Addressing the Legacy of Northern Ireland's Past:

The Model Bill Team's Response to the NIO Proposals

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Contents

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For further detail on our work see https://www.dealingwiththepastni.com/

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Executive Summary

Over the course of more than twenty years, successive UK governments have failed to put in place a comprehensive set of mechanisms to deal with the legacy of the conflict in Northern Ireland. The Stormont House Agreement (SHA) 2014, completed after lengthy negotiations with the Irish government and the five main local political parties, offered a route to finally deliver on the promises made to victims and to comply with binding international legal obligations.

Despite repeated commitments to introduce the enabling legislation (most recently in January 2020), the current UK government now appears to have unilaterally abandoned the SHA. In July 2021, the government published Command Paper 498 on *Addressing the Legacy of Northern Ireland's Past*. This paper proposes a sweeping and unconditional amnesty which would end all legacy-related 'judicial activity' (i.e., current and future legacy prosecutions, inquests and civil actions) as well as all police and Office of the Police Ombudsman investigations. The paper also suggests the establishment of a new Information Recovery Body. The latter, based on the information provided, would not have sufficient investigative powers to conduct effective investigations into conflict-era deaths as legally required by Article 2 of the European Convention on Human Rights. In addition, the command paper includes various proposals for developing oral history and memorialisation initiatives. In the context of an amnesty and the absence of effective investigations capable of delivering truth, justice and accountability, there is a real risk that the credibility of any such reconciliation-focused work would be irreparably damaged – being viewed as 'soft options' to disguise the broader drive towards impunity.

Background and Content of this Report

Since 2013, we have produced a range of technical briefings and reports designed to inform public debates on dealing with the past in Northern Ireland. In 2020, we produced a critical analysis of the key proposals that had been placed in the public domain up until that point. Each of those proposals was 'benchmarked' for their compatibility with: (a) binding domestic and international human rights obligations; (b) the Stormont House Agreement (SHA); and (c) the Good Friday Agreement (GFA), the cornerstone of the Northern Ireland peace process.[1]

That document was premised on the implementation of the SHA, including its provisions for a 'justice option' (prosecutions for conflict-related offences) as well as the continuance of legacy-related inquests, civil actions and judicial reviews. That document also explored two options, which would have seen any post-conviction sentencing for conflict-related offences reduced from the current two-year maximum under the Northern Ireland (Sentences) Act (1998) to zero.

We have argued repeatedly that the best way to address the legacy of the past in Northern Ireland is to implement the SHA mechanisms in good faith, maximise their independence and

1 Model Bill Team (2020) Prosecutions Imprisonment and the SHA: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland. Available https://www.dealingwiththepastni.com/project-outputs/project-reports/prosecutions-imprisonment-and-the-stormont-house-agreement-a-critical-analysis-of-proposals-on-dealing-with-the-past-in-northern-ireland

appoint good staff to ensure that they deliver on the promises made to victims. That remains our position.

In this report, we benchmark the contents of the government's command paper against binding international and domestic human rights law, the Good Friday Agreement and other international experiences of amnesties to deal with past human rights violations.

Given the dubious veracity of some of the claims made in the command paper, and its misreporting of the government's analysis of its own public consultation on legacy in 2019, we remind officials and ministers of the requirements for honesty in policymaking under the civil service and ministerial codes respectively, including the duty in the former not to 'ignore inconvenient facts or relevant considerations when providing advice or making decision'.

In a similar vein, we also 'fact-check' a number of the assertions and assumptions in the report as well as the ways in which some international experiences are misrepresented - particularly the South African and German experiences.

Chapter 1: An Amnesty for State and Non-State Actors

This chapter notes that while the Northern Ireland peace process has made use of a series of tailored forms of leniency (e.g. early release of prisoners, decommissioning, the work of the 'Disappeared Commission'), there is no precedent for the type of sweeping unconditional amnesty envisaged in the command paper.

It further notes that none of the participants during the SHA negotiations argued in favour of such an amnesty and that - in the government's 2019 analysis of its own public consultation - a clear majority of the 17,000 submissions were opposed to such an amnesty. It is notable that some members of the security forces also expressed their opposition to such an initiative, arguing that blanket immunity would create the impression of moral equivalence between security forces and terrorists.

While the government paper uses the term 'statute of limitations', this is a misnomer. Statutes of limitations are used to set an explicit time limit after which criminal investigations and prosecutions are not permitted, usually to allow time for cases to be investigated. Moreover, in many jurisdictions statutes of limitations are not permitted for serious offences. In immediately ceasing all current and future investigations and court hearings on legacy-related matters, including those that have not previously had the opportunity to be effectively investigated, what is being proposed by the UK government is irrefutably a broad, unconditional amnesty.

