

**WRITTEN EVIDENCE OF JANE WINTER
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TO THE COMMISSION OF SECURITY AND CO-OPERATION IN EUROPE,
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Introduction

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. In 2007 BIRW won the Beacon Award for Northern Ireland. In 2008 we were awarded the *Irish World* Damien Gaffney Award, and in 2009 we became the first-ever recipients of the new Parliamentary Assembly of the Council of Europe's Human Rights Prize.

We make this submission on our own behalf and that of our sister organisation, the Committee on the Administration of Justice (CAJ). CAJ was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community. CAJ seeks to ensure 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. In 1992 CAJ won the Reebok Human Rights Award, and in 1998 they were awarded the Council of Europe Human Rights Prize.

We are grateful to this honourable Commission for allowing us to submit written evidence to its hearing on "Northern Ireland: Why Justice in Individual Cases Matters".

Why dealing with the past matters in individual cases in Northern Ireland

The conflict in Northern Ireland, which began in 1969 and officially ended with the Belfast/Good Friday Agreement of 1998, is still creating after shocks as Northern Ireland makes the painful transition from conflict to peace. The past is not a foreign country for Northern Ireland. It cannot be ignored and continues to shape the present and to determine the future. One of the reasons for this is that, although there have been many victims on all sides of the community, many people do not know why their loved one died or they themselves were injured. Many lies have been told, particularly about state collusion in killings. There is a great thirst for the truth, particularly as people begin to emerge from the shadow of the conflict and feel confident enough to ask questions about what happened and why no-one has been held accountable in so many cases.

While there are some in Northern Ireland who believe that a line can be drawn under the past and that people should just move on, no-one who has studied the issue - especially the Consultative Group on the Past¹, set up by the government specifically to examine how Northern Ireland should deal with the past - believes that the past can be swept under the carpet. To do so would be to fail to learn the lessons from the past and to fail to build institutions and create a culture in which any repetition of past violence would become impossible.

There have been many genuine attempts to reform Northern Ireland's institutions since 1998, but while outstanding cases remain unresolved then there is a danger that those reforms will be undermined.

We have heard today about four of those cases, which span four decades and both sides of the sectarian divide.

The relatives of the eleven victims killed by the British army in Ballymurphy in August 1971 have not to this day received the effective investigation they are campaigning for and deserve. BIRW has investigated two of those killings and is certain that those two victims were wholly innocent and unprovoked, and we are sure that the same will be found in the other 13 cases.

The families of the fifteen victims who died in the McGurk's Bar bombing in December 1971 were branded as IRA sympathisers harbouring a bomb which exploded prematurely, when in fact they were the victims of loyalist violence. In the face of clear evidence that the rumour that the bomb was an IRA "own goal" originated in the RUC, the Police Ombudsman for Northern Ireland was forced to withdraw an earlier report exonerating the RUC, and he has now found that there was investigative bias in the police investigation into the bombing. Astonishingly, almost 40 years later, the Chief Constable of the reformed Police Service of Northern Ireland, seems to be unable to accept that finding.

John Finucane and his family have been campaigning for 22 years for an independent inquiry into the murder in 1989 of Belfast lawyer Patrick Finucane. Despite compelling evidence that the police, the army, and the intelligence service were all implicated in his murder by loyalists, an inquiry has yet to be held.

Raymond McCord has fought an almost-single handed campaign to uncover the truth about the murder of his son, Raymond McCord Jnr, in 1997, which has resulted in the unmasking of wholesale collusion over many years between RUC Special Branch and the loyalist group the Ulster Volunteer Force. A report by the former Police Ombudsman has led to the largest police investigation ever known in Northern Ireland. However, the PSNI are now in charge of this investigation again, and that means that they will not be investigating the issue of collusion, which would have to be considered by the Police Ombudsman. However, if the police are not looking for collusion, who will find it?

These are four landmark cases, all of which are crying out for justice, but they are four among many. What emerges very clearly from consideration of just four cases is that

¹ *Report of the Consultative Group on the Past, Belfast, 2009*

Northern Ireland is still experiencing great difficulty in dealing with its past, and that the past must be addressed if Northern Ireland is to be able to shake off the shackles of the conflict and move into a safe and secure future.

