

Northern Ireland Human Rights Commission
Response to the proposed Coroners (Practice and Procedure)
(Amendment) Rules (Northern Ireland) 2002
January 2002

The Northern Ireland Human Rights Commission is a statutory body established on 1 March 1999 as a result of the Belfast Agreement of 10 April 1998. The activities of the Commission include reviewing the adequacy and effectiveness in Northern Ireland of law and practice relating to human rights; advising on the compatibility of legislation and policy with human rights, and promoting understanding and awareness of human rights. It also assists individuals in legal proceedings where human rights issues arise, brings proceedings involving law or practice concerning the protection of human rights, and conducts research and investigations. Recently the Commission has been developing and consulting on proposals for a Bill of Rights for Northern Ireland.

It is in the context of its duty to review the adequacy and effectiveness of protection for human rights that the Commission offers the following comments on the proposed amendment to Rule 9 of the Coroners (Practice and Procedure) Rules (NI).

The Commission consulted with a number of representatives of the next-of-kin of those involved in controversial deaths and Non-Governmental Organisations to inform its response to the proposed changes to inquest procedures in Northern Ireland. The consultees raised the issue of the Government's overall response to the European Court's judgments in *Jordan v UK*, *McKerr v UK*, *Kelly and others v UK* and *Shanaghan v UK* (4 May 2001).

Concerns were expressed to us that there had been no consultation or indeed contact between the Government and the families following the European Court's judgments in May 2001. The point was also made that there had not been an effective

investigation and that there were no proposals for an effective investigation in the very cases that were the subject of those judgments.

The European Court made eight major criticisms of the investigative procedure in the cases before it. Our submission is based around those eight criticisms.

1. A lack of independence of the investigating police officers from the security forces involved in the incident.

The criticism of the Court in relation to the issue of the independence of those carrying out investigations has largely been dealt with by the establishment of the Police Ombudsman in Northern Ireland in November 2000. We welcome the role of the Ombudsman, but her office can investigate matters more than a year old only in circumstances where new evidence comes to light. Her role is therefore limited in relation to the cases that were before the European Court and indeed in relation to other outstanding cases in Northern Ireland for which its judgments have implications. It remains the case, moreover, that members of one branch of the security forces (the police) still investigate killings allegedly caused by another branch (the army).

2. A lack of public scrutiny and of information given to the victims' families concerning the reasons for the decision of the DPP not to prosecute police officers and soldiers.

We welcome the information that the Attorney-General is considering the implications of the judgments for the DPP and we note the changes which are proposed for the prosecution service in the Justice (NI) Bill. We reserve the right to comment further on those changes, especially in relation to their role in an effective investigation procedure in cases where Article 2 issues arise (we will be seeking to encourage MPs and peers to propose amendments to the Bill as it proceeds through Parliament). We are very disappointed that the Justice (NI) Bill does not provide for reasons to be given by the Prosecution Service when decisions not to prosecute are taken. This is contrary to one of the recommendations of the Review of Criminal Justice in Northern Ireland (March 2000).

3. Lack of compellability of witnesses suspected of causing death to attend the inquest.

The amended Rule 9 addresses the issue of the compellability of witnesses to give evidence at an inquest. The amendment takes account of the need to protect the rights of individuals against self-incrimination conferred by Article 6 of the European Convention. However, an inquest does not involve a determination of the civil rights and obligations of any individual (and no change is proposed to Rule 16 in this regard), so it is questionable whether Article 6 rights are even triggered by the process. The proposed change may not sufficiently address the need for public scrutiny and for information to be made available to victims' families.

We are concerned that those called to give evidence at inquests may refuse to answer questions impinging in any way on the circumstances surrounding the death. In those circumstances the Article 6 rights will, in practice, override the Article 2 rights of the next-of-kin of the deceased. There have already been a number of challenges to decisions of coroners as a result of the European Court's decisions in *Jordan et al.* The proposed amendment is likely to raise further arguments about incompatibility with Article 2 and lead to continuing delay as well as uncertainty about the law.