The chapter considers the status of the proposed amnesty under international law. In exploring the limited European Court of Human Rights (ECtHR) jurisprudence on amnesties, the chapter notes the standards required in order to be considered legitimate. These are that it should be *necessary* (e.g., to prevent a return to conflict) and that it should not interfere with the right to truth and the right to reparations. Given that the Northern Ireland conflict ended in 1998 for most intents and purposes and the fact that this amnesty appears specifically designed to close down effective investigations as guaranteed by Article 2 and Article 3 of the European

Convention on Human Rights (ECHR) as well as civil remedies, it is highly unlikely to meet these standards and to thus be deemed lawful.

The chapter also compares the proposed UK amnesty with 289 others from around the world based on a database created by Professor Mallinder covering the period 1990-2016.[2] It notes that only 25% of those amnesties included state actors, of which only 5% were applied to state actors only. It also noted that the clear majority (63%) of amnesties were conditional (e.g. requiring participation in truth recovery or other processes). Only 6% of the 289 sought to exclude civil remedies and none have been identified that sought to restrict coronial inquests.

This chapter also illustrates how the South African Truth and Reconciliation (SATRC) case study is misrepresented as a model of information recovery that has contributed to reconciliation. The chapter notes that it is really quite remarkable that the command paper fails to mention that: (a) prosecutions remained available in the South African context; (b) (unlike the UK government proposal) obtaining an amnesty was conditional on offenders fully disclosing their political offences to the Truth and Reconciliation Commission; (c) of the 7,116 amnesty applications received, the SATRC only granted 1,167 full amnesties and 139 partial amnesties; (d) victims had a right to be present at the amnesty hearings which were presided over by a judge, to make oral and written statements and to be legally represented at such hearings; and (e) amnesty applications concerning the most serious of human rights abuses were televised so that the public could hear the 'full disclosure' of the applicant's involvement in those violations.

This chapter also compares the proposed UK amnesty with that introduced by the former Chilean dictator General Augusto Pinochet, generally regard as one of the most egregious amnesties since World War II. The proposed UK amnesty is significantly more expansive in the impunity that it would create: (a) the Pinochet amnesty excluded certain offences (e.g. sexual violence, the abduction of minors), the UK amnesty does not exclude any offences; (b) the Pinochet amnesty applied only to the first five years (the most violent period) of the 17 year dictatorship, the UK amnesty has no temporal limits and may extend beyond the Good Friday Agreement; (c) the Pinochet amnesty formally excluded cases already before the courts, the UK amnesty would stop all ongoing and future legal proceedings; and (d) the Pinochet amnesty formally only applied to criminal cases, the UK amnesty would include criminal and civil cases, as well as coronial inquests and investigative processes.

Finally, this chapter notes that the Pinochet amnesty was enacted by an illegitimate military dictatorship that was subject to strong international condemnation. In contrast, the UK is a leading democratic state with a permanent seat on the UN Security Council and membership of the G7 intergovernmental forum. The enactment of a broad, unconditional amnesty by the UK would send a dangerous signal to other states that they too can legislate for impunity and evade their international legal obligations. It would also be highly damaging to the UK's international standing.

2 Louise Mallinder, Amnesties, Conflict and Peace Agreement Database (2019) https://www.peaceagreements.org/amnesties/

Chapter 2: A New Information Recovery Body

This chapter analyses the new 'Information Recovery Body' (IRB) proposed in the command paper. In order to provide a comparative context for the proposed scope of the IRB, it first sets out the functions of the Historical Investigations Unit (HIU) and the Independent Commission for Information Retrieval (ICIR) as agreed in the SHA as well as the role of the existing legacy mechanisms. It then examines the proposed powers, ECHR compliance, anticipated 'products' and case remit of the IRB.

With regard to the proposed work of the HIU and ICIR, this chapter notes that the key 'product' from these mechanisms was information recovery provided to families via the reports that were to be produced on each individual case and given to victims and survivors. The key point with regard to the HIU in particular was that it was intended to provide 'information recovery with teeth', in effect using full police investigative powers including search, arrest, questioning as well as disclosure powers and access to intelligence – all of which were to be deployed in providing a report to family members on their case.

This chapter also notes that the command paper would abolish the 'package of measures' which the UK government had established in response to a number of adverse findings by the ECtHR that the UK was in breach of its obligations under Article 2 of the ECHR to provide an effective investigation into certain conflict-related deaths from 2001 onwards.[3] That package of measures includes: investigations by the Office of the Police Ombudsman of Northern Ireland (OPONI) into allegations of police malfeasance; coronial inquests; police investigations (previously conducted by the Historical Enquiries Team, now the PSNI Legacy Investigation Branch); the ability of the PSNI to 'call in' another external force to investigate controversial cases (e.g. Operation Kenova); public inquiries; the Public Prosecution Service (PPS); and civil litigation.

