

**Submission to the Committee of Ministers from the Committee on the  
Administration of Justice (CAJ) in relation to the supervision of the cases  
concerning the action of the security forces in Northern Ireland**

*Jordan v the United Kingdom, judgment final on 4 August 2001*  
*Kelly and Ors v the United Kingdom, judgment final on 4 August 2001*  
*McKerr v the United Kingdom, judgment final on 4 August 2001*  
*Shanaghan v the United Kingdom, judgment final on 4 August 2001*  
*McShane v the United Kingdom, judgment final on 28 August 2002*  
*Finucane v the United Kingdom, judgment final on 1 October 2003*

*and*

*Hemsworth v UK, judgment final on 16 October 2013*  
*McCaughey & Others v UK, judgment final on 16 October 2013*

**April 2020**

## Introduction

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights (FIDH). Its membership is drawn from across the community.

This Rule 9 communication is for consideration at the 1377th meeting (June 2020) (DH) of the Ministers' Deputies. CAJ has regularly made (most recently in January 2020) Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' concerning the actions of the security forces in the 1980s and 1990s in Northern Ireland.

These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement (SHA).

The Committee last issued an Interim Resolution in these cases in 2009 and we strongly urge it to pass a further resolution in consideration of the unimplemented individual and general measures which we outline below. **We also call upon the Committee to keep under active consideration the invocation of its power to issue infringement proceedings against the UK for its delay in fully implementing the judgments in these cases under Article 46(4) of the European Convention of Human Rights (ECHR).** Of particular note is the UK's continued wilful failure to hold an Article 2 ECHR compliant public inquiry into the murder of Pat Finucane and the unilateral abandonment in March 2020 of commitments to implement the Stormont House Agreement.

## Committee of Ministers Decisions of September 2019

The Committee of Ministers last examined the execution of these cases during its 1355th meeting, (23-25 September 2019) and adopted Decisions as follows: (in summary):<sup>1</sup>

As regards *individual measures*

- Recalled profound regret that the investigations and related litigation in the cases of **McKerr, Shanaghan, Jordan, Kelly and Others and McCaughey and Others** have still not been completed;
- Recalled the decision (2015) to resume consideration of reopening the **Finucane** case once the domestic litigation had concluded; noted the UK Supreme Court ruling of 27 February 2019 finding an Article 2 compliant investigation had not taken place and called on the UK to submit concrete information by 1 December 2019 as to how the UK will conduct an Article 2 compliant investigation, and to consider the request for reopening consideration at the March 2020 meeting.

As regards *general measures*

- **Historical Investigations Unit (HIU):** reiterated 'serious concerns' about the delay in the establishment of the HIU and other legacy institutions from the 2014 Stormont House Agreement (SHA) underlining it is imperative that the

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<sup>1</sup> [CM/Del/Dec\(2019\)1340/H46-30](#)

authorities ensure ECHR compliant investigations can be conducted given the passage of time;

- **HIU/ SHA legislation:** noted the publication of a summary of responses to the [2018 SHA] consultation, and a commitment from the UK to implement the SHA, noting that this must be consistent with international legal obligations. Regretting however there was no clear timetable for implementation, and calling for the legislation to be introduced in a manner which will secure ECHR Article 2 compliance;
- **Legacy Inquests funding:** strongly encouraged the authorities to ensure that the funding announced by the NI Department of Justice in February 2019 was rapidly released to ensure the establishment of the Legacy Inquests Unit, to ensure legacy inquests can be concluded without further delay;
- **Legacy inquests disclosure:** sought further information on measures taken to ensure in particular the Police and Ministry of Defence comply with their legal obligations to disclose information to the coroners service;
- **Police Ombudsman:** recalled the ongoing role of the Ombudsman pending the establishment of the HIU and encouraged 'all necessary measures' including providing resources to ensure the Ombudsman can undertake ECHR-compliant legacy investigations, and sought details on the review by the Criminal Justice Inspection Northern Ireland (CJI) into delayed police disclosure to the Ombudsman, affecting cases including Shanaghan.

