

## SECRETARIAT GENERAL

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Contact: Anna Austin  
Tel: 03 88 41 22 29

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Meeting: 1201 meeting (3-5 June 2014) (DH)

Item reference: Communication from a NGO (Committee on the Administration of Justice (CAJ)) (12/05/2014) in the McKerr group of cases against the United Kingdom (Application No. 28883/95) and reply from the authorities (21/05/2014)

Information made available under Rules 9.2 and 9.3 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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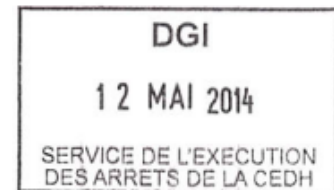
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Réunion : 1201 réunion (3-5 juin 2014) (DH)

Référence du point : Communication d'une ONG (Committee on the Administration of Justice (CAJ)) (12/05/2014) dans le groupe d'affaires McKerr contre le Royaume-Uni (Requête n° 28883/95) et réponse des autorités (21/05/2014)  
**(anglais uniquement)**

Informations mises à disposition en vertu des Règles 9.2 et 9.3 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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**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***

**May 2014**

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.

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

CAJ's areas of work include policing, emergency laws, criminal justice, equality and the protection of rights. The organisation has been awarded several international human rights prizes, including the Reebok Human Rights Award, and in 1998 was awarded the Council of Europe Human Rights Prize.



This Rule 9 communication addresses the UK's Action Plan (12/02/2014) concerning the McKerr Group of Cases and the Action Plan (15/04/2014) concerning the cases of Collette and Michael Hemsworth and McCaughey and others.

This is to be read in conjunction with our previous submissions on the 'McKerr Group of Cases' which have set out in detail our concerns about the UK's failure to promptly implement these judgments.<sup>1</sup> CAJ echoes the Court's concerns surrounding the investigative delays in the inquest proceedings, which resulted in the finding of Article 2 violations in *Hemsworth v UK* and *McCaughy v UK*. Regrettably these criticisms were inevitable as in 2002 CAJ observed the lack of co-ordination in the 'package of measures' put forward to remedy the Article 2 violations found in the 'McKerr Group of Cases'. We stated:

**'...it would appear that the government response to the judgements is piecemeal** and being left to individual departments or agencies rather than being co-ordinated by a lead official or department. Given that the judgements have significant implications for the police, the police ombudsman, the DPP, the inquest system and the Ministry of Defence, **such an approach is bound to be inadequate in terms of properly implementing the judgements. Indeed it is likely to lead to further unwarranted delay, thereby potentially violating the Convention in the process.**<sup>2</sup> (emphasis added)

CAJ notes that in the Action Plan (15/4/14) concerning the cases of *Hemsworth v UK* and *McCaughy & Ors v UK*, addressing the General measures, there is reference to the lack of political consensus among the power-sharing Northern Ireland Assembly to take forward the Haass proposals.<sup>3</sup> The Haass proposals, which followed multi-party talks, put forward new mechanisms for dealing with the legacy of the conflict but have not been taken forward to date.

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<sup>1</sup>CAJ S421 Submission to the Committee of Ministers, September 2013.

<sup>2</sup>CAJ s123 [The UK Response to Jordan, Kelly, Shanaghan and McKerr](#)

<sup>3</sup>[An agreement among the parties of the Northern Ireland Executive on parades, select commemorations, and related protests; flags and emblems; and contending with the past' Proposed Agreement 31 December 2013 \(The Haass proposals\).](#)



Notwithstanding this, to ensure a remedy to the violations identified in these cases and the earlier 'McKerr Group of Cases' the UK has a duty to ensure effective, independent investigations under Article 2 ECHR and hence this responsibility will ultimately fall to the state party. The devolved Department of Justice has argued that legislative changes needed to remedy limitations in the powers of the Police Ombudsman are also not being taken forward due to a lack of political agreement in Northern Ireland among the parties in the power sharing institutions. Insofar as additional powers are required to ensure effective independent investigations in order to fulfill the UK's human rights commitments, CAJ has drawn attention to the powers that the UK government has, further to the 1998 Belfast/Good Friday Agreement under the Northern Ireland Act 1998, to direct action (including legislation) be taken by devolved Ministers when required to fulfill international obligations.<sup>4</sup>