This chapter notes that, taken together, the proposed HIU as outlined in the SHA and the existing package of legacy mechanisms have the legal capacity to deliver 'truth recovery with teeth' rather than having to rely only upon information volunteered to them.

This chapter also expresses concern that the command paper deliberately misrepresents both the existing 'package of measures' and the HIU as 'focused on criminal justice outcomes'. Rather, as noted by the UN Special Rapporteur on Transitional Justice, Pablo de Greiff, in his report on legacy matters in Northern Ireland in 2016, they 'resemble more truth-seeking initiatives than justice measures'. As he also noted, the 'distinctions between truth and justice initiatives are more often than not overdrawn'. This chapter argues that that is precisely what occurs in this command paper. In a context where there has long been universal acceptance that only a small number of cases will ever result in a prosecution, the paper ignores and misrepresents the primary information recovery focus of much of the work of the SHA mechanisms and the 'package of measures' in order to justify and rationalise the proposed IRB which is much less likely to deliver information for families.

3 At the time of the GFA, the existing justice and investigative mechanisms were not capable of delivering ECHR Article 2 compliant investigations. In a series of Strasbourg cases (McKerr group) procedural violations of Article 2 ECHR were found leading to the UK agreeing with the Council of Europe Committee of Ministers to adopt a remedial 'package of measures' reflected in the above mechanisms.

This chapter then critically reviews the proposed powers of the IRB. While details are scant, the command paper expressly sets out that in fact the IRB would be limited to the following two sets of powers only:

- Powers to seek disclosure of information from UK state agencies.
- An ability to 'take statements' from individuals with information.[4]

With regard to the powers to seek disclosure, the command paper sets out that the IRB would follow the disclosure powers model in the draft SHA legislation. It would hence (in a context whereby there has been regular obstruction by such agencies in providing disclosure in legacy cases) replicate deficiencies in the draft SHA legislation on HIU disclosure powers. In particular, there would be no sanction for non-compliance with a request for disclosure from the IRB.

With regard to the power to 'take statements', this is a permissive power. Statements can be taken from persons who wish to volunteer information. It appears that the investigative function of the IRB would be limited to reviewing relevant papers.

Therefore, based on the information provided in the command paper, it appears that the only real powers the IRB would have at its disposal are powers to seek disclosure of documents from UK state agencies. This chapter details how such powers would fall significantly short of the investigative powers of the PSNI and Police Ombudsman as well as the powers of discovery in judicial proceedings such as prosecutions, inquests and civil actions.

The chapter also details how the IRB would create new criminal offences for either IRB staff or indeed those who provide information to the IRB who make unauthorised disclosures to families or others. Given that the UK is also currently considering amending the Official Secrets Act in a way to make it easier to prosecute journalists and others who report on leaked materials, the chapter makes the point that the only people who may end up being prosecuted for conflict-era matters may be either state official whistle-blowers or journalists who report on their disclosures.

The chapter also notes that in the draft 2018 legislation to establish the SHA, the draft clauses with regard to the ICIR included specific provisions that 'the ICIR will not disclose the identities of people providing information'. The command paper contains no mention of the above safeguards for information providers and indeed suggests that it could be possible to arrange (at the initiation of the family, and with the consent of all parties) face-to-face victim-perpetrator mediation sessions. Little detail is provided as to how this might work in practice, or indeed, how the State's Article 2 ECHR responsibilities (including to prevent potential violence from being inflicted against any participant in such a process) would be upheld.

This chapter expresses scepticism concerning the command paper's unsupported assumption that the proposed unconditional amnesty would lead to greater cooperation with the IRB and details a number of reasons why we consider that confidence misplaced.

4 Command paper, paragraph 15.

This chapter also examines the compatibility of the proposed IRB with the ECHR. It outlines that, in addition to a lack of detail concerning the required *independence* from government, the procedural obligations for an Article 2 compliant investigation also require that it should be effective. It notes that the ECtHR has determined that in order for an investigation to be effective, it must be 'capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances … and to the identification and punishment of those responsible. This is an obligation not of result but of means'. The chapter also includes a summary of previous work carried out but the Model Bill Team as what would be required for Article 2 compliant effective investigations drawn from ECtHR case-law including to: (a) establish as many as possible of the relevant facts; (b) identify, or facilitate the identification of, the perpetrators; (c) establish whether any relevant action or omission by a public authority was lawful; (d) establish whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority (e) obtain and preserve evidence; (f) identify material which is or may be relevant to motive (including, in particular, racial, religious or other sectarian motive); and (g) identify acts (including omissions; and including decisions taken by previous investigators or other public authorities) that may have prevented the death from being investigated or a perpetrator being identified or charged.

Given the limitations of the IRB's powers of disclosure and the voluntary nature of witness statements, the chapter concludes that the IRB is not going to be capable of delivering effective investigations that are compatible with the legal obligations under the ECHR.