### **Committee of Ministers' 1369th meeting, 3-5 March 2020 (DH)**

- Following the December 2019 UK General Election the incoming government legislative programme ("Queen's Speech") committed to the "prompt implementation of the Stormont House Agreement". On 9 January 2020, the British and Irish Governments published their *New Decade, New Approach* (NDNA) agreement to restore the Northern Ireland government. The NDNA committed to the introduction of the SHA legislation into the UK Parliament 'within 100 days' (i.e. by April 2020).
- The Committee of Ministers had sought concrete information from the UK by 1 December 2019 as to how the UK intended to conduct an Article 2 compliant investigation into Finucane in light of the findings of UK Supreme Court. The CM regretted the UK had not submitted such information by 1 December 2019 and at the March meeting set a further deadline of 31 March 2020. In this context the Committee of Ministers at its March meeting deferred the planned March 2020 examination of the cases until the June 2020 meeting.<sup>2</sup>

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<sup>2</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016809cc97c](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809cc97c)

## Summary of Developments since last submission (January 2020)

### The Written Ministerial Statement of 18 March 2020 – defaulting on commitment on SHA

- The UK has repeatedly reaffirmed its commitment to implement the Stormont House Agreement to the Committee of Ministers, most recently at the September 2019 meeting. As alluded to above the incoming UK government in its December 2019 legislative programme committed to the “prompt implementation” of the SHA, albeit also in parallel committing to amending the domestic incorporation of the ECHR. On 9 January 2020, the UK-Ireland *New Decade New Approach* deal to restore the NI government committed both to introduction of the SHA legislation into the UK Parliament by April 2020, but also an ‘intensive process’ with the NI parties and Irish government to obtain ‘broad consensus’ on any changes to the legislation.
- This ‘intensive process’ with the NI parties and Irish government however was never commenced by the UK. Instead on the 18 March 2020, the UK, through a Written Ministerial Statement (WMS) to the UK Parliament, signalled the unilateral abandonment of the commitment to implement the Stormont House Agreement.<sup>3</sup>
- The WMS signals the UK will instead adopt an unclear alternative ‘fast track’ information recovery approach that would not involve discharge of the UK’s duties to independently investigate conflict related deaths under the ECHR. The Irish government, the other State Party to the SHA, strenuously objected to the announcement.<sup>4</sup>
- The WMS was intentionally made on the same day as the UK government introduced the *Overseas Operations (Service Personnel and Veterans) Bill* into the UK Parliament.<sup>5</sup> The bill would introduce a qualified presumption against prosecution against members of the British armed forces after a five year period. CAJ shares the grave concerns of other human rights organisations that the bill will facilitate a level of impunity for the UK military for war crimes abroad including torture and extrajudicial killings. The bill would also qualify the incorporation of the ECHR in UK law. The WMS set out that the change as regards the UK position on the SHA was to “ensure equal treatment of Northern Ireland veterans and those who served overseas.” It is clear to CAJ that both sets of changes are driven by a desire to shield the armed forces from scrutiny and accountability and are incompatible with the UK’s human rights obligations.
- On the 31 March 2020, the UK sent a short communication to the Council of Europe stating they would not provide information on the General Measures or Finucane case to the CM for the June meeting in light of the diversion of government resources to deal with the Covid-19 pandemic.<sup>6</sup> Notwithstanding the current gravity of the Covid-19 emergency, it is unclear why the UK has not

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<sup>3</sup> <https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues>

<sup>4</sup> <https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2020/march/statement-by-tanaiste-on-uk-government-legacy-announcement.php>

<sup>5</sup> <https://services.parliament.uk/bills/2019-21/overseasoperationservicepersonnelandveterans.html>

<sup>6</sup> <https://rm.coe.int/09000016809e17d1>

updated the CM on its major policy change as regards to the SHA, given the limited resources this would require.

### **Legacy Inquests**

- A review of outstanding legacy inquests has been carried out by the Presiding Coroner and a Legacy Inquest Unit was to be operational by April 2020, following the belated release of funding. However, we understand this has been delayed due to Covid-19. Clarification is needed on what steps are being taken by the Ministry of Defence (MoD), Northern Ireland Office (NIO), and Police Service of Northern Ireland (PSNI) to promptly discharge their disclosure obligations to these inquests given the excessive delays experienced to date.

### **Police Ombudsman**

- In April 2020, Criminal Justice Inspection NI published their review into delayed disclosure by the PSNI to the Police Ombudsman in cases including Shanaghan. The Chief Inspector of Criminal Justice in Northern Ireland, Jacqui Durkin, called on the PSNI and Ombudsman to strengthen trust and repair damage to public confidence, following the PSNI's failure to disclose sensitive information linked to a historic case in late 2018 to the Ombudsman.<sup>7</sup>
- The Police Ombudsman has advised that all History Directorate investigations, which includes Shanaghan, have been temporarily suspended due to severe staffing issues arising from Covid-19.