CAJ's filed submissions to the Multi-Party Group Past chaired by Richard Haass and provided an analysis from a human rights perspective of the Haass Proposed Agreement on dealing with the past.<sup>5</sup>

**CAJ repeats our request that the Ministers' Deputies give these cases their urgent consideration as we understand that they have not expressed themselves on this group of Northern Ireland cases since 2009.**

***CAJ calls upon the Committee of Ministers (CM) to invoke its power under Rule 11 to issue infringement proceedings against the UK government for its failure to abide by the final judgments in the 'McKerr group of cases'.***

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<sup>4</sup> The Belfast/Good Friday Agreement provided that Westminster ("whose power to make legislation for Northern Ireland would remain unaffected") "will... legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland". s26-27 of Northern Act 1998 provides a power for the Secretary of State to direct that action (including legislation) should or should not be taken in order to fulfil international obligations (defined as 'any international obligation of UK' other than EU law or ECHR rights, which are provided for separately in the Act)

<sup>5</sup> [S419 CAJs submission to the multi-Party Gp- Dealing with the Past, Investigating Troubles-Related Deaths, Haass;](#)  
[S424 Haass CAJ response dealing with the past](#)



## General Measures

CAJ notes that the Action Plan (15/04/2014) concerning the cases of Collette and Michael Hemsworth and McCaughey and others outlines a number of measures to address delay including improving the speed of disclosure, the establishment of a Cross-Agency Working Group, addressing delay in inquest proceedings and improving the Office of the Police Ombudsman's investigations as well as considering facilitation of the establishment of a Legacy Executive Group to assist in the co-ordination and progression of legacy cases. We address a number of these matters in our submission and ask that the Ministers' Deputies seek further clarification of these proposals.

The Action Plan cites the report of the Criminal Justice Inspection '*A review of the cost and impact of dealing with The Past on Criminal Justice Organisations in Northern Ireland*'.<sup>6</sup> This report assessed the costs of the various criminal justice mechanisms dealing with legacy matters. However, this important report fails to disaggregate the costs that are inevitable in dealing with legacy matters and those caused by avoidable delays such as those noted in the domestic challenge regarding the inquest into the death of *Pearse Jordan*.<sup>7</sup> In finding a violation of Article 2 this judicial review noted that obstacles or difficulties created by the PSNI had prevented progress of the inquest:

[349] The applicant relied on a number of periods of delay on the part of the PSNI. I do not propose to analyse all of them. As will become apparent I am content that the PSNI have both created obstacles and difficulties which have prevented progress in the inquest and have also not reacted appropriately to other obstacles and difficulties.

CAJ also notes that the Criminal Justice Inspection Report recommends that senior leaders within the criminal justice system should review demands in the specialist areas dealing with legacy issues and take **appropriate prompt action** where required (paragraph 3.7) (emphasis added). We also support its recommendation that the PSNI should consider adopting a formal, publicly available prioritization model for legacy cases (paragraph 3.8).

<sup>6</sup> '[A review of the cost and impact of dealing with The Past on Criminal Justice Organisations in N.I.](#)' Criminal Justice Inspector for Northern Ireland November 2013.

<sup>7</sup> [Jordan's Applications \(13/002996/1\), \(13/002223/1\) \(13/037869/1\) \[2014\] NIQB 11](#)



A key finding of the report is that

...in the absence of any other mechanism to deal with the past...the next best substitute to reaching a less controversial destination and secure stability is to provide the additional resources necessary for the prompt review and/or investigation of outstanding cases.<sup>8</sup>

We echo its comments that:

...a widely held view which was heard repeatedly by Inspectors (was) that a piecemeal approach to dealing with legacy issues has the very real potential to destabilise the hard won political progress and damage confidence in the criminal justice system.<sup>9</sup>

### ***Historical Enquiries Team (HET)***

As previously outlined in our earlier submission, which addressed the finding by Her Majesty's Inspectorate of Constabulary's (HMIC) that the HET had been acting incompatibly with the requirements of Article 2, CAJ reiterates our request to the CM for the reopening of scrutiny by the Committee of Ministers of General Measures relating to the HET in the 'McKerr group of cases'.<sup>10</sup>

