

The road to a rights based society

CAJ believes that the best guarantee of continuing peace is the construction of a rights based society. Although major progress was made in the Belfast Good Friday Agreement and subsequent developments such as policing reform, many commitments are still unrealised and there has been significant roll-back. Notably, we have neither the politically promised Bill of Rights nor a Single Equality Act. So where are we on the road to a rights-based society?

At this time, the political route forward seems to hold little promise. Our system of devolved government, necessary as it is, is not conducive to legislative progress. That does not mean abandoning the political arena or retreating into bitter cynicism. Politics and politicians are essential to progress. In fact, the foundation of our post agreement society was the quintessentially political act, the exercise of self-determination, the act of constitution-making by all the people of this island in the simultaneous referenda on the Belfast Good Friday Agreement. That act gives all of us, politicians and civil society, a mandate to move forward; neither time nor political disagreement can nullify that continuing mandate. If there is stasis in politics, then those of us in civil society may have to step up to the plate.

What does that mean in practice? The goal is the achievement of a rights based society, building on the promises of the peace process and the various agreements made as part of it. We need to resist rollback and demand full implementation of commitments already made as well as those necessary to bring our society up to date with contemporary human rights standards. More specifically, we need to ensure that the relevant agencies of the state adopt a rights based approach to decision making. We should also not wait for others to make proposals and then criticise them from a purist perspective. We should instead propose practical but human rights compliant measures which could meet identified needs.

Part of this approach is to use international treaties, especially those ratified by the United Kingdom, as settled law. They may not be directly justiciable in the courts, but they should be regarded as the established norm, the starting point and continuing guide for decision making in relevant areas by all public authorities.

We may also start using the authoritative advice about the content of a Bill of Rights that the NI Human Rights Commission gave to the Government in December 2008 as “soft law.” That means we can use it as a guide, a signpost to the direction of travel. We can use it in argument and as an example of what could happen. We can claim it as a statement of good practice.

By taking this approach, we can move forward along the road to a rights based society, even if the legislative route is temporarily blocked. Civil society can work in partnership with politicians on the basis of having different but equal roles in promoting progress. The people spoke for a rights based society in 1998 and that mandate continues to authorise and empower our continuing struggle for that goal.

[A longer and slightly different version of this article by Brian Gormally can be found on the RightsNI blog.]

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Young People and NGOs report to UN Committee on the Rights of the Child

In June 2015, the Children's Law Centre, Save the Children NI and Youth@clc, the Children's Law Centre's youth advisory group, supported by the Centre for Children's Rights, Queen's University Belfast prepared and submitted a Northern Ireland Young People's Report and a Northern Ireland NGO Alternative Report to inform the UN Committee on the Rights of the Child's examination of the United Kingdom's compliance with its obligations under the United Nations Convention on the Rights of the Child (UNCRC), which is scheduled to take place in 2016.

Nearly 900 children and young people across Northern Ireland were consulted in the development of the Young People's report. Fifty-eight NGOs and individuals have endorsed the NGO Alternative Report. The NGO Alternative Report and Young People's Report should be read in conjunction with one another and mutually illustrate where Government has failed to give effect to the UNCRC in Northern Ireland since 2008. Both reports can be viewed in full on the Children's Law Centre's website. The Children's Law Centre, Save the Children NI and Youth@clc would like to sincerely thank all those who contributed to the development of the reports.



Following the submission of the reports, we have continued to engage productively with the Committee on the Rights of the Child. CLC, Save the Children NI and NICCY jointly hosted a visit to Northern Ireland on 4th – 5th September by the Task Force appointed by the Committee to examine the situation in relation to the delivery of the UNCRC throughout the UK. On 1st October, in advance of the pre-sessional hearing, CLC and Save the Children NI hosted a launch event for both the NGO Alternative Report and Young People's Report in the Senate Chamber at Stormont sponsored by Junior Minister Jennifer McCann MLA and the then Junior Minister Michelle McIlveen MLA.

CLC and Save the Children NI, along with a representative group of young people from Northern Ireland, then travelled to Geneva to attend the Committee on the Rights of the Child's pre-sessional hearing in relation to the United Kingdom on 7th October 2015. Both organisations gave evidence to the Committee at the pre-sessional hearing in relation to the situation regarding children's rights in Northern Ireland, using the NGO Alternative Report and Young People's Report as the basis for the key messages we delivered to the Committee. The young people presented evidence to the Committee during a separate meeting, including showing the Committee a DVD which they had produced that summarised the Northern Ireland Young People's Report.