This chapter notes that the command paper is silent on how the IRB would engage in case prioritisation, particularly in an initial stage in the run up to the IRB commencing when there could be a significant volume of requests. It is not clear if, for example, deaths would take priority over serious injuries, or whether the caseload would be usually worked through chronologically (as was proposed for the HIU), or whether a 'first come first served' approach would be taken.

With regard to the 'end products' of the IRB, there is no commitment in the command paper to IRB reports containing any 'findings'. Crucial to the credibility of the OPONI has been the power of that office to come to a 'finding' on controversial matters such as collusion. That power has been upheld following a number of judicial challenges but there is no commitment in the command paper for a similar power for the IRB.

The chapter also contains a number of further 'fact checks'. The assertion that the command paper proposals would lead to 'an end to all troubles prosecutions' is questioned given that whistle-blowers and journalists who report on any of their exposures may be subject to prosecution.

The assertion that the proposed mechanisms in the SHA and the current package of measures is focused on criminal justice outcomes is also described as false and misleading, given that the primary focus for the vast majority of existing and proposed investigative and judicial activities is and would be information recovery – albeit 'with teeth'.

Finally, we question the assertion that the IRB has powers to 'access information and find out what happened' given the limitations on its powers and the serious 'buy-in' challenges it is likely to face.

Chapter 3: Oral History and Memorialisation

The command paper moves oral history and memorialisation front and centre of a new apparently victim-centred and reconciliation-oriented approach to addressing the legacy of Northern Ireland's past. This chapter begins with a brief overview of the oral history proposals developed under the terms of the Stormont House Agreement. It then critiques the British government's new proposals.

We note that in the NIO's analysis of its 2018 consultation on the Draft Northern Ireland (Stormont House Agreement) Bill, the majority of the 17,000 submissions it received were 'broadly supportive' of the OHA, although many raised concerns about the independence of the proposed archive. As an alternative to the OHA being placed within the Public Records Office of Northern Ireland (PRONI), the Model Bill team had proposed a 'hub and spokes' model, stressing the need to work with and through existing oral history groups. This chapter welcomes the fact that the government appears to have changed its viewed on the suitability of confining the OHA to PRONI and is instead now open to the type of model that we put forward. However, it cautions that any attempt to substitute PRONI with an alternative 'state-centric' consortium will not work.

The command paper sets out an ambition for work on oral history and memorialisation 'to be led by a partnership of academics, museums, and other relevant organisations, leveraging existing expertise while ensuring value is added to the good work which is already being done in this sector'. It is suggested that 'in time, such a consortium could serve to unlock other opportunities for collaboration and inclusive debate on other reconciliation, memorialisation, and educational initiatives that have previously proved challenging to progress'.

Given the scale and sensitivity of what is being proposed, and the need to secure genuine and comprehensive community buy-in, this chapter stresses the importance of independent and transparent oversight of the proposed initiatives. Rather than tasking one or more Northern Ireland-based archive, museum or third-level institution with responsibility for overseeing this programme of work, we suggest that an 'honest broker' must be engaged to: guarantee independence and ethical governance; comprehensively address the needs of victims and survivors; and provide clear and objective criteria for funding and assessment of applications. We have suggested that one possible solution would be to look to the type of body that regulates publicly funded academic research such as the Arts and Humanities Research Council (AHRC) funds – in accordance with clear and transparent priority themes and assessment criteria.

The command paper further suggests that multidisciplinary academic work, including factual timelines, statistical analysis and themes and patterns reporting could support the oral history work in order to 'build an understanding of history that reflects the complexity of the events of the past, as well as the broader landscape and context in which they took place'. This chapter supports the idea of commencing with an inventory of what has already been done and identifying key themes for development based on a gap analysis but it registers deep scepticism regarding the utility of the proposed timeline of the conflict.

It is notable that the command paper proposes to fold 'vital aspects' of the Implementation and Reconciliation Group agreed under the terms of the Stormont House Agreement into the new proposals on oral history and memorialisation. This includes the prospect of giving 'serious consideration' to 'statements of acknowledgment' by 'the various actors of the Troubles'. This chapter notes that such a process of acknowledgement has significant potential. However, it argues that - as with oral history and memorialisation initiatives more generally - apologies or statements of acknowledgement can only deliver for victims *alongside* truth, justice and accountability, not as an alternative to such measures. In light of the widespread opposition to the government's current proposals, this chapter suggests that it is difficult to envisage any of the key actors coming forward to apologise for anything - or indeed to envisage victims viewing any such apology or acknowledgement with anything other than disdain.

