

# 3 Human Rights and Guiding Principles

**“Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”**

**Universal Declaration of Human Rights**

## Introduction

- 3.1** In this chapter we explain our view that human rights are central to the criminal justice system. We then examine the principles and values that should underpin the criminal justice system in Northern Ireland and, in the light of these, consider statements of what the criminal justice system should be about and the standards to which it should adhere. We also look at some issues of common applicability across the organisations that make up the criminal justice system and at the role of lawyers, with particular reference to the defence.
- 3.2** Our starting point is the aims which participants to the talks agreed for the criminal justice system.<sup>1</sup> It was the clear intention of those involved in the talks process, and one which we fully endorse, that these aims should be achieved within an overarching framework of human rights. The fundamental principle is that people have basic rights by virtue of their common humanity. The principles of freedom and justice which spring from this are central to debate on crime and justice. In protecting the lives and property of citizens, or depriving offenders of their liberty, the state upholds the rights of victims or potential victims of crime, just as it has to ensure that it respects the basic rights of offenders.
- 3.3** Since the *Universal Declaration of Human Rights* (December 1948) there has been a growing recognition of the universality of certain fundamental rights and freedoms. In the

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<sup>1</sup> See Chapter 1 and *The Belfast Agreement*, Policing and Justice, paragraph 4, page 22.

justice sphere a number of important principles are well established. These include the right to liberty and security of person, the right to a fair trial and the prohibition of torture or inhuman or degrading treatment.

### 3.4

In the research report which we commissioned, two themes that underlie international human rights standards in the field of criminal justice are identified: the protection of the individual against ill-treatment at the hands of law enforcement authorities; and the protection of individuals against arbitrary arrest, detention, trial or punishment.<sup>2</sup> The report goes on to identify a third emerging theme which puts increasing stress on the need for individuals to be protected against threats to their bodily integrity, liberty and dignity from wherever these may emanate. As an example of this, the European Court of Human Rights has indicated that there may be a violation of the right to life where the authorities knew or ought to have known of a real risk to the life of a particular person from the criminal acts of another and they failed to take reasonable precautions against it.<sup>3</sup> The protection owed by states does not just extend to preserving life. The requirement to have sufficient procedures in place to ensure law and order, to properly investigate crimes and bring offenders to justice may also be derived from human rights principles. In another recent case the Court accepted that states were under an obligation to take measures, such as the provision of effective deterrence, to ensure that individuals within their jurisdiction were not subjected to torture or inhuman or degrading treatment or punishment, including that administered by private individuals.<sup>4</sup>

## International Instruments

### 3.5

Basic human rights principles are set out in a number of instruments, notably the *Universal Declaration of Human Rights*, the *European Convention on Human Rights* (ECHR)<sup>5</sup> and the *1966 International Covenant on Civil and Political Rights* (ICCPR). Building on these are a range of declarations, principles, codes of conduct and guidelines which elaborate on specific areas. For example the *Guidelines on the Role of Prosecutors* were adopted by the Eighth UN Congress on the Prevention of Crime and Treatment of Offenders in 1990.<sup>6</sup>

### 3.6

The minimum international standards of human rights have guided us throughout our deliberations and we cannot stress too strongly their applicability to all parts of the criminal justice system in Northern Ireland. They do not and cannot provide a template answering all of the questions which we have been addressing. International standards tend to set out the

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2 Livingstone and Doak, Research Report 14.

3 See Chapter 13 on Victims and Witnesses, *Osman v United Kingdom* 28 October 1998.

4 *A v UK* (1998), Crim LR 892-3.

5 Properly titled the *Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms*.

6 Livingstone and Doak, Research Report 14.

end to be achieved and the broad framework; they cannot prescribe the detail. This is inevitable given their application to a wide variety of legal systems with very different traditions. It follows that we should view these standards very much as a foundation on which to build.

### 3.7

The international human rights instruments fall into three categories in terms of their status before domestic courts. First, there are those which have been explicitly incorporated into domestic law by Parliament and which are, or will be, enforceable. Thus as a result of incorporation of the *European Convention on Human Rights* (ECHR) by the Human Rights Act 1998:

- So far as it is possible to do so, all legislation must be read and given effect by the courts in a way that is compatible with the Convention. Subordinate legislation and Acts of the Northern Ireland Assembly (which is governed by the Northern Ireland Act 1998) will be set aside by the courts if incompatible.
- It will be unlawful for any public authority to act in a way that is incompatible with a Convention right, and individuals will be able to challenge acts and decisions by public authorities on grounds of incompatibility.

### 3.8

The human rights principles set out in the ECHR bear directly on criminal justice and we welcome the fact that preparations for incorporation are being made, for example through the proofing of legislation and training within agencies. Other instruments have been incorporated into domestic law, for example parts of the *UN Convention on the Prevention of Torture*.

### 3.9

The second category of international instrument comes in the form of binding treaties, which have not been incorporated. *The International Covenant on Civil and Political Rights* (ICCPR) and the *UN Convention on the Rights of the Child* (CRC) fall into this category. While such instruments are not part of domestic law, the UN and other international bodies work to promote compliance. For example, the First Optional Protocol to the ICCPR established a Human Rights Committee whilst Special Rapporteurs and Special Representatives have been appointed by the Secretary-General of the United Nations to report on a variety of topics. These include Special Rapporteurs on the Independence of Judges and Lawyers, the Rights of Women and Children's Rights. Furthermore there has been a trend amongst common law jurisdictions for judicial decisions to take such international norms into account. They are said to have "persuasive authority" before domestic courts. A good example was provided by the landmark ruling on aboriginal land claims in Australia's Supreme Court. In this ruling Justice Brennan stated:

"The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights."<sup>7</sup>

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7 *Mabo v State of Queensland [No 2]* (1992), 175 CLR 1 at 42.

**3.10** By their nature, the third category of non-binding instruments, such as the *Guidelines on the Role of Prosecutors*, are not directly applicable before a court of law. They are intended to provide guides to good practice in the areas which they address and are therefore relevant and important as benchmarks for the Northern Ireland system.