We were greatly encouraged by the interest shown by the Committee members in relation to children's rights issues in Northern Ireland. Since the pre-sessional hearing, the Committee has released the List of Issues for its examination of the UK Government, and this highlights numerous issues relevant to Northern Ireland, such as the proposed exclusion of children aged under 16 from age discrimination legislation, the segregation of education and the continued use of academic selection, the use of Tasers and AEPs against children by police, the youth justice system in Northern Ireland and the prevalence of paramilitary style attacks by non-state forces against children.

We now look forward to providing additional information to the Committee in the form of an additional report prior to the examination of the UK, to continue our efforts to ensure that the Committee on the Rights of the Child will produce a set of Concluding Observations aimed at improving the situation regarding the implementation of children's rights in Northern Ireland. We will be in touch with colleagues across the NGO sector in the coming months seeking their help and assistance in providing this additional information to the Committee.

John Patrick Clayton

A Fresh Start for the Government Departments - Reducing Twelve to Nine

'A Fresh Start' Appendix F5 lays out the functions of the new nine Government Departments, legislation which is planned to go through the assembly shortly after Easter 2016 on accelerated passage. There is to be no public consultation on this restructure. The decision to reduce Government Departments was laid out in Paragraph 60 of the Stormont House Agreement;

A reduction in the number of departments from twelve to nine should be made in time for the 2016 Assembly election, with the new allocation of departmental functions to be agreed by the parties.

'A Fresh Start' outlines in more detail what these new departments will look like. Despite the fact there are still policy areas that are not listed and thus we can deduce that decisions have not been made on these or they are staying where they are but we are to be assured that;

No functions are being done away with, and no policies terminated. Staff will follow functions, and there may be a certain amount of early disruption. But once the changes have been effected, there will undoubtedly be greater efficiency.

Restructure arrangements are underway, Derek Baker has been appointed the head of the restructuring programme, the Permanent Secretaries to the new Departments were appointed in October 2015 and the Deputy Secretaries are in place. This restructure could have provided some much needed action on diversity in the NICS especially in gender equality; it was a prime time to make sure there was equal representation of women at the permanent secretary and senior manager level but instead we see the usual men outnumbering women 4:1 in the Department for Communities alone.

This restructure to be an opportune time for Government to sweep under the carpet policies and strategies that have not worked. Despite this, it is key that areas such as equality and human rights are kept as overarching and fundamental to the workings of Government. As such it is important that we keep asking where equality and human rights sits in the new structures. At present OFMDFM provide a co-ordinating role across all the Government Departments, a decision made so that both lead parties had responsibility for delivering and it was not left to a sole party or Minister. There is no mention of this co-ordinating role in 'A Fresh Start' although the Department for Communities (DfC) lists 'delivering equality' and 'co-ordinating work across Departments' in their functions. It seems from an engagement event in December 2015 that the latter is in relation to the equality strategies they will be delivering and not equality and human rights co-ordination as a whole.

We could deduce that with no specific mention recently of the equality and human rights coordinating function moving means that it will stay with the new 'Executive Office.' The one and only mention of this co-ordinating role was back in March 2015 in an OFMDFM Oral Statement where they state, 'Policy responsibility and co-ordination will remain [at the Executive Office] in relation to equality, good relations, the Together: Building a United Community Strategy and Delivering Social Change.'

With the little detail we do know between 'A Fresh Start' and a stakeholder engagement event, the Department for Communities is to be a beast - it will have 8000 staff, 22 arms length bodies and will have all the functions of DSD plus more. On that note it is important we remember that DSD has not been at all effective in delivering on its Section 75 equality duties over the past few years. It did not produce an equality impact assessment covering the nine categories on welfare reform and they have also recently been investigated by the Equality Commission (ECNI) regarding the lack of high level equality screening on their housing policy.

continued overleaf..

This is something that will need a watchful eye after May 2016 as the DfC will have a long list of functions including housing (Associations and the NIHE), Local Government including community planning, the economic inactivity strategy, policy on older people, children and young people, anti poverty, child poverty, gender, sexual orientation and disability to name but a few.

The first day of these new Departments after the elections will be key as the new Minister will choose their vision for the Department from a range of options set before them. Stakeholder communities including CAJ have no idea at this stage what party will get each Department, although we can make assumptions that DUP will keep Finance and possibly choose Education, but the Minister in charge of Communities will be extremely important to the delivery of all of its functions and commitment to equality and human rights.