Whilst the command paper's broad ambition of connecting oral history and memorialisation to broader reconciliation is of course perfectly valid in principle, this chapter suggests that the scattergun illustrations that follow and their linkage to dealing with the past are tenuous and vague. It is not at all clear, for example, how the proposal to establish a cross-border university in the North West connects to post-conflict oral history. The German case study would also appear to have been chosen at random: it is only partially explained and its relevance to the Northern Ireland context is unclear. The two parliamentary commissions in Germany were heavily criticised for being top-down, politicised, western-centric and elitist - speaking for and on behalf of victims rather than comprehensively capturing the voices and experiences of those who lived under the previous East German regime. Moreover, the command paper fails to mention the key contextual point in the German case, which is the fact that the primary driver for post-reunification transitional justice was the opening of the Stasi (secret police) files and the establishment of an organised process by which citizens could access data previously held by the Stasi relating to themselves.

This chapter also highlights a consistent and unsubstantiated assumption running through the command paper – namely that the type of oral history and memorialisation proposals envisaged can only be achieved through what is described in paragraph 40 as 'an approach that moves away from the pursuit of criminal justice outcomes'. We argue that there is no substantive evidence to support the assertion that a move away from Article 2 compliant investigations would facilitate oral history and memorialisation initiatives. On the contrary, the command paper's proposals for an amnesty for all Troubles-related offences have been met with widespread domestic and international opposition, including from many traditionally strong advocates of the 'value-added' of story-telling and memorialisation work.

The chapter concludes by arguing that any new oral history-related proposals must be coordinated to complement the other legacy mechanisms. Putting it simply, any improvement in the government's approach to post-conflict oral history would only become relevant in a context wherein Article 2 compliant truth recovery is delivered through appropriately empowered institutions and where the rights of families to go to court remain unaffected. Any attempt to promote oral history while simultaneously closing down effective routes to truth and accountability will not work. Moreover, it could do untold damage to the credibility of oral history and its capacity to help finally address the legacy of the past.

Chapter 4: Inquests and Civil Cases

The command paper asserts that civil and coronial processes relating to the Troubles, like criminal processes, 'involve an approach that can create obstacles to achieving wider reconciliation'. In order to counter the claims contained in the command paper about the 'time and effort' required by legacy investigative and judicial processes, this chapter explores the notion of the 'slow waltz'.

The 'slow waltz' is a term that the former Police Ombudsman discovered marked on some police intelligence files when examining the police investigation of the Loughinisland murders. It refers to a deliberate strategy to delay access to such materials, including to other investigating officers. As this chapter explains, the term is now more widely used to describe a broader strategy of delay, obfuscation and prevarication by state agencies. For example, High Court legacy cases are challenged by defendants such as the PSNI, MOD and NIO as a default position, followed by contested discovery applications and requests for Closed Material Procedures where material is deemed sensitive. In other words, this chapter argues that it is rather rich for the government to point to 'delay' as a key motivator for ending victims access to the courts on legacy matters when a key reason for such delays in many court actions is the delaying tactics of state agencies themselves.

This chapter also argues that, in light of the deep organisational culture within many state agencies that is resistant to disclosure of conflict-related materials - even when those seeking the information have full police powers or judicial powers of discovery - it is simply not credible to suggest that the proposed IRB (without clearly defined legal powers) would achieve voluntary information retrieval from the relevant state agencies.

The chapter outlines how the key purpose of a coronial inquest is information recovery – 'to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances' and that it is for the coroner to decide 'how widely the inquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it.' It explains the evolution of the package of measures with regard to inquests including reference to improvements in the coronial system and the Lord Chief Justice's 'Five-Year Plan' to deal with outstanding inquests.

In order to offer a practical illustration of the utility of inquests as a route to truth recovery the chapter summarises the background and findings to the Ballymurphy Massacre inquest completed in July 2021. After 100 days of evidence Mrs Justice Keegan (now Lady Chief Justice) delivered her verdicts and findings in which she held that all 10 victims killed between 9-11 August 1971 were entirely innocent and that the force used by the British Army was not justified and in breach of Article 2 of the ECHR. It is also noted that due to the family-centred nature of the inquest proceedings and the fact that the next of kin received substantial disclosure, lawyers for the families had the opportunity to test the veracity of evidence through examination of the witnesses. This process provided the next of kin with information, answers and results previously denied to them as a well as exonerating the victims and finding that the killings were unjustified.

With regard to civil cases, again the chapter points out the power and utility of the power of discovery as a route to information recovery in such processes where defendants such as the PSNI, MOD and NIO have been directed to provide substantial discovery of relevant

documentation to the legal representatives of families and survivors. In order to illustrate the point, the chapter points to the case study of the civil action taken by lawyers with regard to the Ormeau Road Bookmaker murders in 1992. Some of the more sensitive information concerning the allegations of collusion in that case was held in camera, in Closed Material Procedures. Despite that limitation, as a result of discovery in the open court proceedings, lawyers representing the families were able to access significantly more materials than had been made available to the OPONI investigation into the same case - despite the latter having full police powers of search, seizure, right to access intelligence information and so forth.