### **Individual Measures**

- *Finucane* - the UK failed to provide concrete information by 1 December 2019 and again by 31 March 2020 on how it intends to conduct an Article 2-compliant investigation following the Supreme Court findings. Geraldine Finucane has been forced to litigate once again and was granted leave to judicially review the unlawful delay in implementing the Supreme Court judgment.
- *Kelly & Ors* - civil proceedings initiated by the next of kin are ongoing. A review of the inquest proceedings was heard on 31 January 2020 though no hearing date has been scheduled.
- *Shanaghan* - the next of kin continue to wait for the provision of the Police Ombudsman's report and have still not been provided with the Historical Enquiries Team (HET) report.
- *McKerr* - in September 2019 the inquest was reviewed by the Presiding Coroner Mrs Justice Keegan as part of a wider review of all inquests. A High Court judge is to be appointed to case manage this series of cases towards hearing.
- *Jordan* - there has been no decision provided on whether the Public Prosecution Service will prosecute two police witnesses in the inquest for perjury.
- *McCaughey* - an application was lodged with the European Court of Human Rights (ECtHR) on 14 June 2018 and a decision on admissibility is still awaited.

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<sup>7</sup> <http://www.cjini.org/TheInspections/Inspection-Reports/2020/January-March/Disclosure>

## **The UK abandonment of the Stormont House Agreement legislation**

The Stormont House Agreement (SHA) between the British and Irish governments and the five Northern Ireland political parties in the NI Executive was published in December 2014.

The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, including a new 'Historical Investigations Unit (HIU)' to conduct Article 2 compliant investigations into conflict-related deaths, an Independent Commission for Information Retrieval (ICIR), and an Oral History Archive. The SHA also provided for measures to maintain and make legacy inquests Article 2 compliant. The significant delays in the UK moving to progress the SHA legislation are referenced in our previous submissions. From summer 2018 until October 2018, draft legislation was finally subject to public consultation. In July 2019, the UK issued a document summarising the views of consultees.<sup>8</sup> This document did not set out the UK's response to the consultation. In the September 2019, a meeting of the Committee of Ministers reiterated 'serious concerns' about the delay in the establishment of the HIU and other legacy institutions under the SHA. The Ministers Deputies:

....strongly encouraged the authorities to act on this commitment, to provide an estimated timetable for the next steps and to ensure that the legislation introduced to Parliament will guarantee the Historical Investigations Unit's independence in both law and practice and enable it to conduct effective investigations which are sufficiently accessible to the victims' families in full compliance with Article 2 of the Convention;<sup>9</sup>

A new UK Conservative government entered office following the UK General Election on the 12 December 2019. On 19 December 2020, the new government set out its legislative programme - this committed to 'prompt implementation' of the SHA. In a section on "The Armed Forces", a subsection entitled "Historical allegations/Vexatious litigation" provides the following commitment:

To deal with NI legacy issues we will seek the prompt implementation of the Stormont House Agreement in order to provide both reconciliation for victims and greater certainty for military veterans.

However the next paragraph, in contradiction, goes on to state:

In parallel with the Stormont House Agreement institutions we will tackle the inappropriate application of the Human Rights Act to issues that occurred before it came into force.<sup>10</sup>

On 9 January 2020, the British and Irish governments published New Decade, New Approach (NDNA) following negotiations with the NI political parties as an agreed basis for which the power sharing government in Northern Ireland would be restored. Consequently, the devolved Northern Ireland Assembly and Executive have now been re-established.

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<sup>8</sup> Northern Ireland Office '[ADDRESSING THE LEGACY OF NORTHERN IRELAND'S PAST: Analysis of the consultation](#)' responses, July 2019

<sup>9</sup> CM/Del/Dec(2019)1340/H46-30, paragraph 6.