There are key things that will have to be done post May 2016 that we can have influence on at this stage. This includes the drafting of the new equality schemes each Department will have to have - a way of touching base with any new equality unit where we can build relationships for future engagement. The "Fresh Start" process also requires a restructure at the NI Assembly to reflect the new alignment of Departments. These changes create some opportunities to for advocacy and lobbying. For example, it is critical that racism and sectarianism are not divided into two different departments. Human Rights activists should also be concerned about where good relations, age discrimination and T:BUC all stand.

This restructure could be an issue community and voluntary organisations can work together on between January and May 2016 to ensure the best possible results. We are in doubt that a streamlined and cohesive departmental Government structure benefits individuals and the community. However that is only true if the benefit is felt directly by individuals and communities and on the baseline assumption that equality and human rights protections are mainstreamed throughout.

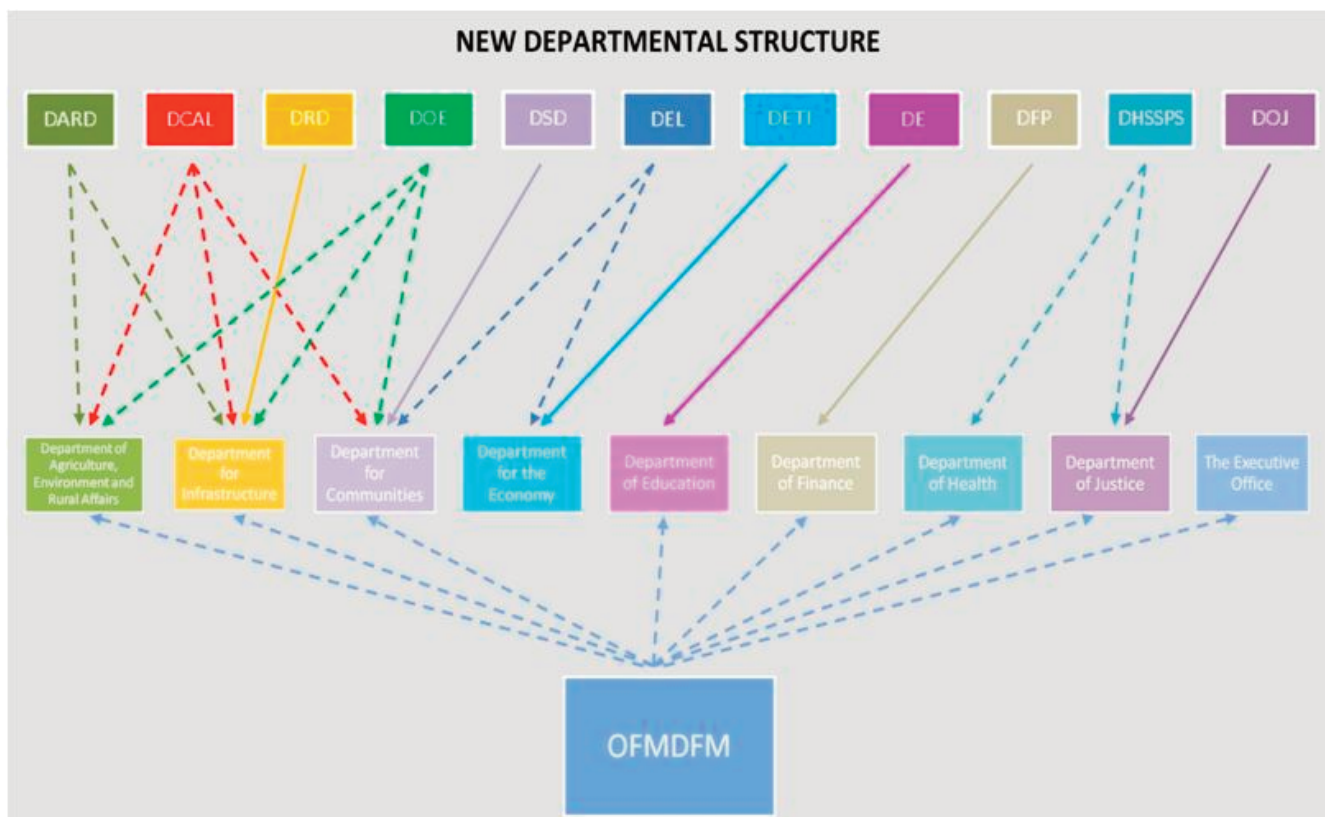


Diagram of the transfer of functions from the Department for Communities event in December 2015