CAJ has also made a submission to the Northern Ireland Policing Board's Working Group on the PSNI HET which sets out our position in relation to the future of the HET.<sup>11</sup>

CAJ regards the HMIC inspection as having identified and verified many of the concerns about HET which have been articulated by CAJ and others for some time. This includes the unlawfulness of its approach to British Army killings (in relation to duties under Article 2). Even if fully implemented CAJ does not regard the recommendations in the HMIC report, which in part reflect the area

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<sup>8</sup> Paragraph 3.5, page 45

<sup>9</sup> Paragraph 3.6, page 45

<sup>10</sup> [CAJ S421 Submission to the Committee of Ministers, September 2013.](#)

<sup>11</sup> [S420 CAJs submission to the NI Policing Board Working Group on the PSNI Historical Enquiries Team September 2013.](#)



of focus of the inspection, as sufficient to make the HET fit for purpose to discharge its current remit. CAJ is of the view that:

- Even with significant reform it is not possible for the HET to meet the necessary requirements of independence and impartiality in relation to state involvement cases;
- This would not preclude the HET continuing its role in cases where it is independently verified that there is no state involvement, notwithstanding the need for reform to improve effectiveness in this area;
- In addition to the army cases and cases exclusively involving the actions of RUC officers (which are referred to OPONI), the other main area of state involvement cases are those which involved informants, and potential collusion, which are still handled by the HET;
- It would take an independent mechanism to determine whether there was state involvement in a case, as well as independent safeguards over the control and disclosure of intelligence to investigators, to ensure HET is not involved in state involvement cases. Rather than creating a complex multi-tiered system CAJ's preferred option would be for a Single Mechanism for all cases to be introduced, along the lines of our submission to the Haass talks.<sup>12</sup> Having no mechanism is clearly not an option given the legal duties to investigate under Article 2.

CAJ has provided an analysis of whether the PSNI has the Article 2 level of independence to investigate potentially unlawful killings where agents of the state may have been involved.<sup>13</sup>

Notwithstanding the broader issues as to why the PSNI did not address the concerns raised about HET much earlier, CAJ has asked the Working Group to ensure its deliberations further examine the broader questions of state involvement cases. Such cases would include those involving the actions of

<sup>12</sup> [S419 CAJs submission to the multi-Party Gp- Dealing with the Past, Investigating Troubles-Related Deaths, Haass;](#)

<sup>13</sup> [S430 Does the PSNI have the "Article 2" level of independence to investigate potentially unlawful killings where agents of the state may have been involved?](#)





agencies beyond the army but also cases involving state informants (Covert Human Intelligences Sources- CHIS).

At present the HET is not deemed fit for purpose for investigating police officers but is permitted to investigate CHIS who were operating for the police and other state agencies. In 2007 the HET's 'view' was that cases 'that allegedly involve the actions of police officers exclusively' would be dealt with by the Police Ombudsman alone and that a 'parallel investigation' would take place by both HET and the Police Ombudsman when both 'police and external collusion was alleged'.<sup>14</sup> By 2008 the Committee of Ministers had been informed a total number of 63 cases had been transferred to the Ombudsman.<sup>15</sup>

An appendix to the *Memorandum of Understanding* between the Ombudsman and 'PSNI Crime Operations HET' sets out a flow chart as how 'mandatory or discretionary referrals from C8' to the Ombudsman are to be handled.<sup>16</sup> In so far as can be determined from this document the PSNI/HET, rather than any independent process, will make the referral but only when there is 'an allegation of police collusion' present. It is not clear how this is determined, and many families will have no idea whether a CHIS is potentially implicated in their case. Furthermore as highlighted by HMIC, and earlier by the Criminal Justice Inspector in relation to the Police Ombudsman, there is the general issue relating to the control of intelligence documents by former Special Branch officers who may have conflicts of interest, and hence be in a position to keep information from investigators. CAJ knows little further about the referral mechanism as the PSNI have declined (on grounds of both 'national security' in general and the involvement of the Security Service specifically) to confirm or deny whether they hold any further information on the matter. Whilst the number of cases to August 2013 the HET has referred to the Ombudsman under their exclusive remit, has been published as 44 cases (53 victims) the PSNI have declined to provide an overall statistics both the number of cases referred for parallel investigation and the overall number of cases which have involved CHIS.<sup>17</sup>

<sup>14</sup> UK Position to Committee of Ministers, Interim Resolution CM/ResDH(2007)73.