<sup>10</sup> [THE QUEEN'S SPEECH 2019, Background Briefing Notes, Prime Ministers Office 19 December 2019](#), page 128

The NDNA document contained the following SHA commitment:

As part of the Government's wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly.<sup>11</sup>

There is further analysis of these developments and potential threats to the SHA in our previous (January 2020) Rule 9 submission.<sup>12</sup>

### **UK Written Ministerial Statement 18 March 2020**

The UK set out a changed approach to dealing with NI legacy in a Written Ministerial Statement by the NI Secretary of State on 18 March 2020. The WMS coincided with the introduction into the UK Parliament of the Overseas Operations (Service Personnel and Veterans) Bill, which will limit the ability to prosecute British soldiers for war crimes abroad (including torture and extrajudicial killings). Noting the introduction of that Bill, the statement made clear its intent was "to ensure equal treatment of Northern Ireland veterans and those who served overseas".<sup>13</sup>

**The WMS signals an explicit departure from the UK commitment to implement the SHA, with the suggestion that the 2014 SHA was an important milestone that "did not stop the debate continuing".** It suggests that the proposals have evolved in alignment with the "principles of the Stormont House Agreement", rather than the Agreement itself.

While the new UK legacy proposals are lacking in detail, it commits the UK to shifting "the focus of our approach to the past" to information recovery, whilst stating there will be a route to justice in a small number of cases, with a suggestion this will assist reconciliation and deliver for victims.

It is now proposed "one independent body" will oversee and manage the information recovery and investigative aspects of the legacy system, providing "every family" with a Family Report for each death. The WMS is essentially silent on the fate of the Historical Investigations Unit, the Oral History Archive, and the Independent Commission on Information Retrieval, which were proposed under the Stormont House Agreement (including the international treaty which gives rise to the latter).<sup>14</sup> It is ambiguous and unclear as to whether these institutions are to be subsumed into the new unnamed 'one independent body', or if this body is to 'oversee and manage' the existing SHA mechanisms.

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<sup>11</sup> Northern Ireland Office '[New Decade New Approach](#)' 9 January 2020, UK Commitments Annex A, paragraph 16.

<sup>12</sup> <https://caj.org.uk/2020/03/10/submission-on-mckerr-cases-jan-20/>

<sup>13</sup> Secretary of State for Northern Ireland, Addressing Northern Ireland Legacy Issues: Written statement - HLWS163 (18 March 2020) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/>

<sup>14</sup> Agreement between the Government of Ireland and the Government of the United Kingdom of Great Britain and Northern Ireland establishing the Independent Commission on Information Retrieval (signed 15 October 2015, not yet in force) [https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/FATRdoclaid210116\\_100026.pdf](https://ptfs-oireachtas.s3.amazonaws.com/DriveH/AWData/Library3/FATRdoclaid210116_100026.pdf)

The WMS includes the line ‘The Government is committed to the rule of law but...’. The desire to ‘swiftly implement’ an information recovery mechanism appears to justify interference with the rule of law. At the same time, the WMS commits the UK to the conduct of quick police investigations in select cases where there is “new compelling” evidence and a “realistic prospect of a prosecution”. There is no mention of grave or serious security force misconduct being investigated, as is presently the case. Once such ‘quick’ investigations are completed, there would be a statutory bar on the same case ever being investigated again.

Cases which are reviewed and where sufficient ‘compelling new evidence’ to require investigation and potentially referral to the Public Prosecution Service is not identified will be “closed and no further investigations or prosecutions would be possible”. This is intended to give all participants “the confidence and certainty” to enable persons with information about deaths to engage with the information recovery process.<sup>15</sup>

**Whilst vague and contradictory, the proposals appear to run contrary to the investigative duty (under the EHCR and other international obligations) in the vast majority of cases.**

The WMS makes a distinction between cases in which “investigations ... are necessary” and others. Only cases in which there is “a realistic prospect of a prosecution as a result of new compelling evidence” would proceed to a “full police investigation and if necessary, prosecution”. Cases that do not meet this threshold would be closed and a ‘family report’ provided to the victim’s loved ones - it is difficult to see how this could meet the Article 2 requirements for an effective investigation. Furthermore, under this criteria, most cases would not merit full investigations given the challenges in meeting the ‘realistic prospect’ threshold.

Key benchmarks in assessing whether such a process could be Article 2 compliant would be (a) the independence of those involved in the review/investigation; (b) its effectiveness: whether those involved had access to all of the relevant information in order to make an informed decision regarding which route to take; (c) how access to all information could be achieved without full police powers being exercised in the information gathering phase; and (d) a sufficient element of public scrutiny of the investigation or its results.