Roundtable Discussion on Implementing the Gender Principles for Dealing with the Legacy of the Past

The Legacy Gender Integration Group held a roundtable discussion with key stakeholders on November 27, 2015 to advance implementation of the Gender Principles for Dealing with the Legacy of the Past. The roundtable discussed how the Gender Principles can contribute to the effectiveness, quality and scope of existing processes to deal with the past, and new planned mechanisms under the Stormont House Agreement. Roundtable participants, who included a diverse range of decision-makers from Northern Ireland and the Irish Government, resoundingly endorsed the Gender Principles for Dealing with the Legacy of the Past. The discussion generated several practical proposals to advance implementation of the Gender Principles.

The Gender Principles were informed by three small closed workshops with women bereaved by the conflict. The report of those workshops was officially launched at the roundtable discussion in November 2015. The roundtable discussion brought together several key stakeholders to establish constructive ways to advance to inclusion of women and the integration of a gender analysis throughout all activities to deal with the past, in order to better meet gendered needs. A diverse range of high-level participants included representatives from the Department of Foreign Affairs and Trade of the Irish Government, the NIO, the OFMDFM, the PSNI and the Northern Ireland Policing Board, political parties including Sinn Féin, the DUP and UUP, the Commission for Victims and Survivors and the Victims and Survivors Service, as well as the NI Human Rights Commission, amongst others.

The roundtable's guiding questions asked participants to reflect on (1) the current activities of their organisations to integrate gender into their work; (2) institutional or broader obstacles to implementing the Gender Principles; (3) strategies to overcome those obstacles; and (4) their concrete plans to advance the spirit and substance of the Gender Principles. Participants largely agreed that current processes of dealing with the past, as well as their own organisational activities and operations, do not pay sufficient attention to gender as a structural component of their work. Challenges to implementation included how the Gender Principles might most effectively be 'framed'. The roundtable discussed, for example, whether in order to have a more sustained impact, the debate concerning the gender principles should be framed principally around 'equality' and 'non-discrimination', given the potential silos attached to perceived 'women's issues'. Likewise, participants noted that silos in policy-making, which often outsource and thereby sideline responsibilities of gender, must be avoided in order to effectively prioritise and integrate the Gender Principles throughout existing and planned processes to deal with the past. Further potential obstacles identified by roundtable participants include the danger that the discussion around gender might be perceived as being driven by one side of the community. To circumvent this, participants emphasized the importance of holistically including all sides of the community during conceptualisation and implementation phases. As practical ways forward to work towards implementing the Gender Principles, participants indicated their motivation to pay close attention to gender in staffing and recruitment situations, in addition to gathering baseline data to gender-disaggregate clients and their needs.

Overall, participants at the roundtable all emphasized the importance of the Gender Principles and of the workshops report, and endorsed the initiative to integrate a gendered lens into processes of dealing with the past. Participants agreed that current processes do not pay sufficient attention to gender as a structural component and that the Gender Principles constitute a helpful tool to integrate gender into current and future processes. The Gender Principles were therefore regarded as constructive guidelines to further benefit the work of various actors and organisations working in relation to dealing with the past. The Legacy Gender Integration Group looks forward to further constructive engagement with stakeholders in order to advance implementation of the Gender Principles.

No Precedent for Absolute National Security Riders in Transitional Justice Processes (TJ)

In the aftermath of the failure to agree Transitional Justice mechanisms to enforce the Stormont House Agreement this comment outlines whether there is comparative TJ precedent for the UK to add a national security rider to any investigation, truth process or other process of information. The nature of an all-encompassing national security rider would fundamentally limit the information that would be received in TJ processes by family members as well as the public. This review looks at a range of sites where TJ mechanisms have been instigated and sought to identify similar practices as have emerged in Northern Ireland following political attempts to negotiate the implementation of the Stormont House Agreement. Countries examined in my survey included: Colombia, South Africa, Argentina, Chile, Brazil, El Salvador, Liberia, Peru, Philippines, Rwanda, Sierra Leone, Sri Lank, East Timor, Canada, Guatemala, Nepal, South Korea, East Timor

Bottom line, I was unable to find parallel situations in which formal national security riders were used to inhibit transitional justice. There is simply no precedent for the position taken by the UK government. This is not to say that states have not sought to inhibit TJ mechanisms by the de facto use of national security mechanisms, but the blank use of national security in the NI context is highly unusual. Riders and more specifically national security riders are rare in transitional justice settings due to a number of factors. First, riders are embraced by some countries in regular legal and political practice more than others. While the UK and US use them quite often, countries such as France have completely prohibited them. Second, riders are devices largely used in countries with highly developed legislatures, uncommon in transitional justice settings.