Existing mechanisms for dealing with the past

There are currently four mechanisms for dealing with the past in Northern Ireland: the Historical Enquiries Team, the Police Ombudsman for Northern Ireland, inquests, and public inquiries. Each operate under different rules and have their limitations.

The Historical Enquiries Team (HET)

The HET was created by the then Chief Constable of the Police Service of Northern Ireland (PSNI), Sir Hugh Orde, in September 2005 and officially commenced work in January 2006. Its purpose is to re-examine every conflict related death from 1968 to 1998 (when the Good Friday peace accord was signed). The HET contains both seconded officers from England and former PSNI and RUC officers, all of whom are retired; the unit reports directly to the Chief Constable. The approach taken was to examine each case in chronological order. However, where cases were linked, or on humanitarian grounds such as the ill-health of the next-of-kin, cases could be taken out of sequence.

The HET is examining a total of 2,557 deaths, involving 3,257 victims. It is currently less than half way through its task, with 1,031 cases investigated and 1,526 yet to be investigated. Seventy two people have been arrested² on foot of HET investigations in 8 cases.³ Some people in Northern Ireland, have refused to engage with the HET due to the perceived lack of independence of the unit since it reports to the Chief Constable, and concerns about the police investigating the police. A fairly recent but worrying development has been that, if the HET turns up any new evidential opportunities, the case is handed back to the C2 (Serious and Organised Crimes) division of the PSNI for investigation. This change has further undermined confidence in the HET's independence. Another concern has been the use of the Serious Organised Crime and Police Act 2005, which is being heavily relied upon in Operation Stafford (Raymond McCord's case). Under that Act a system has been devised to legalise and sanitise the use of "supergrasses" to give evidence against multiple defendants. The use of supergrasses in the past in Northern Ireland led to the collapse of many trials and brought the courts into disrepute.

The HET has come under criticism for a number of reasons. The HET's officers often misunderstand the Northern Ireland context or fail to communicate appropriately with families. Research by the University of Ulster highlighted the "gate-keeping" of intelligence by former RUC officers which led to concerns that the truth was being inhibited. The time taken to carry out investigations is often much longer than anticipated, leading to disappointment and disengagement from families. This has also been our experience in the cases and families we have supported. Finally, the HET has

² 65 of these arrests related to Operation Stafford (Raymond McCord's case)

³ Statistics as at 8th March 2011, supplied by the HET. A further 50 cases are nearing completion

faced patchy and uncertain funding which has required re-structuring, staffing cuts and uncertainty about the future. We also do not consider the HET to be human rights compliant due to its lack of independence. However it is at present the only real opportunity for families to discover what happened to their loved one.

The Police Ombudsman

The Office of the Police Ombudsman (PONI) was created by the Police (Northern Ireland) Act 1998. The Police Ombudsman is accountable to the Northern Ireland Assembly, through the Minister for Justice . PONI was established to provide an independent and impartial complaints service open to all in Northern Ireland seeking to complain about the Police Service of Northern Ireland (PSNI) and its predecessor the Royal Ulster Constabulary (RUC). This mechanism has been used by families who lost loved ones in the conflict to investigate their deaths as the PONI can look at both contemporary and historical complaints. Unfortunately, the PONI can only examine the aspects of the death insofar as they relate to the conduct of police officers. However, considering the nature of the conflict, issues such as whether the police were aware of a threat against an individual, the use of informers by police and the paucity of police investigations often mean that families find out a great deal about a death.

There have been two particularly significant investigations by the PONI. The first was into allegations into the 1998 Omagh bomb⁴ and the second into the role of a police informant who was involved in over ten murders and numerous other criminal acts⁵. Although both these cases were controversial the PONI was seen, for the most part, to be acting in an impartial and independent manner over contentious issues.

Recently, PONI has created some confusion by dealing inconsistently with the definition of collusion. In his report into the IRA bombings of Claudy in 1972⁶, he adopted a definition which was previously employed by Judge Cory⁷ and by Lord Stevens⁸, and which have commanded wide acceptance. However, in his report into the McGurk's bar bombing⁹ he adopted a narrower definition, creating the unfortunate impression that there is one definition of collusion for IRA victims and another for victims of the UVF.