It was suggested in our discussions with the representatives of the next-of-kin affected by the European Court's decisions that witnesses should be obliged to answer all questions and that the right against self-incrimination in the inquest context should be done away with. This was considered appropriate in the context of an inquest, which is just one part of the investigative process following an unexplained death. Other authorities would clearly have to be involved in the fact-finding and prosecution processes required to comply with Article 2.

Another option suggested to us was that a witness should be obliged to answer questions, but that the answers should not be used as evidence in any subsequent prosecution against the witness. This option has been adopted in the Saville Inquiry into the events on Bloody Sunday.

At present the Northern Ireland Human Rights Commission is inclined to the view that the second of these alternatives is preferable to the first and to what is being proposed by the Government. We would be satisfied with the Government's proposal only if it were accompanied by a further proposal providing for the establishment of a new and fuller form of investigation in situations where there are good public interest reasons for such a course of action. (Regard could be had, for example, to the Scottish system in this context.) In that new form of investigation witnesses should, we believe, be to some extent compellable. Until we see what the Government's proposals are for addressing more generally the European Court's criticisms as regards non-compliance with Article 2, and for adopting appropriate procedures for fact-finding, investigation and prosecution which are compliant with the principles enunciated by the Court, we cannot be more definite as to what the legal position of witnesses at inquests should be. The Commission's view is that the role of witnesses in an inquest depends on the status of an inquest as an element of an effective investigation process.

4. The inquest procedure did not allow any verdict or findings which could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed.

Coroners and coroners' juries in Northern Ireland do not have the power to give verdicts and no opinion can be expressed on questions of criminal or civil liability or on any matters other than those referred to in Rule 15, which reads as follows:

The proceedings and evidence at an inquest shall be directed solely to ascertaining the following matters, namely:

- a) who the deceased was*
- b) how, when and where the deceased came by his death*
- c) the particulars for the time being required by the [Births and Deaths Registration (Northern Ireland) Order 1976] to be registered concerning his death*

The precise scope of Rule 15 has been circumscribed by a number of decisions in the domestic courts. We note that the Human Rights Act 1998 requires legislation to be interpreted, so far as it is possible to do so, in a way which makes it compatible with

the European Convention on Human Rights. In the light of the recent European Court judgments, the Human Rights Commission believes that the previous narrow interpretation of Rule 15 is no longer appropriate and that a wider interpretation will be have to be presumed for, in particular, Rule 15 (b).

We note that there is no proposal from the Government to allow for verdicts and would ask why the Lord Chancellor has not addressed this matter and proposed no change to Rule 16.

We are aware that there is an on-going review of the inquest system in England, Wales and Northern Ireland, but that this will not report for another 18 months. We are not convinced that the review will address all the issues raised by the European Court judgments, unless its terms of reference are interpreted appropriately. There is an opportunity for the review to make recommendations that will ensure compliance with the State's responsibilities under the European Convention to conduct an effective investigation. Of course this does not diminish the Government's duty to comply with the European Court's judgments immediately.

Counsel for the Lord Chancellor recently stated at a judicial review taken by the family of Mr Pearse Jordan that the Government accepted there was a need to have an effective process of accountability which could assist in identifying and prosecuting those responsible in cases where there were Article 2 issues but that that could be provided by some mechanism other than an inquest. He speculated that this might include reconsideration by the DPP of whether charges should be brought in relation to the incident in question.

5. The absence of legal aid for the representation of the victim's family and non-disclosure of witness statements prior to their appearance at the inquest prejudiced the ability of the [next-of-kin] to participate in the inquest and contributed to long adjournments in the proceedings.

We welcome the provision of legal aid in some circumstances for the representatives of next-of-kin of the deceased, but our preferred view is that legal aid should be available as of right in all cases.

It is our view that *all* materials, including unused materials, should be disclosed to the next-of-kin of the deceased as well as to the Coroner. Full disclosure to the Coroner would fulfill the requirement of independence if the Coroner also had the power to decide whether the inquest was a sufficient forum for investigating the death concerned or whether issues arising in the particular case meant that a different form of investigation capable of apportioning responsibility for the death and ensuring accountability should be convened. The criteria for convening such an inquiry should comply with the principles outlined by the European Court.