**3.11** International human rights instruments need to be understood as living texts. As with other bodies of law they require interpretation in the light of different situations and there can be dispute about their practical application, particularly where there is a tension between two principles. For example, Article 8 of the ECHR recognises the need to strike a balance between the right of privacy and the possible need to invade that privacy for the prevention of disorder or crime. Throughout the report, and in making our recommendations, we take full account of, and draw extensively on, the principles enunciated in all three categories of instrument.

## Human Rights in the Belfast Agreement

**3.12** The Belfast Agreement addressed human rights against the background of Northern Ireland's recent history. It recognised the importance of respect for civil rights and the religious liberties of everyone in the community. The Northern Ireland Human Rights Commission, established on 1 March 1999, has an important role to play in this sphere as the first independent, statutory human rights commission of its type in Western Europe. It is tasked to:

- keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights;
- advise of legislative or other measures which ought to be taken to protect human rights;
- advise whether Bills before the Northern Ireland Assembly are compatible with human rights;
- bring, and assist, proceedings relating to human rights; and
- to promote understanding and awareness of the importance of human rights.<sup>8</sup>

**3.13** The Northern Ireland Act 1998, which established the Northern Ireland Human Rights Commission, defines human rights as including Convention rights, with the result that the remit of the Northern Ireland Human Rights Commission extends to human rights additional to those in the ECHR. The Agreement also allows for a Bill of Rights supplementary to those in the ECHR, to reflect the particular circumstances of Northern Ireland. The Northern Ireland Human Rights Commission has been asked by the Secretary of State to consult and

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8 Northern Ireland Act 1998, section 69.

provide advice on the scope for defining such rights. The remit of the Commission is such that it will inevitably impact upon the criminal justice system, a state of affairs which we welcome since it means that human rights standards, and their development in the light of changing circumstances, will constantly be on the agenda.

## Views Expressed During the Consultation Process

**3.14** During our consultation process we gathered views on which principles should guide the criminal justice system and what can be done to ensure that principles espoused are upheld. As a starting point we set out in our consultation document the draft set of guiding principles and values which was produced by the cross-cutting review of the criminal justice system in Northern Ireland, which took place in 1997/98.<sup>9</sup> These principles and values are reproduced below.

### **GUIDING PRINCIPLES: A DRAFT**

The criminal justice system exists to uphold the rule of law. The criminal justice system is concerned with crime in all its elements and the process which brings offenders to account, but constitutes only a part of society's response to crime. The guiding principles of the publicly funded elements of the system are:

- to deliver a fair system of justice to the community;
- to ensure the prompt and just treatment of those suspected, accused or convicted of crime;
- to bring offenders to account;
- where prosecutions ensue, to ensure a fair trial before an independent and impartial tribunal within a reasonable time, and to convict the guilty and to acquit otherwise; and to maintain a proper appellate system;
- to work to prevent individuals from offending and sentence those proven guilty in a just and proportionate manner, while seeking to reduce the risk of further offending;
- to be responsive to the community's concerns, and to encourage community involvement where appropriate;
- to work, in conjunction with the community, to reduce crime, minimise the fear of crime and enhance community safety;
- to have regard to the proper concerns of victims of crime;
- to ensure witnesses and jurors can perform their roles free from harassment or intimidation;
- to act in all instances to enhance the effectiveness, efficiency and economy of the system; and
- to encourage the use of the civil justice system as a remedy in appropriate cases.

<sup>9</sup> The cross cutting review, instituted as part of the Government's Comprehensive Spending Review, examined the workings, effectiveness and value for money of the criminal justice system as a whole covering services that were the responsibility of the Secretary of State for Northern Ireland, the Lord Chancellor and the Attorney General.

### VALUES: A PRELIMINARY DRAFT

The common values to which the publicly funded elements within the criminal justice system adhere are:

- maintenance of the rule of law;
- protection of individual rights and freedoms under the law;
- fairness to all, regardless of gender, ethnic origin, religion, political opinion, age, disability or sexual orientation;
- maintenance of a criminal justice process that is as open, simple, transparent, inclusive, and accessible, as possible;
- respect for the independence of decision making of the police, the prosecuting authorities and the judiciary in relation to operational matters, decisions on whether to prosecute, and judicial functions respectively;
- assurance of public accountability for the performance of the system without compromising that essential independence;
- recognition of the proper independence of action of the various parts of the criminal justice system, including the judiciary;
- partnership between the criminal justice system, the community, and other external bodies; and
- behaviour that promotes public confidence in the criminal justice system.

**3.15** There was a variety of responses to the draft principles and values from people we met with and those who attended our consultation seminars. There was widespread support for a statement of the principles or aims of the system. Some approved of the guiding principles and values generally but made specific suggestions for amendments. It was pointed out that noting “proper” concerns of victims of crime implied that some of the concerns were “improper” and it was felt that the rights of victims needed greater emphasis. Some people also wanted a recognition of restorative or reparative principles within the criminal justice system. There was concern that there was an over-emphasis on independence at the expense of accountability and it was suggested that “respect for independence of decision making” sounded like an instruction to the public rather than a value to be upheld by the system. We have been very conscious of such views when addressing issues of independence and accountability in relation to the judicial and prosecution systems in particular.

**3.16** Some of those we heard from were unhappy with the form in which the draft guiding principles and values appeared. There was a view that splitting the principles and values was confusing and that they were not presented in an accessible, easily understood way. Particularly during consultation seminars, we found that the principles and values as drafted did not clearly communicate what the criminal justice system was about. Several commented that a shorter clearer statement would be preferable. There was some criticism that the statements were vague, resulting in different people making different interpretations. For example endorsing public accountability left questions about what is meant by accountability,

accountability to whom and how. It was pointed out that acting to enhance effectiveness, efficiency and economy was something that any organisation ought to do, and therefore that stating it as a principle for the criminal justice system seemed unnecessary.

### **3.17**

In our discussions with people about the principles which should be upheld by the criminal justice system some general themes emerged. Here we set out some of the things people understood these themes to mean and what they wanted done as a result:

#### **■ Fairness**

All should be equal before the law. Being fair and seen to be fair is vital in order to gain people's confidence in the criminal justice system. In part this means treating all those who come into contact with the system equitably. There was a suggestion that the court system was unfair and alienated one side of the community, having "no room for Irishness".