<sup>15</sup> Ministers' Deputies Information documents CM/ResDH(2007)73 paragraphs 47-57.

<sup>16</sup> Dated 11 May 2005, still in force as of August 2013, [available at [http://www.psni.police.uk/policies\\_procedures\\_het.pdf](http://www.psni.police.uk/policies_procedures_het.pdf)], appendix issued under PSNI FOI F-2013-03386.

<sup>17</sup> PSNI FOI reference F-2013-03386.





Nevertheless the former head of HET speaking at a conference in May 2013 did confirm the HET had undertaken cases involving CHIS, some but not all of which had been referred to the Police Ombudsman for parallel investigation. The Head of HET also clearly stated the position that Special Branch CHIS had in any case been operating within Home Office Guidelines.<sup>18</sup> The guidelines in question, issued in 1986 and an earlier version from 1969, heavily restrict permitted informant involvement in criminal offences.<sup>19</sup> However this HET position is not correct. As is made clear by the 'De Silva Review' into the death of Pat Finucane, and declassified documents within it, "the RUC did not apply either circular in Northern Ireland."<sup>20</sup> This had been public knowledge for some time and given this it is not clear why the HET have been operating under this premise but it does have clear implications for how the HET will have handled and referred on cases involving CHIS.

**In light of the HMIC finding that the HET had been acting incompatibly with the requirements of Article 2 CAJ, reiterates our request to the CM for the reopening of scrutiny by the Committee of Ministers of General Measures relating to the HET in the 'McKerr group of cases'.**

### ***Office of the Police Ombudsman for Northern Ireland (OPONI)***

We refer to our previous submissions on OPONI and welcome the recent reform that has taken place within the Police Ombudsman's Office; however, there are still a number of outstanding legislative changes to the Ombudsman's powers to ensure the Office can fully discharge its remit which are yet to be taken forward.

CAJ responded to the Department of Justice Targeted Consultation on the new powers package for the Police Ombudsman in July 2013.<sup>21</sup> We

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<sup>18</sup> Queen's University, UU Transitional Justice Institute and Healing Through Remembering [\*Dealing with the Past in Northern Ireland: Law, Prosecutions and Truth Recovery\*](#) Europa Hotel, 21 May 2013.

<sup>19</sup> Home Office Circular *Informants who Take Part in Crime*, 97/1969 Home Office Circular 35/1986 Consolidated Circular to the Police on Crime and Kindred Matters'

<sup>20</sup> [\*The Report of the Patrick Finucane Review Volume 1 \(De Silva Review\)\*](#), paragraph 4.15.

<sup>21</sup> [S415 CAJ's response to DoJ's consultation on New Powers Package Policy Paper for OPONI](#).



welcomed the reforms, from the Police Ombudsman's Five Year Review of Powers, that the Department intended to implement, which would remedy gaps in OPONI's remit. We also noted that other recommendations from the Five Year Review, some of which engaged international obligations, were being parked by the Department – this included powers to compel retired/former RUC officers to cooperate with the Ombudsman and amendments to RUC complaints regulations.

On the 18 October 2013 the Department wrote again to CAJ seeking views on four further proposals presented to the Department in relation to the Police Ombudsman. The four proposals are as follows:

- i) "Recommendations and findings by the Police Ombudsman should be binding on the PSNI Chief Constable;
- ii) The PSNI should not interview or debrief serving or retired officers who are known to be witnesses or suspects in an existing or impending investigation by the Office of the Police Ombudsman;
- iii) The Police Ombudsman must be empowered to arrest and interview agents and informers [sic] of the PSNI (or any other agency) if it may assist an investigation by the Police Ombudsman; and
- iv) All protocols or memoranda of understanding (MoU) governing the release of information from the PSNI and other agencies to the Office of the Police Ombudsman to assist an investigation should be available for scrutiny by the Policing Board / Justice Committee."<sup>22</sup>

CAJ believes all four of the proposals would assist with furthering human rights compliance and remedy gaps in the Police Ombudsman's powers and overall accountability framework. We elaborated as follows:

**Recommendation i: that Police Ombudsman's Recommendations are binding on the Chief Constable.** This recommendation would remedy the situation of the McGurk's Bar bombing when the Chief

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<sup>22</sup> Department of Justice Policing Policy and Strategy Division Letter to consultees, 18 October 2013.