The command paper does not explicitly include judicial review (JR) in its proposal to 'end judicial activity in relation to Troubles related conduct'. However, a table referring 'Civil Cases, JRs and Inquests' is included in paragraph 38 of the command paper. In a context where the current government has included controversial plans to limit judicial review in legislation, this chapter notes that judicial review has played a key role for families and survivors in challenging public authorities on a range of legacy-related matters including failure to: conduct article 2 compliant investigations; fund legacy inquests; and conduct a proper investigation into whether the Omagh Bomb could have been prevented.

The chapter notes that any attempt to interfere with the right of victims and survivors to judicially review legacy-related decisions by public authorities will be fiercely resisted. Moreover, any such a move would be in breach of the Good Friday Agreement (GFA), both in terms of its commitment to the incorporation of the ECHR into domestic law and in terms of the devolution of powers in Northern Ireland.

Conclusion

The report concludes by arguing that due to the lack of public confidence in the current UK government's position on legacy, trust will only built by the UK accepting:

(a) that the rule of law must be central to the legacy process and as a result the government's ability to introduce an amnesty will inevitably be curtailed and will also require genuine Article 2 and Article 3 ECHR compliant investigations.

(b) that the Stormont House Agreement remains the basis for maximising political consensus on legacy.

(c) that protecting the Good Friday Agreement in all its parts remains the cornerstone of the Northern Ireland peace process.

It argues that there are ways of lawfully reducing conflict-related sentences from two years to zero while still upholding the rule of law, implementing almost all of the SHA (other than 'jail time') and acting in a way that is compatible with the Good Friday Agreement. Finally the report respectfully urges the UK government to return to such a lawful, honourable and politically workable position.

Introduction

In January 2020, the United Kingdom government once again committed to introducing legislation to implement the legacy aspects of the 2014 Stormont House Agreement (SHA). The pledge to initiate this process within 100 days was part of the *New Decade, New Approach* agreement to re-establish the Northern Ireland Executive.[5] However, in March 2020, the UK government unilaterally signalled its intent to renege on that commitment. In a Written Ministerial Statement to the House of Commons, the Secretary of State for Northern Ireland, Brandon Lewis MP, said that the British government proposed to address legacy by ending what he referred to as 'the cycle of reinvestigations into the Troubles in Northern Ireland … and ensuring equal treatment of Northern Ireland veterans and those who served overseas'.[6]

At a meeting of the British-Irish Intergovernmental Conference in June 2021, the two governments agreed to the following joint communiqué on legacy:

> *The Conference discussed the urgent need to make progress on a collective basis on Northern Ireland legacy issues in a way that supports information recovery and reconciliation, complies fully with international human rights obligations, and that responds to the needs of victims and survivors, and society as a whole. The UK and Irish Governments agreed there was a need for a process of intensive engagement in the period immediately ahead with the Northern Ireland parties and others on legacy issues. It was agreed that this would need to build on previous discussions around the implementation of the Stormont House Agreement and to take account of the views of all participants including new proposals which the UK Government intended to bring forward. They agreed that the interests and perspectives of victims and survivors, and all those most directly affected by the Troubles, had to be central to the discussions.*[7]

The two governments had therefore agreed to engagement that built on negotiations regarding implementation of the SHA, but that also 'took account' of views of others including proposals from the UK.

In July 2021, following selective leaks to the *Daily Telegraph* and *Times* newspapers, the British government issued a command paper entitled *Addressing the Legacy of Northern Ireland's Past*.[8] That command paper includes provisions to introduce a broad, unconditional amnesty (the paper misleadingly uses the term 'statute of limitations'), which would (if enacted) have the effect of closing down all 'Troubles'-related prosecutions as well as other 'judicial activities' including current and future civil actions and inquests. It also outlines plans to introduce a new 'Information Recovery Body', which would allow individuals and family members to 'seek and

5 Northern Ireland Office (2020) *New Decade, New Approach* p. 48.

6 UK Parliament, Written Ministerial Statement: Legacy Issues, *Hansard*, 8 March 2020 Vol 673, 168. https://hansard.parliament.uk/commons/2020-03-18/debates/20031826000006/LegacyIssues

7 BIIGC 24th June 2021 'Joint communiqué of the British-Irish Intergovernmental Conference.' Available; https://www.gov.uk/government/news/joint-communique-of-the-british-irish-intergovernmental-conference

8 Northern Ireland Office, *Addressing Northern Ireland Legacy Issues* (18 March 2020) https://www.gov.uk/government/news/addressing-northern-ireland-legacy-issues

receive information about Troubles-related deaths and injuries' as well as a 'major oral history initiative' designed to 'further mutual understanding and reconciliation'.