#### **■ Justice**

A just system would result in the guilty being convicted and the innocent being acquitted. The need for proportionality, with punishment that fits the crime, was raised. Philosophies of justice could be described as retributive, reparative or restorative.<sup>10</sup> For some, freedom from fear of crime was an important aspect of justice which entailed sufficient protection of the public. One view expressed was that justice should mean that those convicted of an offence "lose their rights" but others argued that prisoners had rights.

#### **■ Respect for Victims**

There was a feeling that victims "are not high enough on the agenda". It was suggested that victims were ignored and not given a voice in the adversarial system. Victims should not have to prove their case. Many recognised the sensitivities surrounding this area, with the right of the accused to be presumed innocent unless and until proved guilty.<sup>11</sup>

#### **■ Accountability, Transparency and Accessibility**

The demand that "the system should serve us" was a desire for accountability. One view was that the judiciary lacked respect for ordinary people and a recurrent theme was the need for criminal justice to be open to public view. There was also an emphasis on the need for better communication for a variety of reasons, including the need to counter views such as "the guilty walk free from court." At one consultation seminar there was a call for those in charge of the justice system to get out and explain to the community, rather than "sit in ivory towers". It was variously suggested that accountability required publication of reports, inspection and a good complaints system that "really works".

#### **■ Independence and Impartiality**

There was a general consensus that judicial and quasi-judicial decision making should not be open to improper outside influence. This raises difficult issues with regard to the need

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<sup>10</sup> See Chapter 9 for a discussion of these concepts.

<sup>11</sup> See Chapter 13 for a discussion of issues relating to victims.

to be able to hold people to account for their decisions and the desire for transparency.<sup>12</sup> The question then becomes how to define “improper outside influence”. One view was that prisoner releases were governed by political expediency demonstrating too much political control over the criminal justice system.

■ **Prevention**

The maxim “prevention is better than cure” was frequently mentioned with the desire for more emphasis on the causes of crime and effective remedies.<sup>13</sup> It was pointed out that high rates of recidivism or re-offending demonstrated a failure in the system. One suggestion was that success should be measured according to how few people had gone through the system. Many felt that money spent on custody would be better spent on schemes diverting people from crime.

■ **Efficiency**

Efficiency of the system could be defined in terms of cost or the amount of time spent on a case. The maxim “justice delayed is justice denied” sums up the need for justice to be dispensed speedily.<sup>14</sup> Whilst the criminal justice system could be measured in terms of value for money and economy with resources, an alternative was to assess how effective the system was at changing behaviour and rehabilitating offenders.

**3.18** These examples are not summaries of our views on these key areas but illustrate a range of opinions that we heard. During the consultation seminars the debate over these principles was not about whether or not they were important to the criminal justice system but what they actually meant in practice. It was noted that concepts such as independence and accountability might be in conflict. There was widespread recognition that there were inevitable tensions in the aims of the system, for example the differing approaches that might be associated with punishing the offender, protecting the community and rehabilitation.

**3.19** International human rights principles were widely commented upon in debate over the practical application of abstract principles. Indeed we found a very high degree of awareness of various international instruments and conventions in submissions and during our meetings with groups and at seminars. There were consistent demands that Northern Ireland should use agreed international standards as a benchmark. International principles were seen as allowing for comparisons across jurisdictions and as of particular benefit when they were associated with mechanisms to encourage or enforce their application, thus ensuring that they were more than mere words on paper.

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12 See Chapter 6 on the judiciary for a discussion of judicial independence, Chapter 4 on the prosecution, and Chapter 15 on the structure and organisation of the criminal justice system.

13 See Chapter 11 on community safety.

14 See Chapter 15 on organisation and structure for more discussion of delay.

- 3.20** The need for appropriate evaluation was also emphasised. It was argued that a network of indicators should be developed so that data could be published against which the success, or otherwise, of the system could be judged.<sup>15</sup>
- 3.21** In our consultation document we asked whether principles and values should be enshrined in legislation. Some argued that such a step would be useful, enabling the principles to be used as an aid to judicial interpretation of legislation. One organisation commented “... there is little value in principles being set out for rhetorical effect, what is required is the embodiment of appropriate principles in legislation that confers rights and imposes obligations”.
- 3.22** There are precedents for setting out principles and aims in legislation. For example, in England and Wales the Crime and Disorder Act 1998 established the principal aim of the youth justice system as the prevention of offending by children and young people.<sup>16</sup> We found this approach in other jurisdictions. The Canadian Corrections and Conditional Release Act 1992 outlines the purpose of the Canadian federal correctional system and goes on to set out principles such as the paramountcy of protection of society and that correctional decisions should be made in a forthright and fair manner.<sup>17</sup> Similarly the New Zealand Children, Young Persons and their Families Act 1989 has a list of aims and principles for dealing with young offenders. For example it states that decisions should be made and implemented within a time frame appropriate to the young person’s sense of time.
- 3.23** There was a counter-argument against putting principles into legislation. It was felt that the incorporation of the *European Convention on Human Rights* into domestic law would be a means of ensuring that human rights were protected effectively and of providing appropriate and accessible means of enforcement. It was, therefore, argued that it was unnecessary for an additional list of principles, which might be seen as contrasting with the European Convention, to appear in legislation. There was a danger of causing confusion and of encouraging unproductive litigation if there were too many sources of entrenched rights and principles.

## Evaluation and Recommendations

- 3.24** The criminal justice system exists to uphold the rule of law. The publicly funded elements include the courts and judiciary, the prosecution service, legal aid, the police, probation and prisons. In addition there is the legal profession and a wide range of voluntary groups and agencies working to tackle the effects of crime or reduce criminality.

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15 See also Chapter 16 on research.

