British Irish
RIGHTS WATCH

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9th January 2012

By email: justiceandsecurity@cabinet-office.x.gsi.gov.uk

Dear Sir/Madam,

Consultation: Justice and Security Green Paper (October 2011) CM 8194

British Irish RIGHTS WATCH (BIRW) is an independent non-governmental organisation that has been monitoring the human rights dimension of the conflict, and the peace process, in Northern Ireland since 1990. Our vision is of a Northern Ireland in which respect for human rights is integral to all its institutions and experienced by all who live there. Our mission is to secure respect for human rights in Northern Ireland and to disseminate the human rights lessons learned from the Northern Ireland conflict in order to promote peace, reconciliation and the prevention of conflict. BIRW's services are available, free of charge, to anyone whose human rights have been violated because of the conflict, regardless of religious, political or community affiliations. BIRW take no position on the eventual constitutional outcome of the conflict.

BIRW has commented previously on other aspects of the security and criminal justice system in Northern Ireland. We have only commented, at this stage, on one aspect of the Green Paper which concerns Northern Ireland, in relation to inquests.

We welcome the fact that the Green Paper addresses inquests in its opening survey of recent background developments and the case for change. In a number of recent high profile inquests, such as the inquest into the 7th July 2005

London bombings, there has been a need to consider sensitive intelligence material. In these cases coroners have been adept at arriving at strategies whereby such material can be assessed whilst maintaining its secrecy and enabling the inquest to fulfil its function (as discussed at paragraph 1.47). This does not mean that there may not be more intense challenges to withhold such information in the future and the further use of Public Interest Immunity (PII) certificate applications.

To avoid this, recourse may be had to establishing a public inquiry under the Inquiries Act 2005. This occurred in the proceedings following the inquest into the shooting of Azelle Rodney which lead to a statutory inquiry as the coroner could not arrive at a verdict because sensitive intelligence was withheld by the government from the family of the victim and the coroner. (In his opening submissions to the Azelle Rodney Inquiry, Ashley Underwood QC, Counsel to the Inquiry, made it clear that, "It will be my submission throughout that it will be entirely possible to hear this matter sufficiently in public with sufficient engagement of the family so as to discharge the state's article two obligations by way of this inquiry." http://www.guardian.co.uk/uk/2010/oct/06/azelle-rodney-police-shooting-evidence).

The authors of the Green Paper are quite correct in pointing out that it would be disproportionate to have a public inquiry simply to deal with a small amount of sensitive material (paragraph 1.49).

The Green Paper notes at page 14 the importance of the UK's compliance with the positive obligation to provide an effective investigation required when there has been a breach of Article 2 of the European Convention on Human Rights (the right to life), given effect by the Human Rights Act 1998. It is becoming increasingly clear from research conducted by BIRW into the mechanisms available to investigate state violations of Article 2 or collusion by the state in such violations, that the inquests are a core mechanism in such investigations. An Article 2 compliant inquest could discharge the positive obligations upon the state in such circumstances. As the Green Paper points out, in all cases there must be additionally the involvement of the next-of-kin to extent that their legitimate interests are safe guarded. This means ensuring the state or its agents are accountable, which means engaging the proportionality priniciple in relation to sensitive information.

The Green Paper examines closed procedure material (CMP) in relation to inquests in greater detail from paragraphs 2.10 – 2.23, and admits that because an inquest is a form of public inquiry it would be difficult for it to proceed if relevant sensitive material could not be disclosed. The Green Paper assesses the viability of a number of possible options to enable sensitive material to be disclosed whilst protecting national security (however that might be defined). These include 'light' security vetting and the use of jury confidentiality agreements. The Green Paper protects the important principle that an inquest

jury must be summoned by law when a death occurs in state custody or is caused by a state agent (paragraph 2.12). This principle cannot simply be removed because of security consideration as this would be disproportionate to the need for accountability.

In that small number of cases where sensitive information is in play in closed material procedures, BIRW would favour the proposal that a judge and jury be empanelled, a judge having greater powers to access sensitive information and having greater experience of dealing with sensitive information and in directing juries in complex criminal proceedings. This would curtail the need for the use of PII or recourse to a public inquiry.

The Green Paper addresses the significance of the inquest system in Northern Ireland between paragraphs 2.21 and 2.23. At 2.23 the Green Paper notes that in relation to the legacy inquests into deaths occurring during the conflict, "The Government is extremely mindful of the important role that families have played in these proceedings to date." This is indeed the case. For example, the inquest into the shooting of Daniel Hegarty in 1972 has concluded with possible prosecutions pending against former serving soldiers of the British army and inquests have been ordered by the Attorney-General on a number of those killed during the Ballymurphy Internment Massacre of 1971.

The inquest is one mechanism of truth recovery in terms of dealing with the past in Northern Ireland, but it is an increasingly significant one given that the reputation of the Police Ombudsman for Northern Ireland (PONI) is tarnished and the work of the Historical Inquiries Team (HET) is hampered by its accountability to the Police Service for Northern Ireland (PSNI). Civil litigation brought by the relatives of the 1998 Omagh Bomb, might attribute culpability but can establish little more than that in relation to delivering answers which might salve a quest for justice and closure.

It was clear from the recent inquest into the death of Daniel Hegarty that the family were 'overwhelmed' by the findings (see http://www.bbc.co.uk/news/uk-northern-ireland-16125077). Such is the importance of the inquest system in Northern Ireland in relation to the past and as a developing an Article 2 compliant model of investigation into state violations when death occurs or when the state is alleged to have colluded in the death of an individual.

The Green Paper poses the question "Should any of the proposals for handling sensitive inquests be applied to inquest in Northern Ireland?" Our response would be that there is at present no need to apply any such proposals to the "legacy" or historical inquests which are listed or may be listed in the future in Northern Ireland, such as those into the Ballymurphy Internment Massacre. Questions of the sensitivity of information need not apply to historical inquests where any such argument raised by the state as to national security interests over thirty years ago would be both specious and disingenuous. This point is

strengthened when it is recalled that many inquests into deaths arising from the conflict held over thirty years ago bought in open verdicts meaning that the facts could not be established. In addition many of the original inquests into deaths alleged to have been caused by the British army or other state agents were flawed in that investigations into such killings were inadequate, prejudiced toward the alleged perpetrators and undertaken in a climate of extreme suspicion on the part of the local community. Second inquests into such deaths would enable truths to be exposed and accountability finally to be established, as well as innocence in circumstances when innocence was often impugned (for example in the case of Daniel Hegarty).

In contemporary inquests in Northern Ireland, when sensitive material may be in play, BIRW would argue for Article 2 compliance whenever possible with as few constraints on accountability as necessary to protect national security. It can be envisaged, for example, that in an inquest into the death of a dissident republican leader allegedly killed to protect a state informer and therefore possibly killed on the orders of the state or with the knowledge of the state, similar proposals regarding sensitive information and closed material procedures should be applied as above with a judge having access to such materials and directing a jury as appropriate, if a jury is sitting. Consideration should be given to widening the powers of coroner's to have access to sensitive material.

Yours sincerely,

Christopher Stanley,
Research and Casework Manager.