police Ombudsman Funding

CAJ last commented in detail regarding severe cuts to the funding of the Police Ombudsman's office in our submission of November 2014.[47]

This was at a time the Ombudsman's office was resuming legacy investigation following a period of suspension due to the 'lowering' of independence of the office during the term of the second Police Ombudsman. The removal of resources in 2014 had the purpose or effect

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equality schemes containing binding duties to assess the impact of policy decisions on equality of opportunity. It has transpired that no such impact assessment took place on this policy decision.

[44] Ministerial Code as provided for in paragraph 4 of Schedule 1 to the Northern Ireland (St Andrews Agreement) Act 2006.

[45] See Families take legal action over stalled Troubles inquest funding *Irish News* 22 September 2016

[46] See AQO 401/16-2, Mr Trevor Lunn, Tabled Date: 22/09/2016 Answered On Date: 04/10/2016; AQO 276/16-21Mr Trevor Lunn, Tabled Date: 08/09/2016, Answered On Date: 20/09/2016; AQO 275/16-21 Mr Colum Eastwood Tabled Date: 08/09/2016 Answered On Date: 20/09/2016 and (Oral Answer Mr Eastwood & Mr Kelly: 106/16-21; AQW 808/16-21 Mr David Ford Tabled Date: 08/06/2016 Answered On Date: 13/06/2016.

[47] S438 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, November 2014.

of hampering in particular the legacy work of the Ombudsman's office. At the time the third and current Police Ombudsman stated:

> The reduction in budget has undermined our ability to deal with the past...It is ironic that on the release of a Criminal Justice Inspection report, which states that the independence of the Office has been fully restored, our capacity to undertake work has been significantly reduced.
>
> I am determined to protect the police complaints system and I will not skimp on the quality of investigations, but if the cuts continue as anticipated, they will have a significant impact on the way in which we hold police to account in Northern Ireland.[48]

Two years later the lack of resources to the Ombudsman is still significantly affecting the pace in which the Office can conduct its Article 2 work. In the summer of 2016 the Office set out in correspondence to victims awaiting investigations the current status of funding.

The correspondence set out that the Ombudsman had managed in 2015/16 to largely complete 65 of the current caseload of 370 public complaints and referrals from the Police Service for Northern Ireland, relating to legacy investigations. This included a number of complex inquiries. The correspondence states that a further 98 cases from the legacy caseload have now commenced inquiries, although it was noted that the complexity of some of these cases meant they were unlikely to be completed until late 2017. The Ombudsman operates a prioritisation policy and other legacy outstanding investigations outside the above are not planned to be commenced in 2016/17. The Ombudsman correspondence attributes these delays to resourcing stating that:

> Unfortunately the funding made available to the Police Ombudsman supports the deployment of only 23 investigators and a small number of support staff to this work. This level of resourcing is inadequate to complete our programme of legacy investigations within an acceptable timescale.
>
> Since 2014 the Police Ombudsman has repeatedly made the case that he requires additional funding in order to accelerate our programme of legacy investigations while maintaining the thoroughness of those inquiries.[49]

The Ministers' Deputies may wish to seek commitments in relation to adequate resourcing of the Police Ombudsman's historic investigations function.

[48] Statement Police Ombudsman 'Police Ombudsman's Office cuts 'historical' workforce by 25%: Major investigations to be delayed.'
[49] Client related correspondence to CAJ, May 2016.

Individual Measures

Jordan

The Inquest concluded before summer 2016. It was heard by Horner J sitting as a Coroner and without a jury. We are advised that a verdict is expected within the next 4 weeks. The Applicant has also challenged the delay in the progress of his Inquest since the judgment of the ECHR in 2001. The Applicant was successful in the High Court inasmuch as it was agreed that the PSNI was responsible for unwarranted delay and the Applicant was awarded damages of £7,500. That decision has been appealed and the Applicant has cross-appealed against the decision of the High Court that the Coroner was not also responsible for delay.

The Court of Appeal has ruled on a preliminary issue - namely as to the timing of a challenge to the delay in the conduct of an inquest and has ruled that the next of kin cannot bring a challenge until the conclusion of the inquest. The Applicant intends to appeal this preliminary ruling. The substantive appeal and cross-appeal are listed on 20 & 21 December 2016.

McKerr

There has been no progress this year in this case. Following the hearings before Weir LJ in January 2016 a small number of inquests have progressed to hearing. While a High Court judge has been appointed to preside over the Coroner's Court - he has only listed 2 'legacy' inquests and no others have been listed, even for Preliminary Hearing, pending a decision by Government to release funding to enable inquests run in a timely fashion.

Finucane

Mrs Finucane’s appeal and the Secretary of State’s cross appeal against the judgment and Order of Mr Justice Stephens, delivered on 26 June 2015, is listed for hearing between 22 – 25 November 2016.

The Court has directed the respondent to file an affidavit before the end of October setting out what steps the PSNI and/or PPS has taken since the publication of Sir Desmond de Silva’s Report on 12 December 2012.

Hemsworth

Civil proceedings in this case are still outstanding and a report from the Office of the Police Ombudsman is also awaited. There will be no prosecution in this matter.

Shanaghan

The Office of the Police Ombudsman has indicated that its report has been completed and is now with the Police Ombudsman for his consideration. It is anticipated that a public statement will be issued early in 2017.

Kelly and Others

At the Preliminary Hearing it was indicated that this case was in the second group of cases to be heard before the Coroners' Court and would be heard within 36 months from the grant of funding. As the issue of funding still unresolved no hearing date has been provided.

We call on the CM to continue to keep these General and Individual Measures under close scrutiny and for it to express itself, including through infringement proceedings, on the failure of the UK to effectively implement both the General and Individual Measures in these proceedings over a decade since these judgments were delivered

Committee on the Administration of Justice
October 2016