The PONI has been criticised for the length of time its investigations take to be completed, its failure to communicate with families and the diversion of resources away

⁴ *Police Ombudsman Public Statement on Matters arising from the Omagh bombing*
Police Ombudsman for Northern Ireland, 2001

⁵ *Statement by the Police Ombudsman for Northern Ireland on her investigation*
into the circumstances surrounding the death of Raymond McCord Junior and
related matters, January 2007

⁶ Public statement by the Police Ombudsman under Section 62 of the Police (Northern
Ireland) Act 1998, Relating to the RUC investigation of the alleged involvement of the
late Father James Chesney in the bombing of Claudy on 31 July 1972, PONI, August 2010

⁷ Whose inquiries led to the setting up of the Wright, Hamill and Nelson Inquiries

⁸ Who conducted investigations into collusion in Northern Ireland and into the Finucane
case

⁹ Public statement by the Police Ombudsman under Section 62 of the Police (Northern
Ireland) Act 1998, Relating to the complaint by the relatives of the victims of the
bombing of McGurk's Bar, Belfast, on 4 December, 1971, PONI, February 2011

from historical cases. The PONI has highlighted the strain these historical cases place on the office and cuts in PONI's budget do not suggest that this situation will improve. The current Police Ombudsman, Al Hutchinson, has said that he can only afford to investigate two historical cases a year. With a caseload of over 70 such cases, this will take decades.

Inquests

An inquest is quite unlike other civil or criminal proceedings; it is not a trial. The Coroner cannot determine criminal or civil liability or apportion guilt or blame. He or she can only determine the identity of the deceased and how, when, where, and in what circumstances he or she died. In many cases, these are matters already known to the family of their loved one, but sometimes significant new information can emerge at an inquest, despite its limited remit. For many years the term "in what circumstances" was interpreted as meaning literally "by what means" a person died (for example, from gunshot wounds). Following successful legal challenges, the term is now interpreted as meaning "in what broad circumstances". Technically, the broader definition only applies to deaths that occurred after the Human Rights Act 1998 came into force in October 2000, but in practice Northern Ireland coroners are tending to apply the wider definition to historical cases as well.

Coroners themselves decide who will be called to give evidence as witnesses and they examine the witnesses themselves, although "properly interested people" or their legal representatives are also permitted to put questions to witnesses within the limited scope of the inquest's remit described above. Persons with a "proper interest" include: relatives of the deceased; solicitors acting for the next of kin; anyone who may, in some way, be responsible for the death; others at some special risk or appearing to the Coroner to have a proper interest.

Coroners usually sit with a jury in contentious cases, but they are not permitted to come to verdicts, they can only make findings about who the deceased was and how, when, where and in what circumstances they met their death.

Legal aid¹⁰ is not normally available for inquests, although the Attorney General for Northern Ireland has discretion to make such financial assistance available in exceptional cases. The lack of legal aid means that families often find themselves without any legal representation, while all other parties have lawyers. Human rights groups argue that, if inquests are to stand any chance of gaining public confidence, "interested parties" must be able to take part in an informed and open way on an equal footing with everyone else. Obviously, this can only be achieved if all potentially relevant material is fully disclosed. While these rights are not guaranteed in law, Coroners now generally agree that effective participation by families requires wide disclosure.

Nevertheless, past experience shows that material may be redacted, particularly if it may later be the subject of a Public Interest Immunity (PII) certificate. Such a certificate is made on the application of an interested person (usually the police) by the Secretary

¹⁰ Financial assistance paid for by the state

of State for Northern Ireland. The application is heard by a court, and, if granted, it permits the applicant not to disclose evidence where this is considered contrary to the public interest. Such certificates reduce transparency and create the suspicion that the interests of the state, rather than those of the public, are being protected. We believe that PII certificates can seriously undermine the ability of inquests to make meaningful enquiries.

It is clearly important that all witnesses with any significant evidence should appear at inquests. While there have been some welcome changes in compelling such witnesses to appear, they may still refuse to answer questions, even if they directly relate to the circumstances surrounding the death, on the ground that they have the right to remain silent. Witnesses are also allowed to refuse to answer questions if, by doing so, they would incriminate themselves.