We are concerned this would not be an Article 2 compliant process. With too high a threshold for the use of police powers to investigate, and an obligation to close cases forever once the process is completed, the process would not adequately expose human rights violations, and thus would not facilitate guarantees of non-recurrence, justice, or truth recovery.

The prospect of no investigations into grave and serious security force misconduct, in a context where evidence of official criminal wrongdoing will likely have been destroyed therefore precluding investigation, also falls short of EHCR duties.

The language suggests the ‘new evidence’ trigger will be set higher than the threshold required by the EHCR. In addition, the subsequent blanket ‘closed cases’ procedure

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<sup>15</sup> Secretary of State for Northern Ireland, Addressing Northern Ireland Legacy Issues: Written statement - HLWS163 (18 March 2020) <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/>



prevents investigation when there is subsequently new evidence, however ‘compelling’ it may be.

With regards to the duty for a ‘prompt’ investigation, the WMS bemoans the fact that “many families have waited too long to find out what happened to their loved ones” and suggests the “cycle of investigations” has undermined attempts to come to terms with the past. It fails, however, to acknowledge the UK responsibility for these delays, including as a result of failure to implement the SHA agreed in 2014.

Furthermore, the relationship between ‘investigation’ and ‘information recovery’ was already addressed in the proposed structure of the HIU. The HIU provides for a two-stage ‘review’ and full ‘investigation’ where there are evidential leads, but with thresholds tied to the ECHR. However, it was always envisaged that the bulk of the work carried out by the HIU would be focused on information recovery. Given the small number of successful prosecutions anticipated, it is acknowledged that the key outcome for the vast majority of victims and survivors would be the family reports. However, the key added value of the HIU was ‘information recovery with teeth’ – an independent investigative mechanism with full police powers and with access to all relevant open and closed source material.

The ICIR was to provide a ‘firewalled’ separate route to information recovery through protected statements. It is not clear how institutional independence could be managed in one body. Indeed, given that a small number of prosecutions would be still possible, it is not clear how the information recovery function of the ICIR would be workable if it were merged with the HIU.

It should be noted that the WMS is among a further group of around half a dozen proposals that have emerged since the SHA. Many of these proposals have been drafted, at times explicitly, with a view to shielding the armed forces from scrutiny in Northern Ireland legacy cases. In April 2020 CAJ along academic colleagues in Queen’s University Belfast published a critical analysis of these proposals examining their compatibility with the ECHR, SHA, and Belfast/Good Friday Agreement, a copy of which is provided as an appendix to this submission.<sup>16</sup>

***The Ministers’ Deputies may wish to seek information from the UK as regards its unilateral abandonment of the SHA and to seek further detail as to how the UK now intends to implement its ECHR obligations in relation to General Measures resultant from the current group of cases.***

***We also call upon the Committee to keep under active consideration the invocation of its power to issue infringement proceedings against the UK for its delay in fully implementing the judgments in these cases under Article 46(4) of the Convention.***

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<sup>16</sup> <https://caj.org.uk/2020/04/09/prosecutions-imprisonment-and-the-sha/>

## Police Ombudsman

### **The Criminal Justice Inspection Northern Ireland report into a Review of Police Service (PSNI) Disclosure of Information in Historic Cases to the Police Ombudsman<sup>17</sup>**

On 14 February 2019 the former Police Ombudsman for Northern Ireland (PONI) reported publicly that his investigators had identified sensitive material held by the Police Service of Northern Ireland, which had not been made available to the Office of the Police Ombudsman for Northern Ireland (OPONI). The PSNI acknowledged the disclosure failings, apologised to those affected, and said that it had not sought to deliberately withhold the information. On 19 February 2019, the Department of Justice (DoJ) asked the former Chief Inspector of Criminal Justice in Northern Ireland to undertake an independent review of the methods the PSNI use to disclose information in respect of historic cases to the OPONI and that it be given priority within the Inspection Programme.

After the fieldwork for the Review was completed, the PSNI, as part of its review of systems in response to the original failure of disclosure, notified OPONI in October 2019 that it had identified further additional undisclosed material. The OPONI, having reviewed this additional material, has apparently now assured CJI that none of it was significant, required new lines of enquiry or further work, or related to matters already published. At the time, however, this announcement had a particularly negative impact on the confidence of victims in the disclosure process.