16 Crime and Disorder Act 1998, section 37.

17 Corrections and Conditional Release Act 1992 Part 1, 3-4.

- 3.25** Respect for human rights and dignity should be the core value of the criminal justice system in all its aspects. There needs to be constant effort to ensure that there is widespread understanding of what this means. The major exercise underway to prepare for the incorporation of the *European Convention on Human Rights* is valuable in this respect. This has included events run by the Judicial Studies Board and a conference organised by the Northern Ireland Office attended by over 200 representatives of key agencies in the criminal justice field, statutory and non-statutory. **We recommend that human rights issues should become a permanent and integral part of training programmes for all those working in criminal justice agencies, the legal professions and the relevant parts of the voluntary sector.**
- 3.26** During our consultation process and in visits to other jurisdictions we heard a strong case for a shared set of guiding principles or aims for the criminal justice system as a whole. Their publication would serve an important role in allowing the public to judge the system against agreed standards. It is also a mechanism by which those working in criminal justice, in a variety of different services and agencies, can relate to the overall aims towards which they are working and through which those services and agencies can operate in a coherent, co-operative fashion.
- 3.27** We carefully considered the arguments for including the basic principles of the criminal justice system in legislation. While we strongly endorse the view that the principles and aims expressed should be followed and realised, we do not think that this is best achieved through incorporating them in legislation. Nor do we believe that such legislation would add significant value. Instead we suggest reliance on the human rights framework, which is rapidly increasing in importance and influence, together with enhanced systems of openness and accountability, a theme running through this report.
- 3.28** While we generally endorse the guiding principles and values identified in our consultation paper, we do not think that such lists provide the necessary clear direction for the criminal justice system. Nor do they communicate to the public in a succinct fashion what the criminal justice system is about. Rather we believe that a statement of aims for the criminal justice system as a whole should be clear, concise, understandable, and in a form which allows the development of measurable indicators. In this context, **we endorse the Criminal Justice Board<sup>18</sup> aims for 1999/2000 as a good model for the criminal justice system-wide set of aims:**

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18 The Criminal Justice Board is an inter-agency strategic body consisting of the directors and chief officers of the main statutory agencies involved in delivering criminal justice.

**Aim A**

To dispense justice fairly and efficiently and to promote confidence in the criminal justice system

- (i) Provide fair and just criminal processes and outcomes.
- (ii) Improve service delivery by enhancing levels of effectiveness, efficiency and co-operation within the criminal justice system.
- (iii) Make the criminal justice system as open, inclusive and accessible as possible and enhance and promote public confidence in the administration of justice.

**Aim B**

To contribute to the reduction of crime and the fear of crime

- (i) Work co-operatively to help reduce crime.
- (ii) Reduce numbers of persons re-offending and frequency of re-offending for persistent offenders.
- (iii) Reduce levels of fear of crime.

**3.29** This set of aims encapsulates those identified by the talks participants (paragraph 1.2 above) and is consistent with the guiding principles and values identified in our consultation document. Such broad aims should stand the test of time and indeed should not be the subject of frequent alteration if progress towards them is to be measured over a meaningful period. However, it is important that the criminal justice system is dynamic and able to adapt to changing circumstances and public opinion. **We recommend that the aims of the criminal justice system be published, together with a criminal justice plan outlining measures to be taken in support of them and appropriate performance indicators.** The plan could cover a three year timeframe but be subject to annual review. It would be the product of consultation between the criminal justice agencies and should take account of views from the community, which might be secured through such mechanisms as the Community Safety and Policing Partnerships (Chapter 11), relevant Assembly committees and elected representatives. **An annual report on progress in implementing the plan should also be published.**

**3.30** It is not our wish to see system-wide principles and plans replacing or interfering with the mission statements, ethos and strategic and business plans of individual agencies, all of which we regard as important in themselves. However, it is clear to us that in areas such as tackling delay and acting against particular types of crime, more can be achieved through a co-ordinated approach than if elements of the criminal justice system act in isolation from each other. It follows that the development of the criminal justice plan should be timed in such a way that the planning mechanisms of the individual agencies can take account of it. Particular attention would have to be paid to its relationship with arrangements for developing policing plans, which are also likely to involve an extensive consultative process. Policing is an integral part of the criminal justice system for these purposes.

## EQUITY MONITORING

**3.31** A core value and objective of the criminal justice system is that it should have the confidence of the community it serves. Another is that it should treat people fairly and equitably regardless of their background. It is in this context that we consider the role of equity monitoring, both in terms of employment in the system and of the impact of the criminal justice process on different sections of the community. We note that section 75 of the Northern Ireland Act 1998 places a statutory duty on public authorities to have due regard to the need to promote equality of opportunity:

- (i) between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
- (ii) between men and women generally;
- (iii) between persons with disability and persons without; and
- (iv) between persons with dependants and persons without.

**3.32** From an employment perspective, all criminal justice agencies (but not the judiciary)<sup>19</sup> are subject to the provisions of the Fair Employment Act 1989, which requires them to monitor the religious make-up of their work force and the religion of applicants for jobs and send details to the Equality Commission annually.<sup>20</sup> The Equality Commission publishes a report summarising the returns.

**3.33** We regard such monitoring activity as especially important in the criminal justice context for a number of reasons. At one level, commitment to equality of opportunity must be part of the ethos of criminal justice agencies as employers; and from a merit perspective, it is important to ensure that candidates are being attracted from all sections of the community, including those identified in section 75 of the Northern Ireland Act 1998. However, securing a workforce that is as reflective as possible of the community as a whole should also help enhance confidence in the criminal justice system. From another perspective, monitoring applications for posts in the criminal justice system will provide a useful indicator of whether all sections of the community are sufficiently confident in the system to work in it.

**3.34** We have had access to figures on the religious background and gender of employees in various of the component parts of the criminal justice system. Overall, Catholics are under-represented in the workforce to a significant extent, although there are large variations between the agencies. For example, while at 1 January 1999 the percentage of Catholic prison officer/governor grades was 6.7%, Catholics accounted for 32.9% of the staff of the Department of the Director of Public Prosecutions and 36.2% of those in the Compensation

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19 We look at equity monitoring in relation to the judiciary in Chapter 6.

20 The Northern Ireland Act 1998 transferred the functions of the Fair Employment Commission to the Equality Commission.

Agency.<sup>21</sup> From the perspective of gender, women are generally well represented in the “non-operational” parts of the criminal justice system, although we understand that this does not apply to the higher managerial positions.