In the absence of formal riders being placed during the agreement phase of negotiations on the past, I expanded my search to see if national security concerns generally have been used to inhibit transitional justice processes. There are a number of strategies by which national security concerns have been used to inhibit transitional justice processes. These examples are not exhaustive but demonstrative of the methods used. One common theme is commissions limiting their own mandate under political pressure to do so. In Morocco the Equity and Reconciliation Commission (ERC) is prohibited from publicly naming perpetrators and compelling witnesses to cooperate and its mandate is limited in terms of the period and types of abuses it covers. Another theme was the broad inherent power of the State in the context of national security to limit the efficacy of transitional justice as was the case in South Korea. Finally, courts have also used national security concerns to limit transitional justice processes as happened in El Salvador where the Supreme Court rejected the findings of the International Truth Commissions on the bases that the report passed over the legitimate and permanent national security interests of the country. The problem of national security concerns being used to limit transitional justice processes is common enough that most critiques/guiding principles include the suggestion that national security considerations should not apply to any matter that is the subject of a truth commission.

There is no doubt that the work of transitional justice mechanisms have the potential to render them privy to national security information. However, many transitional justice processes have explicitly acknowledged that transitional justice processes are themselves national security institutions, advancing and rehabilitating holistic security for deeply divided and politically fragmented societies. Thus, it is in the best interest of national security to bestow upon these processes the widest and most robust powers. This often takes the form of the power of search and seizure and the authority to compel the provision of information, including records and documents of government authorities. There are also instances of truth commissions suggesting that the government annul the national security laws. Perhaps the strongest argument to be made is not only that there is no precedent for national security riders but that national security limitations as a whole are counterproductive because truth commissions and other truth recovery mechanisms themselves can be viewed as national security institutions, intended to deliver wholesale and accepted security for all members of society equally.

Fionnuala Ní Aoláin

Update on Termination of Pregnancy in Northern Ireland

Northern Ireland's law on termination of pregnancy dates back to the 19th Century and is one of the strictest legal regimes in Europe; in fact, only five other countries are similarly restrictive (Andorra, San Marino, Malta, Lichtenstein and Ireland). It is unlawful to procure an abortion in NI unless it is necessary to preserve the life of the pregnant woman, where there is a risk of serious and adverse effect on her physical or mental health, which is either long term or permanent (*R v Bourne* [1930] KB 687).

The Northern Ireland Human Rights Commission (NIHRC) initiated legal proceedings against the Department of Justice after lengthy engagement on the issue of the Department's compliance with their international human rights obligations. The NIHRC argued that the failure to provide access in NI to a termination of pregnancy in three instances – serious malformation of the foetus, rape and incest – breaches the human rights of women and girls.

International human rights law does not provide a human right to a termination of pregnancy. However, what it does do is require States to protect the private and family life of women and girls and protect them from inhuman and degrading treatment.

In November 2015, the High Court granted a Declaration of Incompatibility (DOI) in relation to the law prohibiting termination of pregnancy in the cases of fatal foetal abnormalities and sexual crime raised on the violation of the right to family and private life under Article 8 of the European Convention on Human Rights. Mr Justice Horner concluded that the failure to provide access to this service for women and girls where there is a fatal foetal abnormality was disproportionate as it "constitutes a gross interference with her personal autonomy". He further commented that by imposing a blanket ban, "reinforced with criminal sanctions, it effectively prevents any consideration of the interests of any woman whose personal autonomy in those circumstances has been so vilely and heinously invaded. A law so framed, can never be said to be proportionate."

What is a DOI?

UK courts must interpret law in line with the European Convention on Human Rights: this is required of them as a public authority under the Human Rights Act. Where a court cannot 'read' legislation in a way that makes it compatible, it must issue a DOI. This is a statement by the courts that a particular statute or legislative provision is incompatible with the provisions of the Human Rights Act. A DOI has only been issued on 29 other occasions by UK courts between 2000 and 2015.