Many inquests, however, have been opened and left uncompleted. Some inquests into conflict-related deaths have yet to be resolved many years after the death occurred, and have led to lengthy legal proceedings, including judicial reviews, and referrals to the Supreme Court¹¹ and the European Court of Human Rights. In some cases, an inquest is never held. For example, there has never been an inquest in Rosemary Nelson's case.

Recently, the Attorney General has exercised a discretion that allows him to order a new inquest, even if there was already one completed, although there must be new evidence before he will consider doing this.

Inquests are no panacea for anyone seeking the truth about the death of a loved one. They may leave families with even more questions and so fail to address their trauma and distress, but at their best they do provide a forum for establishing the facts.

Inquiries

There are many cases in Northern Ireland that deserve an inquiry, but very few people are fortunate enough to get one, and the UK's coalition government has sent very strong signals that there will be no more lengthy and costly inquiries.

It should be borne in mind that Inquiries are a remedy of last resort – they only happen when the system has failed. This inevitably circumscribes what an inquiry can achieve by way of a remedy.

It is often said that inquiries are inquisitorial, rather than adopting the adversarial approach of a court. However, in reality, they all start from the same premise, which is that something has gone badly wrong that needs examination. Any person or institution who is likely to be responsible for things having gone wrong is entitled to be represented and to defend themselves, which in practice means that they will seek to blame someone else and/or will attack anyone who criticises them, which immediately creates an adversarial atmosphere. Although victims may be represented by more than one lawyer, generally speaking they have only one voice, which can easily get drowned out by all the other interested parties.

¹¹ Formerly the House of Lords

The lesson from the four recent inquiries in Northern Ireland (Bloody Sunday, Billy Wright, Rosemary Nelson and Robert Hamill) is that no two inquiries are the same.

So far, the two inquiries that have reported have been disappointing. The Bloody Sunday Inquiry exonerated the victims, which elicited a public and handsome apology from the Prime Minister, David Cameron, but failed to call the senior army officers or the politicians to account. The Billy Wright Inquiry narrowed the definition of collusion and then found that there had been none, despite finding no less than fifteen acts or omissions on the part of civil servants which facilitated or assisted the murder. At least the Billy Wright Inquiry made a positive recommendation, which is that there should be a complete overhaul of the Northern Ireland prison service. The Bloody Sunday Inquiry made no recommendations at all!

CAJ and BIRW have had a joint observation project at the Hamill, Nelson and Wright Inquiries. What that has taught us is how idiosyncratic inquiries are; there is no read-across or learning from one another. The Billy Wright Inquiry has been the least transparent and the least aware that one of the key functions of an inquiry is to allay public fears and suspicions. The Rosemary Nelson Inquiry adopted an unusual procedure of channelling all questions to witnesses through Counsel to the Inquiry, who played "good cop, bad cop" throughout. This approach was most disconcerting for witnesses and far from transparent. The Robert Hamill Inquiry was the most transparent and granted "observer status" to CAJ and BIRW, who were invited to make closing submissions to the Inquiry even though we were not a party to the Inquiry.

All three inquiries were different from each other, and different again from the Bloody Sunday Inquiry. The reason for this is that the person who has most influence over an inquiry is the person appointed to be Counsel to the Inquiry, and he (none of them was a woman) makes numerous macro and micro decisions which affect the conduct of the inquiry. The Chair also stamps his (there were no female chairs, either) personality on an inquiry, and can influence its direction by interpreting the terms of reference widely or narrowly.

We are still waiting for the reports in the Nelson and Hamill Inquiries, but we are not altogether optimistic that they are going to satisfy all the families' or the NGOs' concerns. The Robert Hamill Inquiry did not seem receptive to our joint closing submissions, which emphasised those elements of the case which suggested collusion. The Rosemary Nelson Inquiry has said that it will not be looking at whether RUC officers threatened her before her death because there is so much conflicting evidence on the issue.