**3.35** The attainment of a workforce that is, at all levels, and in its constituent agencies, broadly reflective of the community in Northern Ireland, by religious background, gender and other categories identified in section 75 of the Northern Ireland Act 1998, is an objective for the criminal justice system which we strongly endorse. It will take time to get there and we do not recommend compromising the merit principle in order to achieve this objective. However, **we recommend that, whatever machinery is devised for administering criminal justice matters after devolution, it should have as a primary task the development of a concerted and proactive strategy for securing a “reflective” workforce in all parts of the system.** The creation of a single Department of Justice (Chapter 15) would be conducive to such an approach. Effective equity monitoring of the workforce and of job applicants will of course be central to the strategy.

**3.36** We turn now to the issue of monitoring with a view to recording any potential differential treatment of people who pass through the criminal justice process or are affected by it. The Secretary of State for Northern Ireland has power under Article 56 of the Criminal Justice (Northern Ireland) Order 1996 to publish information to help people in the criminal justice system avoid discrimination on any improper ground. However, data is not yet collected in a way that would allow such monitoring across the system. We believe that this is an important area in the light of the overall values, aims and objectives of the criminal justice system. During our consultation process it was suggested to us variously that Catholics were likely to receive less favourable treatment than Protestants and that the less well off were likely to be treated unfairly in comparison to the affluent. Focus group research which we commissioned identified within the Nationalist community a lack of faith in the criminal justice system as a consequence of the long held beliefs about what they felt to be discrimination, lack of accountability and bias in favour of the Unionist population.<sup>22</sup> The research also noted that an important element in discussion of class was its perceived influence on how people were treated within the criminal justice system. Some women described the experience of being in court as being in an unsympathetic environment.

**3.37** We acknowledge that collecting data on the impact of the criminal justice system and process on different categories of people is a major exercise, especially in relation to community background. Given the information systems that are currently in place, it will not be possible for comprehensive information to be collated for some time. In certain cases there may be practical difficulties or human rights objections to the collection of information; for example it would not be appropriate for an individual to be asked his or her community background,

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21 It should be borne in mind that in each of these categories a percentage are not classified as either Catholic or Protestant – that figure is as high as 15.1% amongst prison officers and governors.

22 Dunn, Morgan and Dawson, Research Report 12.

although there are proxies for making such classifications. Also this must not interfere with, or have the appearance of interfering with, the essential independence of the judiciary, the prosecution service or other parts of the system where independence of decision making is of importance. However this form of monitoring is necessary if equality and equity issues are to be addressed. Not only does it assist the system in assessing whether it is operating equitably, but, where differential treatment is identified, it enables agencies to research the reasons for such difference of treatment and, where appropriate, take action accordingly.

**3.38** We recognise the difficulties and the scale of the task. However, **we recommend that the Criminal Justice Board and its research sub-committee be tasked with developing and implementing a strategy for equity monitoring the criminal justice system, as it affects categories of people, in particular by community background, gender, ethnic origin, sexual orientation and disability, whilst ensuring that this is done in a way that does not compromise judicial independence.** Different approaches may be needed for these categories. Information technology will be central to this, in particular to enable cases to be tracked through the system.

**3.39** The question arises of publication of the results of equity monitoring of the criminal justice system, whether in relation to employment or more generally. We heard a variety of opinions on this, especially so far as information on community background was concerned. Some argued for transparency on the basis that such information should be made available provided that it was not disaggregated to such an extent that the background of individuals might be identifiable. The key argument against was that the risk that information could be used selectively to create a distorted picture and, therefore, that it could be damaging to confidence.

**3.40** It is our view that it is generally desirable that data from equity monitoring, in all its forms, should be gathered and made publicly available, subject to the need to ensure that a particular individual's community background is not revealed or cannot be deduced.<sup>23</sup> Transparency in the public availability of information of this sort is a confidence booster in itself. Regular publication of data is necessary to demonstrate that problems have been identified and action is being taken, and on occasion to dispel inaccurate and damaging assumptions. Certainly part of the information strategy has to be to avoid misinterpretation of statistics, but we do not believe that the manipulation of statistics carries anything like the risk that is associated with ignorance of the true position.

**3.41** We note that a report has been produced on gender in the Northern Ireland criminal justice system under Article 56 of the Criminal Justice (Northern Ireland) Order 1996.<sup>24</sup> A range of

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23 Handling and disclosure of monitoring information is governed by the Fair Employment (Monitoring) Regulations (Northern Ireland) 1989 and the Fair Employment (Monitoring) (Amendment) Regulations (Northern Ireland) 1991 which make it an offence, subject to narrowly defined exceptions, to disclose, without an individual's consent, information provided for monitoring purposes from which an individual's community background would be revealed or deduced.

24 *Gender in the Northern Ireland Criminal Justice system.* (1997) Northern Ireland Office: HMSO.

publications has been produced in England and Wales under similar powers.<sup>25</sup> **We recommend that the outcome of equity monitoring should be published on a regular basis, to the maximum extent possible without risking the identification of the community background of individuals.**

## **ETHICS, CONFLICT OF INTEREST AND MEMBERSHIP OF EXCLUSIVE OR SECRET OATH BOUND ORGANISATIONS**

**3.42** During the course of our consultations, while it did not feature as one of the strongest issues, concerns were raised with us about membership of various organisations, including the Loyal Orders, the Ancient Order of Hibernians and Freemasons. Some were worried that if judges or prosecutors in particular belonged to such groups, there could at the very least be a perception that it might affect decision making in individual cases. Others felt that it was inappropriate for an employee of any criminal justice agency to be associated with such organisations. There was, however, another view that precautions to deal with possible conflict of interest in individual cases should be sufficient to address the problem, without putting restrictions on or monitoring membership of the organisations.

**3.43** This is a difficult area. We are conscious of the recommendation of the Independent Commission on Policing that all police officers should be obliged to register their associations; and we are aware of the view of the Northern Ireland Affairs Committee on the matter.<sup>26</sup> We do not think that other criminal justice agencies are entirely analogous to the police, with their very direct relationship with the public, but we have an unease about those employed in the criminal justice system being members of organisations such as those described at paragraph 3.42 above. However, we are conscious that freedom of expression (Article 10 ECHR) and freedom of association (Article 11 ECHR) are fundamental human rights. We also reflect that the *Basic Principles on the Role of Lawyers* note the right of lawyers to freedom of expression and association and that the *Basic Principles on the Independence of the Judiciary* state:

“In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and

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25 Publications under Section 95 of the Criminal Justice Act 1991 include: *Race and the Criminal Justice System 1992, 1994, 1995, 1997 and 1998*; *Gender and the Criminal Justice System, 1992*; *Costs of the Criminal Justice System, 1992*; *Briefing Paper for the Ethnic Minorities Advisory Committee at the Judicial Studies Board 1997*; *Does the Criminal Justice System treat men and women differently?* Research findings No 10 1994; *The Sentencing of Women*, No 58 1997.