While the UK proposals have been welcomed by some former British Army veterans, they have been rejected by the vast majority of victims' organisations, human rights NGOs, all of the main political parties in Northern Ireland, the Northern Ireland Assembly, the Irish government, and the former Obama-era US Under-Secretary of State.[9] In their own assessment the UN experts on both Transitional Justice and Extrajudicial, Summary or Arbitrary Executions have already expressed:

> *...grave concern that the plan outlined in July's statement forecloses the pursuit of justice and accountability for the serious human rights violations committed during the troubles and thwarts victims' rights to truth and to an effective remedy for the harm suffered, placing the United Kingdom in flagrant violation of its international obligations.*[10]

Further to the Joint Communiqué, the two governments embarked on a series of discussions with the local political parties and invited a number of civil society and other stakeholders to present their views in the summer of 2021. This report represents our views both on the command paper's contents and on the best 'way forward' in terms of dealing with the legacy of the conflict in Northern Ireland.

Background and Purpose of this Report

Since 2013, we have produced a range of technical briefings and reports designed to inform public debates on dealing with the past in Northern Ireland. Members of the team have also given written and oral evidence to the US Congress (2015), the Westminster Defence Select Committee (2017), the Dáil Joint Oireachtas Committee on the Implementation of the Good Friday Agreement (2018) and the Westminster Northern Ireland Affairs Committee (2019).[11]

In 2020, we produced a critical analysis of all proposals that had been placed in the public domain until that point on how to address the legacy of the conflict (including the March 2020 Written Ministerial Statement). Each of those proposals was 'benchmarked' for their compatibility with: (a) binding domestic and international human rights obligations, in particular Article 2 of the European Convention on Human Rights (ECHR) regarding the right to an effective investigation into conflict-related deaths; (b) the Stormont House Agreement (SHA); and (c) the Good Friday Agreement (GFA), the cornerstone of the Northern Ireland peace process. That document was premised on the implementation of the SHA, including its

9 See further 'Troubles: Political Reactions to PM's Plan to End Prosecutions' *BBC News* (14 July 2021) https://www.bbc.co.uk/news/uk-northern-ireland-57837622;; Michael Posner 'Why the UK Government Still Needs to Acknowledge its Role in Northern Ireland's Troubles', *Forbes* (4 August 2021) https://www.forbes.com/sites/michaelposner/?sh=3d5c85d85149

10 United Nations Office of the High Commissioner on Human Rights 'UK: UN Experts Voice Concern at Proposed Blanket Impunity to Address Legacy of The Troubles in Northern Ireland' (10 August 2021) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E

11 This has included drafting a 'Model Bill' as to what the implementation of the SHA legacy mechanisms might look like once enacted into legislation and a 105pp response to the NIO's public consultation on the government's draft legacy bill. See further https://www.dealingwiththepastni.com/

provisions for a 'justice option' (prosecutions for conflict-related offences) as well as the continuance of legacy-related inquests, civil actions and judicial reviews. However, in recognition of the government's commitments with regard to veterans, that document also explored two options that would have seen any post-prosecution conviction for conflict-related offences reduced from the current two-year maximum under the Northern Ireland (Sentences Act) (1998) to zero.[12]

We have argued previously that the best way to address the legacy of the past in Northern Ireland is to implement the SHA mechanisms in good faith, maximise their independence and appoint good staff to ensure that they deliver on the promises made to victims.[13] That remains our position.

We are resolutely opposed to the government's explicit intention (as expressed in the recent command paper) to move away from the Stormont House Agreement and as such there appeared little point in systematically benchmarking these recent proposals against the SHA.

In this report, we have opted instead to benchmark the contents of the government's command paper against binding international and domestic human rights law as well as the Good Friday Agreement. We also endeavour to highlight obvious gaps and omissions. It notable, for example, that there is not a single reference to gender equality issues in the command paper.[14] In addition, as is detailed further below, there is a clear obligation under the Civil Service and Ministerial Codes not to make untrue claims in a government command paper. Given the dubious veracity of some of the claims made in the paper to rationalise the proposals therein, we have also opted to 'fact check' a number of these. The veracity or otherwise of some of the claims made in this command paper may be of relevance to any future challenges concerning the legality of the resultant legislation so we considered that it might be useful to have these inaccuracies detailed in one place.