Constable rejected the Police Ombudsman's report and would not implement its recommendations.<sup>23</sup>

**Recommendation ii: the PSNI should not interview/debrief officers who are witnesses/suspects in a Police Ombudsman investigation.**

This recommendation would merit further clarity as to its detail, to ensure the rights of accused persons and victims are given due regard. It would appear to be designed, however, to prevent the scenario whereby state actors are given undue cover for their alleged actions. This type of situation was found in the recent HM Inspector of Constabulary (HMIC) report into the PSNI Historical Enquiries Team (HET) in relation to the issue of what was commonly referred to as pre-interview disclosure. This involved preferential treatment of state actors who were given "all existing evidential documentation and other material" relevant to the case by the HET prior to interview. This approach went well beyond the right to be informed of the nature of the offence in which a person is a suspect and be furnished with sufficient information about the case against them. There is no obligation to reveal the entire prosecution case against a suspect before questioning begins and the HMIC held that the HET process for state actors was 'illegal and untenable.'<sup>24</sup>

**Recommendation iii: the Ombudsman be empowered to arrest and interview informants and agents as part of an investigation.**

This recommendation would remedy a key gap in current powers and accountability arrangements. At present if the Police Ombudsman is investigating alleged misconduct or criminality by PSNI handlers of informants it appears it would be the PSNI themselves, despite the issue of conflict of interest, who would have to interview relevant persons who are informants to the PSNI or other agencies. The recommendation would remedy this problem and, as well as avoiding

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<sup>23</sup> See 'Chief Constable again rejects Mc Gurk's Report' Press Release from the Mc Gurk's Bar Bombing Relatives, British Irish Rights Watch & Pat Finucane Centre — September 1, 2011

[Available at: <http://www.patfinucanecentre.org/cases/mcgurk04.html> accessed October 2013].

<sup>24</sup> HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013 Section 4.48.



the need for a multi-agency investigation, assist in ensuring investigations meet independence requirements.

Furthermore in relation to historic cases CAJ, in recent evidence to the Policing Board Working Group on the HET, noted the contradictory official position that the PSNI HET is not deemed sufficiently independent to investigate police officers but *is* permitted to investigate Informants/agents who were operating for the police and other state agencies.<sup>25</sup> At present, as noted above, HET refers cases to the Police Ombudsman for a 'parallel investigation' where there is suspected police and external collusion alleged.<sup>26</sup> Whilst the above recommendation would not fully remedy this position it would allow the Ombudsman to investigate the actions of handlers more effectively.

**Recommendation iv: protocols and MoUs on disclosure by the PSNI and other agencies to be scrutinised by the Justice Committee or Policing Board.** Whilst further information on the process and respective powers would be of assistance, CAJ believes that implementing this recommendation could assist in tackling the recurring problem of informal restrictions on disclosure of information to investigators and other processes.

Whilst supporting these four new recommendations, CAJ urged the Department of Justice not to lose sight of the other unimplemented recommendations from the Ombudsman's Five Year Review and to also find a mechanism to ensure that other recommendations, which engage matters of compliance with human rights obligations, were also dealt with.

We note the UK government request in its Action Plan (15/04/2014) that examination of this General Measure should be closed. We strongly object to this premature suggestion, given the outstanding reforms necessary to ensure that the Office is able to properly discharge its functions in accordance with Article 2 and also particularly in consideration of the lessons learned from the early closure of the examination of the HET.

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<sup>25</sup> CAJ S420 Submission to Historical Enquiries Team (Het) Working Group Ni Policing Board (September 2013)

<sup>26</sup> UK Position to Committee of Ministers, Interim Resolution CM/ResDH(2007)73. It appears only a small number of parallel investigations have resulted from HET referrals; although the PSNI is declining to give specific statistics (see PSNI FOI reference F-2013-03386).