26 The Northern Ireland Affairs Committee, in its July 1998 Report on “*the Composition, Recruitment and Training of the RUC*” concluded that membership of organisations such as Loyal Orders, the Ancient Order of Hibernians or other exclusive groups who generally prohibit membership on religious grounds was incompatible with membership of public organisations, especially the RUC.

assembly, provided, however, that in exercising such rights judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the independence and impartiality of the judiciary.”<sup>27</sup>

**3.44** We take into account that we are looking ahead to a period when we hope that membership of these organisations, and expressions of cultural identity associated with them, will not arouse the concerns that might have been the case in the past. We do not recommend that membership of exclusive or oath bound organisations should be regarded as incompatible with employment in or holding office within those parts of the criminal justice system that are the concern of our review. We have thought about the idea of registers of membership. Such a device would enable information to be made public about the extent of membership within various agencies, and could be used in order to allocate work so as to avoid any possible conflict of interest. Care would have to be taken to ensure the confidentiality of any register. Registers of membership of specified exclusive organisations could be considered further by the Government, but we are not satisfied that the benefits of such an approach would be sufficient to justify the exercise, with all the practical and definitional issues that would be involved.

**3.45** Particular issues arise over the membership of these organisations on the part of people exercising judicial or quasi-judicial functions. The issue of perception of bias contrary to Article 6(1) of the ECHR when judges are Freemasons arises in *Salaman v UK*, a case currently before the European Court of Human Rights.<sup>28</sup> We believe that these matters are best dealt with through self-regulation in the context of existing policies on ensuring the actuality and appearance of impartiality and addressing conflict of interest. **As part of our strategy for developing transparency and accountability mechanisms, we recommend the publication of statements of ethics for each of the criminal justice agencies covering all those employed or holding office in the criminal justice system.** In some cases such a statement might be incorporated in other published documents.

**3.46** When conflict of interest might be at issue in decision making, with the judiciary and prosecution for example, a statement of ethics would reflect existing practice by making clear that it was the responsibility of the individual concerned to ensure that this did not arise, where necessary by declining to take particular cases. A statement of ethics would of course include other matters appropriate to the circumstances of the particular agency or group. The recent decision of the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties and another and related appeals*<sup>29</sup> gives important guidance on conflict of interest in a judicial context.

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27 *Basic Principles on the Independence of the Judiciary*, Article 8.

28 *Salaman v United Kingdom* (App. No. 43505/98).

29 *The Times*, 19 November 1999.

**3.47** We can of course envisage circumstances where membership of a particular organisation would be incompatible with employment in the criminal justice system. **If an organisation were, by its policy or its actions, clearly committed to acting contrary to the law or the interests of the criminal justice system, then it would be for the criminal justice agencies to make clear that their employees were not permitted to belong to such an organisation.**

## DEFENCE SAFEGUARDS AND THE LEGAL PROFESSION

**3.48** Many of the values and human rights norms that underpin the criminal justice system are concerned with safeguards for defendants and the protection of their rights. For such rights and safeguards to be deployed effectively, defendants need to have access to a competent legal profession.

**3.49** Article 5 of the *European Convention on Human Rights* refers specifically to the right of persons arrested to be informed promptly in a language which is understood of the reasons for their arrest and of any charge against them, the right to be brought promptly before a judge and the right to be entitled to trial within a reasonable period of time or to release pending trial. Article 6 refers to the right of everyone charged with a criminal offence to be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. The Article goes on to guarantee everyone charged with a criminal offence to be presumed innocent until proved guilty according to law. It lays down a number of “minimum rights”, which include the right to be informed promptly in language which is understood of the nature and cause of the accusation, the right to have adequate time and facilities for the preparation of a defence, the right to defend oneself in person or through legal assistance of one’s own choosing, the right to free legal assistance if one has not sufficient means to pay for it, the right to examine and cross-examine witnesses and the right to have the free assistance of an interpreter in court.

**3.50** We also endorse a number of specific rights which are provided in the *International Covenant on Civil and Political Rights* (ICCPR) and other international instruments, including the right of all persons deprived of their liberty to be treated with humanity and with the respect for the inherent dignity of the human person,<sup>30</sup> to have access to doctors,<sup>31</sup> to be visited by and to correspond with members of their family and to be given adequate opportunity to communicate with the outside world.<sup>32</sup>

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30 Article 10(1) of the ICCPR.

31 Human Rights Committee General Comment 20, paragraph 11.

32 Principle 19 of the *Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment* (Body of Principles).

- 3.51** We want to emphasise that one of the most important defence safeguards is for persons to have access to a lawyer throughout the criminal process. The assistance of a lawyer is a primary means of ensuring the protection of the human rights of people accused of criminal offences.<sup>33</sup> Lawyers play a vital role in ensuring a defendant's right to a fair trial as they have a duty to put their client's case before the court, whatever the nature of the crime with which he or she is charged. It is vital that there is public understanding of this role and that there is no confusion between the client and the lawyer. Later in this chapter we outline a strategy for making the public better informed about the criminal justice system. This must include education on the role of the defence lawyer.
- 3.52** Lawyers also play an important role in protecting their clients in custody. We endorse principle 1 of the *United Nations Basic Principles on the Role of Lawyers* that all persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings. We also endorse principle 5 of the Basic Principles that every person who is arrested, detained or charged must be informed of their right to have the assistance of legal counsel.
- 3.53** Principle 16 of the Basic Principles also provides that governments shall ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference. In his report on his mission to the United Kingdom in 1998, the Special Rapporteur on the Independence of Judges and Lawyers, Mr Param Cumaraswamy, expressed particular concern about the fact that lawyers in Northern Ireland who had represented those accused of terrorist offences had been subjected to intimidation, harassment or improper interference and had been identified with their clients or with their clients' causes. The Special Rapporteur welcomed the Northern Ireland Law Society's decision to establish a complaints procedure to enable solicitors to complain to the Society about any agency within either the criminal or civil justice system which had allegedly impugned or threatened their independence, professionalism and integrity. **We agree with the Special Rapporteur on the Independence of Judges and Lawyers that government has a responsibility to provide the machinery for an effective and independent investigation of all threats made against lawyers and note the role of the Police Ombudsman if such allegations relate to the actions of police officers. Further, we endorse his recommendation that training seminars should be organised to enable police officers and members of other criminal justice agencies to appreciate the important role that defence lawyers play in the administration of justice and the nature of their relationship with their clients.**
- 3.54** It is crucial to the health of the criminal justice system that there should be effective legal professions. We note this passage from the 1970 report of the Committee on the Supreme Court of Judicature of Northern Ireland:

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33 See Amnesty International, *Fair Trials Manual* (1998), page 103.