The Hamill and Wright Inquiries converted from the Police and Prison Acts to the Inquiries Act 2005. Their principle reason for doing so was that the Inquiries Act gave them greater powers to compel disclosure and the attendance of witnesses. BIRW and CAJ are opposed to the Inquiries Act because it removes powers from an independent Chair and gives them to the relevant Secretary of State. Where that Secretary of State or his or her department is a party to the inquiry, the independence of the inquiry can be seriously damaged, because the Secretary of State has the power to decide, among other things, what evidence is disclosed and whether hearings are held in

public, and even has the power to shut an inquiry down altogether. In practice, these issues did not arise in the Hamill and Wright inquiries, but they would certainly create enormous problems in any inquiry into, for example, Pat Finucane's murder

Ultimately inquiries are only as good as their reports. So far, the evidence suggests that, judged by their reports, inquiries are hit-and-miss affairs. One of the problems with inquiries is that they only happen after everything that can go wrong has gone wrong, so it is a huge task to put things right at that stage.

It has long been our view that what is required is a human rights-compliant mechanism which can establish the facts, hold those responsible to account, and protect the valid public interest, as opposed to politicians' interest, in covering up incompetence and wrong-doing.

The government's stance on dealing with the past

In 2007 the government established the Consultative Group on the Past. They were inundated with submissions and requests for meetings; there was clearly an appetite on all sides of the community for scrutinising Northern Ireland's painful past, coming to terms with it, and moving on. The Group produced a thoughtful and thought-provoking report in 2009¹². They rejected the notion that there can be a hierarchy of victimhood (that some victims are more deserving of sympathy than others), pointing out that it is survivors who deserve our equal support, because the loss of a loved one is equally painful whatever the circumstances. In that spirit, they recommended a one-off recognition payment of £12,000 to the family of everyone who had lost someone in the conflict. This recommendation sparked immediate controversy on all sides of the community. Many confused the proposal with compensation, and regarded the amount of £12,000 as derisory. Others could not equate the suffering of the widow of, for example, a soldier with that of the widow of a paramilitary killed by the army. Others still welcomed the payment, seeing it as being of practical benefit in, for instance, sending a child to university. Many, including the NGOs, wondered why the payment was limited to the families of those who had died, and did not include the wounded, many of whom have long-term unmet needs.

So controversial was the recognition payment idea that unionist political parties rejected the rest of the report, thus doing their constituents a great disservice by throwing the baby out with the bathwater. We know from our contact with members of the Protestant/unionist/loyalist community that, whatever their opinion of the recognition payment proposal, many of them would like to see some mechanism for dealing with the past, as would their Catholic/nationalist/republican counterparts (many of whom also rejected the recognition payment idea).

Chief among the Group's recommendations was a Legacy Commission, which would seek to ascertain the truth about every death brought about by the conflict and to help to achieve reconciliation. We do not agree with all the details of these proposals, but it was an idea that could and should be developed into something workable and human rights compliant

¹² *Report of the Consultative Group on the Past, 2009*

The previous government allowed the recommendations of the Consultative Group on the Past to run into the sand, simply publishing a compilation of responses to its tardy consultation on the Group's report. The present coalition government has failed to take up the reins, merely promising a further round of consultations with those who have already voiced their views.

The present Secretary of State for Northern Ireland has made some rather strange proposals for dealing with the past. For example, he has suggested that "historians rather than lawyers" should deal with the past, and that a Historical Memory Documentary Centre such as that established in Salamanca, Spain, in the post-Franco era, might be a way forward¹³. Similarly, he has suggested that the HET's files could be consigned to an archive like that compiled on the Stasi in Germany¹⁴. Not only are these comparisons with the aftermath of totalitarian states rather surprising coming from a minister in the UK government, but they clearly indicate that he regards the past as something that is over and can be filed away, which is far from being the case.

Conclusion

As the four cases considered today so graphically and tragically illustrate, the past remains very much part of the present in Northern Ireland today. Unless an effective, human rights-compliant mechanism is found for dealing with all the unresolved individual cases arising from the conflict, that conflict will continue to cast its long shadow across Northern Ireland's future and make it more difficult to achieve the peace and stability that Northern Ireland so badly needs and so greatly wants.

We respectfully request this honourable Commission to seek an assurance from the UK government that it will establish such a mechanism without further delay and in consultation with victims, human rights experts and others.

We thank this honourable Commission for your interest in Northern Ireland; long may it continue.

¹³ *Historians may be best at dealing with Troubles: Owen Paterson, Belfast Telegraph, 17 November 2010*

¹⁴ *Northern Ireland cold case files 'could form Stasi-like archive', Belfast Telegraph, 14 February 2011*