CAJ notes the recent unsuccessful judicial review challenge taken by a former RUC officer Mr. Turkington and the Northern Ireland Retired Police Officers' Association to the powers and remit of the Police Ombudsman.<sup>27</sup> This followed the publication of a public statement by the Police Ombudsman on 10 July 2013 finding that the police had failed to uphold the right to life of a Mr Dalton in the case known as the 'Good Samaritan bomb.'<sup>28</sup> In finding that the application for judicial review was out of time and no good reason had been offered for the delay the Court dismissed the application and held that the Applicant should pay the legal costs of the Dalton family who were a Notice Party to the proceedings<sup>29</sup>.

The Police Ombudsman noted in his public statement that a number of retired police officers identified by the investigation as likely to have knowledge that would have assisted the investigation declined to co-operate.<sup>30</sup> Despite the failure to co-operate with this investigation the Northern Ireland Retired Police Officers' Association of Northern Ireland published a 30-page detailed rebuttal of the Police Ombudsman's findings and it was reported<sup>31</sup> that it stated that:

'This association regrettably, can no longer encourage its members to engage with the Police Ombudsman in the investigation of historical incidents, where breaches of the European Convention on Human rights are alleged.'

In response the Police Ombudsman noted that:

'The Police Ombudsman's Office is the lawful mechanism for investigating criminality and misconduct of police officers.'

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<sup>27</sup> [Derry 'Good Samaritan' bomb: RUC officers' legal bid fails](#) BBC News Online 6 May 2014

<sup>28</sup> ['Police should have done more to protect public from terrorist bomb'](#): Police Ombudsman' Press Release 10 July 2013.

<sup>29</sup> In the matter of an application by David Turkington and the Northern Ireland Retired Police Officers' Association for judicial review, [2014] NIQB TRE9270

<sup>30</sup> [Public Statement by the Police Ombudsman under Section 62 of the Police \(Northern Ireland\) Act 1998 Relating to the complaints by the relatives of a victim in respect of the events surrounding the bombing and murders at 38 Kildrum Gardens on 31 August 1988](#)

<sup>31</sup> [Former officers withdraw police ombudsman help](#) BBC News Online 24 October 2014.



It is extraordinary that the Retired Police Officers' Association will not encourage their members to participate as witnesses in investigations into the most serious of crimes. **This reinforces the need for the office to be able to compel officers to assist its investigations and to produce all documentation in their possession.**' (emphasis added).'

***CAJ calls call upon the Committee to continue to supervise the Police Ombudsman as a General Measure to ensure its effectiveness in preventing new violations. The Committee may in particular wish to ask the UK to address the full implementation of the Five Year Review of powers and ascertain if it is considering using its powers to direct the devolved Department of Justice to ensure recommendations required to ensure Article 2 compliance are implemented.***

### ***Inquests***

We remind the Ministers' Deputies of CAJ's long standing concerns, as outlined in our earlier submissions, surrounding the capacity of the coronial system in Northern Ireland to deal with 'legacy' inquests. We understand from information provided by the Coroners' Service in May 2014 that at present there are 46 outstanding inquests involving 75 deaths to be dealt with. The limitations of the current system continue to be well documented in the media.<sup>32</sup>

We note from the UK Action Plan (15/04/2014) that the 'Department of Justice recognizes that the coronial law in Northern Ireland would benefit from review and updating' and it intends to commission a review of the legislation. While the Department notes that any amendment is unlikely to impact significantly on the progression of legacy cases we submit that legislative reform to the current anomalies within our inquest system could in fact result in effective investigations in compliance with Article 2 ECHR which could result in a more speedy resolution of these proceedings which could obviate the need to take

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<sup>32</sup> Cobain, Ian ['Delay, delay, delay': Northern Ireland Troubles inquests still outstanding](#) The Guardian 13 April 2014; Adrian Rutherford [75 killings and still no inquests](#) Belfast Telegraph 24 April 2014;



further challenges. The Department has introduced a 'Legal Aid and Coroner's Courts Bill' to the Northern Ireland Assembly. This bill proposes the designation of the Lord Chief Justice of Northern Ireland as the President of the Coroners' Courts to improve judicial case management. However the bill does not deal with many of the issues surrounding legacy inquests that need to be addressed.