“The administration of justice and the maintenance of the rule of law depend on the quality and strength of the legal profession more than any other single factor. The best laws and the best procedures must fail to produce the best results if those who practise the law are less learned and competent or less willing and able to bear their professional responsibilities than they should be.”<sup>34</sup>

**3.55** Under current arrangements, unique to Northern Ireland, the Department of Further and Higher Education, Training and Employment funds a number of bursaries for those who have completed undergraduate law degrees and who wish to continue their study to become barristers or solicitors. The situation was last reviewed by the Committee on Professional Legal Education in Northern Ireland,<sup>35</sup> which reported in 1985 under the chairmanship of Professor P M Bromley. The report noted that “there is a strong public interest in securing the most suitable training of members of the legal profession which should extend to providing financial support for those in training... we believe it necessary to ensure that students, qualified to do so, should have the opportunity to enter the profession irrespective of their financial position”.<sup>36</sup> This is of particular importance in ensuring that the legal profession as a career is accessible to people from all parts of the community, based on merit. We heard that the bursary scheme had been effective in helping maintain the quality of the legal profession in Northern Ireland and ensuring that entry to it was not determined by wealth. **We recommend the continuation of bursaries to ensure that entry to the legal profession is open to people of talent from all sections of the community, regardless of means.**

**3.56** The *UN Basic Principles on the Role of Lawyers* state the need for government, professional associations of lawyers and educational institutions to ensure that lawyers have appropriate education and training and are made aware of the ideals and ethical duties of the lawyer and human rights and fundamental freedoms recognised by national and international law.<sup>37</sup> We have discussed above the impact of the Human Rights Act 1998 and some of the preparations that have been made by the Government and judiciary. **We recommend that lawyers should receive appropriate training in human rights principles before starting to practise.**

**3.57** As we were finalising our report two barristers sought leave for a judicial review of the form of the declaration required on appointment as a Queen’s Counsel. We do not address this issue in our report, and note that the matter is now being considered by the court. Nor do we address other aspects of the internal structures and organisation of the legal profession, which we believe go beyond our remit.

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34 *Report of the Committee on the Supreme Court of Judicature of Northern Ireland* (1970).

35 *Report of the Committee on Professional Legal Education in Northern Ireland* (1985).

36 *Report of the Committee on Professional Legal Education in Northern Ireland* (1985) paragraph 7.7.

37 *Basic Principles on the Role of Lawyers*, Article 9.

## LEGAL AID

- 3.58** Accessibility to justice regardless of ability to pay is an important principle and if the right to legal assistance is to be effective, it must be provided free to those who do not have sufficient means to pay for it. We note that the Government published a consultation paper on arrangements for the administration of legal aid in Northern Ireland on 14 June 1999.<sup>38</sup> Consultation finished on 29 October 1999 and the Government is considering its response. As noted in the consultation document, the provision of publicly funded criminal legal services is a necessary function of a free and democratic society governed under the rule of law and is a means of ensuring fairness and confidence in the system. Article 3(3)(c) of the *European Convention on Human Rights* recognises the right of free legal aid provided it is in the interests of justice for it to be granted.
- 3.59** One of the principles of legal aid is that suspects and defendants can state their case on an equal footing with the prosecution. The European Court has developed this principle to require that the defence have equal access to material information and expert assistance before and at the trial. In particular it has been established that the defendant must be able to secure the attendance and examination of experts on his or her behalf under the same conditions as apply to experts against him or her.<sup>39</sup> This means that legal aid provision must enable the defence to draw upon experts of equal standing to those called for the prosecution.
- 3.60** It is important that there should be adequate availability of expert witnesses, such as forensic psychiatrists or fingerprint experts, both for the prosecution and the defence. We have not heard evidence of any difficulties in the availability of such witnesses in Northern Ireland. However, **we suggest that there would be some benefit in the compilation by the Law Society of a list of experts in particular fields that could be drawn on by the defence.**

## THE RIGHT OF SILENCE

- 3.61** A number of individuals and groups raised with us particular aspects of current criminal procedure and practice which in their view did not protect the interests of defendants sufficiently. Some of these, such as the arrangements for disclosure of evidence to the defence and the length of time defendants are having to wait in custody before trial, are dealt with later in our report.<sup>40</sup> One area that we deal with here is the law on the right of silence. Under the Criminal Evidence (NI) Order 1988 a court or jury is able to draw an adverse inference from a suspect's failure to answer police questions in certain circumstances and

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38 *Public Benefit and the Public Purse: Legal Aid Reform in Northern Ireland*, a consultation paper issued by the Northern Ireland Court Service, 1999: HMSO, Chapter 12.

39 *Bonisch v Austria* (1985) Series A No 92.

40 See Chapter 15 on the organisation and structure of the criminal justice system.

from a failure to testify at trial.<sup>41</sup> A number of groups have raised doubts about the legislation on human rights grounds. There was a more specific concern over the impact of the cautions given by police officers about the consequences of remaining silent upon vulnerable suspects such as children and people with a learning disability.