There has been long standing criticism of the police handling of disclosure in historic cases, with many victims regarding the delays, over-classification of material, and actual failure to disclose as deliberate attempts to impede historical investigations into possible police malpractice.<sup>18</sup> Two previous reports by CJI had criticised the level of cooperation between the PSNI and OPONI<sup>19</sup> and the ineffectiveness of systems of disclosure in historic cases.<sup>20</sup> In 2014, the Ombudsman served notice on the PSNI that he was to take legal action for its refusal to provide his investigators with information following repeated requests.<sup>21</sup>

The PSNI accept that they have a duty to disclose relevant information to OPONI when investigating deaths in which police officers may be involved under the investigative obligation of Article 2 ECHR, as well as under a variety of domestic legislation.<sup>22</sup> There is

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<sup>17</sup> Available at: <http://www.cjini.org/TheInspections/Inspection-Reports/2020/January-March/Disclosure>

<sup>18</sup> See CAJ's analysis of "The Apparatus of Impunity" <http://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/03/15131009/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf>

<sup>19</sup> The relationship between the Police Service for Northern Ireland and the Office of the Police Ombudsman Northern Ireland. CJI, December 2013 available at <http://www.cjini.org/getattachment/b97d8f4a-295f-42d5-8e63-ecc2199307c8/report.aspx>

<sup>20</sup> Coronial Processes. An inspection of the arrangements in place in the Police Service of Northern Ireland to manage and disclose information in support of the Coronial process in Northern Ireland. CJI, December 2016. <http://www.cjini.org/getattachment/45098860-9917-48bc-93ac-ffec70960e84/report.aspx>

<sup>21</sup> PONI Media Release <https://www.policeombudsman.org/Media-Releases/2014/Police-Ombudsman-takes-legal-action-against-the-PS>

<sup>22</sup> Report to the Northern Ireland Policing Board regarding PSNI Failings in Legacy Disclosure. 21 February 2019. <https://www.psnipolice.uk/news/Latest-News/260219-report-to-the-nipb-regarding-psni-failing-in-legacy-disclosure/>

also a Memorandum of Understanding between OPONI and the Chief Constable PSNI regarding the sharing of 'sensitive material' (MoU).

In her report, the Chief Inspector of CJI made a number of criticisms of the practical systems the PSNI uses to hold and search its material, and also identified a lack of trust between OPONI and the PSNI. Her recommendations relate to remedying the practical problems and propose a review of the MoU between the two organisations.<sup>23</sup> However, the report also deals with a long standing proposal from human rights and victims' groups that OPONI investigators have direct access to the PSNI material. In fact, the former Chief Constable had stated his intention to give appropriately vetted OPONI staff full and unfettered access to the PSNI legacy systems and with that, the OPONI would also take full responsibility for the information it had access to.<sup>24</sup>

The report recognises that there are legal complications in this proposal, and the Chief Inspector suggests in her foreword that "it is important that the PSNI and the OPONI work through these at pace to provide the clarity both would benefit from".<sup>25</sup> However, in the body of the report it is noted that, given the complexity of the current systems for storing and retrieving information, "OPONI staff would not currently be trained, skilled or resourced to competently undertake this task, although these issues could be addressed and work would be needed between the two organisations to agree what would be required. Whilst CJI would be fully supportive of the former Chief Constable's position, the above areas would need to be addressed before this role could be effectively transferred to the OPONI."<sup>26</sup>

This is a matter that must be taken into account if and when a new Historical Investigations Unit is established with the implementation of the Stormont House Agreement; it would be completely unsatisfactory if the new unit had to put up with the problems that OPONI have had over the past years.

In relation to the report itself, it makes clear that the difficulties in the disclosure system are of long standing, but also that the PSNI is taking steps to ameliorate the situation. It would, however, be reasonable to ask why technical matters relating to computer systems, staffing levels, training, and management oversight have been allowed to continue for so long. As the report itself recognises, these matters are vital to the confidence of the public in the investigation of historic matters, but also in policing as a whole.