We remind the Ministers' Deputies of some of the key issues affecting inquests which we have raised in our previous submissions - identified in 2009 but never remedied – and noted again in the recent judgment challenging the inquest proceedings into the death of Pearse Jordan:

[345] Deficiencies in coronial law have been recognised on a number of occasions. Court of Appeal on 6 October 2009 stated:-

The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal incremental case law. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently. One must sympathise with any coroner called on to deal with a contentious inquest of this nature which has become by its nature and background extremely adversarial. The problems are compounded by the fact that the Police Service which would normally be expected to assist a coroner in non-contentious cases is itself a party which stands accused of wrong-doing. It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect. If nothing else, it is clear from this matter that Northern Ireland coronial law and practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest. What is also clear is that the proliferation of satellite litigation is extremely unsatisfactory and diverts attention from the main issues to be decided and contributes to delay.





In summary some key concerns CAJ has identified in relation to the coronial system in Northern Ireland's capacity to deliver effective inquests into conflict related deaths are that:

- the process of appointing a jury is anonymous and therefore there is inadequate provision for vetting jurors who may have a conflict of interest or potential bias;<sup>33</sup>
- an inquest jury in Northern Ireland, unlike elsewhere in the UK, needs to reach a unanimous decision;
- inquests in Northern Ireland cannot issue verdicts of lawful or unlawful killing, which falls short of international standards;
- there are protracted delays and litigation involving the Police (PSNI) and armed forces ministry (MOD) in relation to disclosure to next-of-kin, of material that is submitted to be relevant, such as details of witnesses' involvement in other lethal force incidents which falls within the broader circumstances of the death;
- there are concerns about failures to secure attendance of security force personnel at the hearing; and
- inquests continue to be subject to excessive delays.

CAJ recalls the Concurring Judgment of Judge Kalaydjieva, in *Hemsworth v. UK* and *McCaughey & Ors v. UK*, which could also apply to the large number of historic cases which the UK has failed to expeditiously investigate including the individual measures currently under the scrutiny of the CM. Judge Kalaydjieva stated:

**'...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'**<sup>34</sup> (emphasis added)

CAJ notes that the UK Action Plan (15/04/2014) recommends improvements to the PSNI disclosure process, the establishment of a Cross-Agency Working

<sup>33</sup> See s10 [Justice and Security \(Northern Ireland\) Act 2007](#)

<sup>34</sup> *Hemsworth v. UK*, page 25



Group and the proposal to establish a Legacy Inquest Unit. Central to all these mechanisms is to the requirement that they meet the Article 2 requirements – in particular that of independence and effectiveness. As well as including the PSNI, membership of the Cross-Agency Working Group should include the MOD and M15 given their role in legacy matters. There is a need for greater detail about these proposals and in particular a need to publish protocols, including timetables and penalties for failing to comply with disclosure deadlines. Clarification is also needed about who decides: what is a 'national security' matter; who is responsible for the redaction of this material and who decides the classification level in the first place.

Given our outstanding concerns we would ask that the Ministers' Deputies see further clarification of these proposals.

***CAJ expresses concern that actions are being taken with the purpose or effect of obstructing access to effective legacy inquests.***

## **Individual Measures**

### ***Kelly***

A number of the families have proceeded with civil proceedings against the MOD and PSNI as successor to the RUC given the lack of an effective investigation carried out by the HET. The relatives of Antony and Oliver Hughes, two civilians killed and injured by the SAS in this incident have only recently received an unequivocal apology from the Ministry of Defence for the injuring and killing of the two brothers (Annex 1).

### ***Shanaghan***

The family met with OPONI in March 2014 in and have been advised that they will receive 3 monthly updates in respect of this investigation which is hoped to be completed within 12 months. The family had also been advised by the HET that its teams had been 'reshaped'. A request was made to the HET in January 2014 for clarification of a number of matters about this case including details of the team now responsible for it. A response to this correspondence was received from the Crown Solicitors Office in March 2014 advising that



until work on taking forward the HMIC Report recommendations is completed  
no response to the issues raised could be provided.