The essential purpose of such an investigation would be to secure the effective implementation of the domestic laws which protect the right to life and, especially in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Such an enquiry should have the power to return verdicts and findings which will play an effective role in securing a prosecution in appropriate cases.

6. The inquest proceedings did not commence promptly and were not pursued with reasonable expedition.

The government has responded by taking administrative action including the appointment of a second full-time Coroner and another part-time Coroner and providing additional courtroom space.

We welcome the appointment of more coroners and the increased availability of court space for the hearing of inquests but are concerned that without addressing the substantive issues this will not have any significant effect on ensuring compliance with the requirements of an effective investigation.

7. No prompt or effective investigation was carried out into the allegations of collusion.

8. The scope of the investigation of the inquest excluded the concerns of collusion by security force personnel.

Criticisms 7 and 8 relate to the scope of the inquest and have not been addressed by the Government to date (see para. 4 above).

The European Court did not specify in detail which procedures the State should adopt in providing for the proper examination of the circumstances of a killing in which State agents may be implicated. It did not say that there should be one unified procedure available satisfying all the necessary safeguards. It did say that if the aims of fact finding, criminal investigation and prosecution are carried out or shared between several authorities, the requirements of Article 2 may be satisfied if, while seeking to take account of other legitimate interests, such as national security or protection of the material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner.

The UK Government argued in these cases that a combination of the police investigation, the review by the DPP, the inquest system and the possibility of civil proceedings satisfied the procedural requirements of Article 2. However the Court rejected the notion that civil proceedings could assist in the satisfaction of Article 2 and said that the remedies available in Northern Ireland did not satisfy the requirements in these cases.

The Commission does not believe that the Government's response to date meets the criticisms of the European Court and we therefore look forward to a speedy response which does address all those criticisms.

General comments

It appears to the Commission that there is no one person or department within the UK Government that has an overall role in co-ordinating the Government's response to the European Court's judgments. This seems to be leading to continuing delay in relation to the next-of-kin's concern to have outstanding issues determined, not just in

the cases of *Jordan et al*, but in relation to other cases pending. Many of these cases have been pending for lengthy periods of time.

The Commission is concerned that there is an on-going failure on the part of the State to carry out an effective investigation in the cases that were before the European Court. This has already led to legal challenges and no doubt will continue to do so, thereby exacerbating still further the delay in the provision of an effective investigation. The Commission believes that the Government needs to address specifically and speedily the cases where inquests are outstanding, as future reform is not sufficient to address the findings of the Court in *Jordan et al* and other outstanding inquests.

In its assessment the European Court outlined general principles that we believe should inform procedures for an effective investigation (see the Appendix below). The Human Rights Commission believes that the Government needs to address these matters expeditiously in order to give effect to one of the European Court's central principles – that individuals must experience human rights as practically effective. Rights which exist only in theory are illusory and unacceptable.

Appendix

- Article 2 of the European Convention enshrines a basic value of the democratic societies making up the Council of Europe. It should be interpreted and applied so as to make its safeguards practical and effective.
- The burden of proof may be regarded as resting on the State to provide a satisfactory and convincing explanation where events lie wholly, or in large part, within the exclusive knowledge of the authorities.
- Article 2 covers situations of intentional killing as well as situations where the permissible use of force results as an unintended outcome in the deprivation of life.
- The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in

- The form of the investigation to achieve these purposes will vary, but the authorities must act on their own motion.
- The persons involved in the investigation must be independent from those implicated in the events and this must extend to practical independence.
- The investigation must be capable of leading to a determination of whether the force used in the circumstances was or was not justified and to the identification and punishment of those responsible.
- Authorities must have taken reasonable steps available to secure the evidence concerning the incident.
- A prompt response by the authorities in investigating the use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing the appearance of collusion in or tolerance of unlawful acts.
- For public confidence there must be a sufficient element of public scrutiny of the investigation or its results in order to secure accountability in practice as well as in theory. The degree of public scrutiny may vary from case to case.
- In all cases the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests. This includes providing the next-of-kin with information about decisions not to prosecute and access to the investigation and court documents.