## Legacy Inquests

In September and October 2019, the Presiding Coroner, Mrs Justice Keegan, held individual preliminary hearings in to all outstanding legacy inquests. There were 41 hearings with the four 'Stalker Sampson' inquests, which includes some of the 'McKerr Group of cases,' being heard as one preliminary hearing. Following consideration of submissions made on the state of readiness of each pending legacy inquest, the

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<sup>23</sup> <http://www.cjini.org/TheInspections/Inspection-Reports/2020/January-March/Disclosure> P10/11

<sup>24</sup> Police Service of Northern Ireland: <https://www.psni.police.uk/news/Latest-News/140219-psni-look-to-give-poni-full-andunfettered-access-to-psnis-legacy-systems/>

<sup>25</sup> <http://www.cjini.org/TheInspections/Inspection-Reports/2020/January-March/Disclosure> P7

<sup>26</sup> Ibid. P35

Presiding Coroner issued a statement<sup>27</sup> in November 2019 setting out how she intended to sequence these legacy inquests as part of a five year plan. A thematic approach will be taken to some inquests given “concerns expressed by the international human rights community that the wider picture might be missed if we focussed solely on a series of individual inquests”<sup>28</sup>. Case Management Protocol disclosure request letters were issued in relation to the first five cases to be heard.

Following these preliminary hearings into legacy inquests, it was anticipated that appropriate structures and processes will be put in place to enable substantive hearings to begin in April 2020, but we understand that this has been delayed due to Covid-19

Inquests that have not been listed for hearing in Year 1 are to be subject to twice-yearly case management reviews (including Loughgall - Kelly & Others, Stalker & Sampson case - McKerr) or periodic administrative review as directed by the Presiding Coroner.

While we welcome the active judicial management of legacy inquests and the work of the Legacy Inquest Unit to progress these inquests to hearing, we seek clarification that the PSNI, MOD, NIO, and other relevant bodies are taking all necessary steps to ensure that they are complying their disclosure obligations in a prompt and effective manner.

***We call upon the Ministers’ Deputies to seek confirmation from the State Party what steps it is taking to ensure that all agencies responsible for providing disclosure to the Coroners’ Courts are complying with this obligation to identify, preserve and disclose potentially relevant material promptly.***

## Individual Measures

### ***Finucane***

Despite the Ministers’ Deputies’ decision in September 2019 calling on the UK authorities to provide concrete information by 1 December 2019 on how they intend to conduct an Article 2 compliant investigation into Mr Finucane’s death following a Supreme Court judgment, the UK has wilfully failed to comply with this request.

Regrettably, once again Geraldine Finucane has been required to litigate in NI courts. On 31 January 2020, she was granted leave to apply for judicial review regarding the delay by the Secretary of State in deciding upon a mechanism fit to comply with Article 2 ECHR.

The court hearing was due to take place after the Easter recess. However, this has been adjourned due to Covid-19. We are concerned to note that the government sought a further 12 week extension of time to provide a replying affidavit setting out its position, citing Covid-19 as the cause, despite it being 14 months since the Supreme Court judgment. The court granted a 6 week extension of time.

The Secretary of State cancelled a meeting with Geraldine Finucane, which was planned for 24 January 2020, on 22 January 2020 due to pressures on his diary. A meeting with

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<sup>27</sup> <https://judiciaryni.uk/sites/judiciary/files/media-files/Presiding%20Coroner%27s%20Statement%20in%20relation%20to%20legacy%20inquests%20-%2020%20Nov%202019.pdf>

<sup>28</sup>Pg 3, Ibid

the Secretary of State took place on 21 February 2020, though Geraldine Finucane advised that no assurance of a public inquiry was provided.<sup>29</sup>

Thirty one years after this murder, there is an urgent need for a fully independent Article 2 public inquiry and we call upon the Ministers' Deputies to re-open examination of this case without further delay.

### ***Shanaghan***

The next of kin still await the Police Ombudsman's report into the murder of Patrick Shanaghan. The family have engaged with the Police Ombudsman's office following the judgment of *Shanaghan v UK in 2001*. Despite repeated assurances, they have never received a completed Article 2 investigation report in any form in relation to this murder.

The Criminal Justice Inspection Northern Ireland (CJI) review<sup>30</sup> into the methods the Police Service of Northern Ireland use to disclose information in respect of historic cases to the Office of the Police Ombudsman for Northern Ireland has delayed disclosure of the report into this death, which was to be made available to the family in early 2019. Publication of the CJI report was delayed from October 2019 until 2 April 2020 due to the identification of further potential issues with the PSNI legacy disclosure processes to the Police Ombudsman.