What happens next?

The matter has now passed back to the Department of Justice to consider. One option is for the Minister to bring forward legislation to the NI Executive and then introduce this to the NI Assembly, giving affect to the judgment. Another possibility is that one of the parties could appeal the decision of the High Court, leading to further legal argument before the Court of Appeal and ultimately the Supreme Court. Although a DOI is not a legal obligation to change the law, it does send a clear message to legislators that the currently law should be changed. Of all the DOIs that have been made final i.e. upheld on appeal, only one remains outstanding at present. This is relation to prisoner voting and a parliamentary committee has been established to consider how this may be remedied.

If the NI Assembly chooses not to act, to remedy the DOI on termination of pregnancy then the UK parliament has the power to ensure that NI law is made compatible with the Human Rights Act. The NIHRC continues to press for an expedited remedy to ensure that the Northern Ireland Assembly acts to protect the human rights of vulnerable women and girls.

Les Allamby, Chief Commissioner, NIHRC

Civil Liberties Diary - Winter

3 November

Stormont voted in favour of a change in the law on same sex marriage for the first time. 53 MLAs voted for the law change and 52 voted against, with one abstention. Despite this vote, the proposal ultimately fell due to a DUP 'petition of concern'.

9 November

The first legal challenge to a ban on same-sex marriage in Northern Ireland is held in the Family Court in Belfast. The case (known as X's Petition) challenges the Marriage (Same-Sex Couples) Act 2013 that mandates that marriages from another jurisdiction should only be recognised as a civil partnership in Northern Ireland. The couple were married in England last year and are seeking a declaration that their marriage is recognised in this jurisdiction.

18 November

Stormont has finally agreed a deal to resolve issues over welfare reform in Northern Ireland. The DUP and Sinn Féin agreed the 67 page blueprint, but it has not yet been signed by the UUP, the SDLP and the Alliance parties. The deal has been criticised by victims groups' as it emerged that the new bodies envisaged in the Stormont House Agreement, including the Historical Inquiries Unit, are in indefinite limbo.

1 December

The Northern Ireland High Court ruled that abortion law in Northern Ireland breaches the human rights of pregnant women in cases of fatal foetal abnormality or resulting from a sex crime. The Court held that the failure to provide exceptions to the ban in both categories contravenes entitlements to respect for private and family life. Mr. Justice Horner

stressed that the cases was only dealing with alleged failures to provide limited exceptions to the ban on abortion and determinations on whether this complied with the European Convention on Human Rights.

2 December

Attorney General John Larkin is considering an appeal of the High Court ruling that Northern Ireland's abortion laws are not compliant with human rights. Health Minister Simon Hamilton, however, said that new proposed abortion guidelines for healthcare staff have been circulated in the Stormont Executive.

4 December

Two gay couples have brought legal action against the Stormont administration to have Northern Ireland's ban on same sex marriage lifted. Proceedings brought against the Department of Finance and Personnel claim that the ban breaches entitlements to family life and marriage granted under the European Convention on Human Rights. The challenge is being heard in tandem with a separate bid by two men who want their marriage in England to be recognised in Northern Ireland.

15th December

Denise Wright, co-ordinator of the Northern Ireland Refugee and Asylum Forum has lauded the 'overwhelming,' response from locals as Northern Ireland welcomes its first Syrian Refugees. Among the 51 people are 11 children, some of whom have never known life outside of a refugee camp. This marks the first time Northern Ireland has been involved in a refugee resettlement programme.

19th December

Bishop of Derry Donal McKeown has used his Christmas message to ask that the centenaries of the Easter Rising and the Battle of the Somme be commemorated respectfully, stating that we should 'learn from the past and not abuse it,' in order to 'to honour the memory of the people and not to dishonour them for our purposes.' The Bishop added that the message of Christmas was that the healing of a society is possible.

29th December

2015 has seen a 4 year high in the number of violent deaths in Northern Ireland, with a total of 19 murders, up from 13 in 2014, which saw the lowest number of violent deaths since the outbreak of the Troubles. The number of paramilitary linked deaths has increased also, tripling from just one in 2014 to 3 this year, most notably the death of Kevin McGuigan, prompting gridlock in the Executive now putatively resolved by the Fresh Start Deal. (Irish News.)

*Compiled by Elizabeth Super and
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newspapers*

Just News

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