### ***Finucane***

The judicial review challenging the decision not to discharge a commitment to hold a public inquiry is listed for December 2014 before Mr Justice Stephens.

### ***Jordan***

The Coroner and Chief Constable have issued Notices of Appeal against the judgment of Mr Justice Stephens dated 31 January 2014 in which he issued an order of certiorari quashing the verdict at the inquest into the death of Pearse Jordan.<sup>35</sup> The next of kin have issued a cross appeal and we understand that the Appeal has been listed for hearing on 6 October 2014 for 2 - 3 weeks. The judgment held the PSNI responsible for the delay in violation of Article 2 noting that it had been “creating obstacles and difficulties which have prevented progress in the inquest and have also not reacted appropriately to other obstacles and difficulties”<sup>36</sup> and has been saliently summarized<sup>37</sup>.

### ***McKerr***

We understand that a further preliminary hearing concerning disclosure has been provisionally fixed for 29 May 2014. The Chief Constable has advised that he expects that disclosure should be completed by the end of 2014.

### ***McCaughey***

On 13 February the Court of Appeal reserved its decision on the Applicant's renewed leave application of the judicial review in which the applicant who is a sister of the deceased, seeks to quash the verdict. Leave has been granted by

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<sup>35</sup> Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1) [2014] NIQB 11

<sup>36</sup> Paragraph 349

<sup>37</sup> Stanley, Christopher [‘The Jordan Judgment: Where now after 22 Years? Challenging State Failure’](#) *Rights NI* March 2014

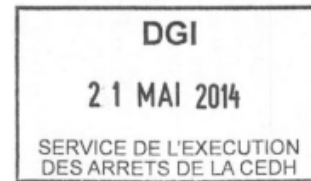


the High Court on one ground – the failure of the Coroner to secure the recall of one of the soldiers responsible for the use of lethal force - "Soldier A".

### **Hemsworth**

We note that OPONI are re-investigating this matter and a file is with the PPS.

**We call on the CM to continue to keep these General and Individual Measures under 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.**



**DEPARTMENT OF JUSTICE (NORTHERN IRELAND) RESPONSE TO  
PAT FINUCANE CENTRE AND COMMITTEE ON THE ADMINISTRATION OF  
JUSTICE SUBMISSIONS ON  
McKERR AND HEMSWORTH/McCAUGHEY ACTION PLANS**

1. It is accepted that the current system is subject to delays. The justice system is taking a number of actions to tackle legacy issues, but the reality is that dealing effectively with the past will require a much wider approach as proposed following the all-party talks chaired by Dr Richard Haass.
2. The Haass proposals are still under consideration by the Northern Ireland Parties. In the meantime, the Department of Justice is fully committed to doing all that it can to tackle investigative delay through implementation of the measures in the Action Plan.
3. The cross agency working group outlined in the Action Plan will take forward a number of the practical issues raised in the submissions, including protocols, information sharing and oversight arrangements. The group, which is holding its first meeting on 4 June 2014 to agree its terms of reference and membership, will report to the Criminal Justice Delivery Group chaired by the Minister for Justice, thus providing the strategic coordination recommended by Criminal Justice Inspection Northern Ireland.
4. Implementation of the HMIC review of HET is a matter for the NI Policing Board and is the subject of a monthly accountability meeting between the Chair of the Policing Board and the Minister for Justice. The Department of Justice recognises trust has been damaged, but in the implementation of the HMIC recommendations the expectation is that there will be a fresh start and confidence rebuilt.
5. In terms of OPONI, we are not pressing for supervision of the measure to be closed at the current time.
6. The Minister for Justice has also commissioned a Legacy Review to make recommendations on the effectiveness of the current legacy arrangements. The Review is due to report shortly.
7. The Review team met the Pat Finucane Centre on 14 May 2014 and the Committee on the Administration of Justice on 1 May 2014 to discuss the Review and their submissions on the Action Plan. At those meetings, which were very helpful on a range of issues, the Department agreed to keep in contact with both organisations as implementation of the Action Plan develops.