While assurances have been given that all disclosure has been made this most recent development has further undermined families' confidence in the PSNI's capacity to fully comply with its disclosure obligations.

The Shanaghan family still await the report into the death of Patrick Shanaghan. The Police Ombudsman has advised them that, having reviewed previously undisclosed material from the PSNI, nothing of significance was found that was not already known to its investigation and the completion of their investigation is no longer impacted by this issue. Regrettably, however, the family have been advised that the Police Ombudsman will not be publishing the public statement associated with this investigation until the delivery of the Court of Appeal judgment in the judicial review taken by the Northern Ireland Retired Police Officers' Association. No time frame has been given for this. The Police Ombudsman also advises that all historical directorate investigations, which includes Shanaghan, have been temporarily suspended due to severe staffing issues arising from Covid-19.

The Historical Enquiries Team was disbanded before delivery of its report into Shanaghan's death, given concerns surrounding its independence and effectiveness. The family have requested a copy of the HET report which has not been provided and we ask the Ministers' Deputies to call upon the State to provide this without further delay.

### ***McKerr***

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<sup>29</sup> <https://madden-finucane.com/2020/02/21/bbc-newsline-finucane-family-meeting-with-british-government-sos-friday-21st-february-2020-stormont-belfast/>  
<https://madden-finucane.com/2020/02/21/pat-finucane-family-receive-no-assurance-of-inquiry-from-sos/>

<sup>30</sup> Ibid 17

The first preliminary hearing of these inquests, since the inquests were abandoned in December 1994, was held in the autumn of 2007. This followed the judgment of the House of Lords in March 2007 in *McCaughey v Chief Constable PSNI*, which finally clarified the obligations upon the Chief Constable of the PSNI to comply with section 8 of the Coroners Act (NI) 1959 in relation to disclosure by police to the Coroner of all documentation in writing held by police touching the death of the deceased. There have been many preliminary hearings since 2007, however the postponed hearing scheduled for December 2018 was the first planned preliminary hearing since Weir LJ reviewed all current inquests in January 2016. In September 2019, the cases were reviewed by the Presiding Coroner, Mrs Justice Keegan. On 31 January 2020, she advised that the Lord Chief Justice was allocating a High Court judge in April 2020 to case manage this series of cases towards hearing. However, this has been delayed due to Covid-19. PSNI disclosure is another issue and a further cause for delay is the current stoppage of PSNI Legacy Investigation Branch work.

### ***McCaughey***

On 14 June 2018, an application was lodged with the ECtHR in the name of *Sally Gribben v UK*, taken by the sister of Martin McCaughey deceased. The application number is 28864/18. A decision on admissibility is still awaited.

### ***Jordan***

After delivering his verdict in the Pearse Jordan inquest in November 2016, Mr Justice Horner, sitting as Coroner, referred two police witnesses, Officers M and Q to the Public Prosecution Service to consider whether they should face criminal proceedings for perjury. The referral to PPS of these two officers was made on 5 December 2016. The decision as to whether these officers will be prosecuted is still under consideration.

In November 2019, following an appeal by the PSNI, the Northern Ireland Court of Appeal reduced the award of damages to the Jordan family for delays in progressing the inquest of the death of Pearse Jordan from £7,500 to £5000. The Court of Appeal refused the next of kin permission to appeal and they have applied for legal aid for leave to apply to appeal to the Supreme Court.

We understand that a number of other judicial reviews on delay arising from legacy inquests having been adjourned by the High Court of Northern Ireland pending the decision in Jordan.

### ***Kelly & Others***

Civil Proceedings initiated by the next of kin are ongoing, discovery has been provided, and specific discovery applications have now been made and remain an ongoing issue. At the conclusion of the specific discovery applications, the case will be listed. However it is understood that there are public interest immunity issues, which will require consideration.

The inquest is still outstanding and the Presiding Coroner has indicated that a High Court Judge is to be appointed to this inquest given the complexity of the issues it raises. As such, it requires active case management.

This case has been deemed only one of two cases in which the Coroner is actively managing as a stand-alone case due to its complexity. There was a specific review on 31 January 2020 and the court has ordered that all material disclosed in the civil proceedings is to be provided in the inquest proceedings. A hearing date was set for March 2020 to address the issue of public interest immunity and the concerns raised by this, but due to Covid-19 these proceedings did not take place.