### 3.62

Although the European Convention does not explicitly guarantee the right of silence, Article 14(3)(g) of the ICCPR states that in the determination of any criminal charge against a person, everyone shall be entitled to a guarantee not to be compelled to testify against himself or herself or to confess guilt. This fundamental right has been considered to be inherent in Article 6 of the European Convention even though it is not expressly set out there. In *John Murray v United Kingdom*, the European Court of Human Rights stated that the right to remain silent under police questioning and the privilege against self-incrimination were generally recognised international standards which lay at the heart of the notion of a fair procedure under Article 6.<sup>42</sup> The Court held that the right of silence was not absolute and that a court could draw inferences from an accused's failure to provide an explanation for facts that clearly called for an explanation. However, certain safeguards had to be in place before this could be done and the Court put particular emphasis on the weight of the evidence against the accused, the discretion vested in the judge as to whether to draw inferences or not and the availability of reasons for drawing them. The Court held on the facts that there was no violation of Article 6 in this case by reason of the application of the law on permitting the drawing of inferences from silence. The Court, however, found that the drawing of inferences from an accused's silence in the first 48 hours of detention during police questioning, when the accused was denied access to legal advice, was a violation of Article 6. We note that there are other applications currently before the Court from Northern Ireland and other parts of the United Kingdom raising this same issue, and that it will be necessary for the Government to monitor the outcome of these cases and, if necessary, take remedial action.

### 3.63

A recent survey of the use made of the 1988 Order suggests that although the courts have considerable latitude to draw whatever inferences appear proper from an accused's silence, the Order has been used much more often to strengthen an already strong prosecution case than to fill any large evidential gaps.<sup>43</sup> The Government has taken administrative steps to prevent the drawing of inferences from silence when a suspect is questioned in the police station while denied access to legal advice. It has also prepared the legislation necessary to amend the 1988 Order to this effect and is preparing for the consultation process required to amend the Code of Practice governing police questioning issued under the Police and Criminal Evidence (NI) Order 1989 (PACE). However, given the concerns raised with us,

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41 Articles 3-6 of the Criminal Evidence (Northern Ireland) Order 1988.

42 [1996] 22 EHRR 29.

43 Jackson, Wolfe and Quinn, *Legislating Against Silence: The Northern Ireland Experience* (2000) forthcoming.

and in particular worries about the lack of understanding which vulnerable people can have of the cautions which are issued to them, **we recommend research into the impact of PACE at the stage of police questioning.**

**3.64** In the interests of a healthy criminal justice system which enjoys the support of the whole community it is essential that the rights of both defendants and victims are upheld. We deal with issues relating to victims in greater detail in Chapter 13.

## **PUBLIC UNDERSTANDING AND ACCOUNTABILITY**

**3.65** A very clear message from our consultation process was the need for more effort to be made on the part of those working within the criminal justice system to explain their work to those outside. Securing a clear understanding on the part of the community about the way in which criminal justice operates and is structured is an essential component of a strategy of enhancing public confidence in the system and is an important contribution to transparency and accountability. Throughout our consultation process and in the research we commissioned we found that a lack of knowledge of the system proved a barrier to the necessary public confidence in and interaction with the system. We hope that our consultation process and this report will help in this respect by improving awareness of key aspects of the system.

**3.66** We believe that each criminal justice agency has a responsibility to explain its activities to the public in an accessible manner. In principle, accountability must lie not just to government,<sup>44</sup> but to the public and individuals affected by the criminal justice system as well. A variety of creative means, such as the internet and schools programmes, can be used, taking account of the target audience in order for information to be widely disseminated. Government has an overarching responsibility for promoting the dissemination of information about criminal justice and its operation. This would be a function of any newly created Department of Justice.

**3.67** **We recommend a public information and education strategy for the criminal justice system. This might include the following features, some of which are already in place:**

- **The production and distribution of guides to various aspects of criminal justice, targeting specific groups such as witnesses, victims, children, minority groups and defendants.**
- **The prominent display of mission statements for each criminal justice agency.**
- **The publication of statements of principles showing how the system as a whole will address specific issues, such as the treatment of victims, racial discrimination or cross-agency working.**
- **The publication by all agencies of codes of practice in accessible language.**

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<sup>44</sup> See Chapter 17 for a discussion of accountability through political structures, complaints and inspection.

- The publication by all agencies of annual reports, which include objectives, indicators and an account of performance.
- The publication of statistical and research material in accessible form.
- Consideration of innovative methods for increasing public understanding such as open days at courts for schools, colleges and the public,<sup>45</sup> and the creation of videos explaining aspects of the criminal justice system.
- The inclusion of a criminal justice module in the school civics curriculum.

**3.68** In relation to this last point, the teaching pack *Law in Our Lives*,<sup>46</sup> supported by Queen's University, the Law Society and the Bar Council, has been distributed to all schools in Northern Ireland. However, criminal justice does not have a place in the curriculum. We note the report of the Citizenship Taskforce in England, which recommended that 5% of curriculum time should be devoted to education for citizenship.<sup>47</sup> In Northern Ireland a pilot project has been established by the University of Ulster (with the support of the Northern Ireland Council for the Curriculum, Examinations and Assessment, the Citizenship Foundation and Nuffield) to develop this area of the curriculum. We understand that, as part of the current review of the Northern Ireland curriculum, the Northern Ireland Council for the Curriculum, Examinations and Assessment plan to issue proposals in April 2000 for consultation on specific provisions for education in democratic citizenship. **The need for awareness of criminal justice issues should be considered as part of the current review of the Northern Ireland curriculum.**

**3.69** We believe that mechanisms of the sort outlined above will enhance the accountability of the criminal justice system to the public. Also, the publication of relevant data, including codes of practice, statements of principles, standards and performance indicators, will help provide benchmarks against which the success of the system can be measured and against which its component parts can be inspected. Recommendations on inspection arrangements are made in Chapter 15.

**3.70** Another important aspect of accountability is the existence of satisfactory complaints mechanisms. We deal with this in ensuing chapters relating to specific agencies. However, we wish here to make the general point that **all parts of the criminal justice system should be covered by complaints mechanisms that are well publicised, easily accessible and understood, administered with due sensitivity and expedition and which, where appropriate, have an independent element. The workings of the complaints mechanisms should receive coverage in annual reports and, in those parts of the system subject to inspection, be inspected.**

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45 See Chapter 8 on the courts.

46 *Law in Our Lives* (1993), Northern Ireland Curriculum Council.

47 *Final Report of the Advisory Group on Citizenship*, QCA 22 September 1998.