The Gestation of Current UK Government Legacy Policy

On 23 December 2014, the UK and Irish governments published the Stormont House Agreement (SHA). The latter was concluded after a decade and a half of prevarication in the course of which two major reports (from the Consultative Group on the Past and from Richard

12 Model Bill Team (2020) *Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland* https://www.dealingwiththepastni.com/resources/

13 See, for example, Model Bill Team, *Addressing the Legacy of Northern Ireland's Past: Response to the NIO Public Consultation* (QUB Human Rights Centre, 2018)https://www.dealingwiththepastni.com/resources/

14 Our own work has throughout been informed by the principles designed by the Legacy Gender Integration Group to ensure that gender related issues inform the design and implementation of legacy mechanisms. See further 'Legacy Gender Integration Group, Workshops Report: Developing Gender Principles for Dealing with the Legacy of the Past' (2015), https://www.ulster.ac.uk/__data/assets/pdf_file/0018/74070/Legacy-Gender-Integration-Group_Workshops-Report_Developing-Gender-Principles-for-Dealing-with-the-Legacy-of-the-Past_18-11-2015.pdf accessed 30 August 2021.

Haass and Meghan O'Sullivan) were published but not implemented.[15] In addition to retaining legacy inquests, the SHA proposed four interlocking institutions to deal with the past, the key one being the Historical Investigations Unit (HIU). This was described by the Committee of Ministers of the Council of Europe, which oversees implementation of the decisions of the European Court of Human Rights (ECtHR), as a 'key turning point' in the fulfilment of the UK's international law obligations.[16] In a context whereby the UK had yet to implement satisfactory remedies to address the rulings of the ECHR, the UK government repeatedly pointed to the promise to implement the SHA (and in particular to establish the HIU) as the mechanism through which it would finally do so.

Following a further delay of three years, in May 2018, the UK government published a draft Northern Ireland (Stormont House Agreement) Bill, an equality screening document and a connected consultation paper. The equality screening document concluded that a full Equality Impact Assessment should be carried out on the draft Bill. There were over 17,000 written responses to the consultation which ran for 21 weeks from May 2021. In July 2019, the UK government published an analysis of those public responses.[17] As is discussed further below, the command paper fails to mention that, according to the NIO's own analysis of the consultation process, 'there was majority broad support for the institutional framework of the SHA' (p.12) and that a 'clear majority of all respondents' opposed an amnesty or statute of limitations, with many arguing such a move 'could risk progress towards reconciliation'.[18] In January 2020, as part of the agreement to re-establish devolution in Northern Ireland, the UK government promised to implement the SHA mechanisms within 100 days.[19]

However, as noted above, in March 2020 the government appeared to shift its position quite dramatically. In a Written Ministerial Statement, the government misleadingly and disingenuously cited the responses to the public consultation by way of rationale for a new approach to legacy. That change in position was in fact explicitly prompted by the introduction of a Bill to set a presumptive five-year time limit on prosecutions for members of the UK armed forces who have served overseas. Presenting the Written Ministerial Statement (WMS) to the House of Commons, the Secretary of State for Northern Ireland, Brandon Lewis MP, said that the government proposed to address legacy by 'ensuring equal treatment of Northern Ireland veterans and those who served overseas'.[20]

15 Consultative Group on the Past, *Report of the Consultative Group on the Past* (2009), https://cain.ulster.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf; An Agreement Among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past (2013), https://www.northernireland.gov.uk/publications/haass-report-proposed-agreement.

16 The commentary by the Committee at its March 2021 meeting is available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a18992

17 Northern Ireland Office, *Addressing the Legacy of the Northern Ireland's Past: Analysis of the Consultation Responses* (2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814805/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses.pdf

18 Ibid, p.21 – emphasis in the original.

19 Northern Ireland Office (2020) *New Decade, New Approach* p. 48.

20 Hansard House of Commons Written Ministerial Statement, 8th March 2020 Vol 673, 168

The statement went on to claim that 'while the principles underpinning the draft Bill as consulted on in 2018 remain, significant changes will be needed to obtain a broad consensus for the implementation of any legislation'.[21] The WMS did, however state: 'there must always be a route to justice'. In July 2020, in a debate in the House of Lords on the Overseas Operations (Service Personnel and Veterans) Bill, the Minister of State for Defence stated 'a Northern Ireland Bill is coming forth to deal with similar issues; the Northern Ireland Office is currently in the process of preparing it. We expect more information in early course.'[22] In fact, there was little or no information forthcoming.[23]

In July 2021, without any evidence of a meaningful consultation process, the UK government published its command paper on legacy. As noted above, that command paper suggests not only abandoning the mechanisms agreed in the SHA but also including a sweeping statute of limitations (in effect an amnesty) which would also have the effect of closing down prosecutions, civil actions and conflict-related inquests.

To recapitulate the UK government itself delayed the establishment of the SHA mechanisms. It repeatedly promised to implement the SHA as a way of satisfying its international legal obligations and addressing the needs of victims (most recently in January 2020). It conducted a public survey on draft legislation, which found majority support for the SHA and clear opposition to an amnesty. In March 2020, in signalling its intent to move away from the SHA, the UK government nonetheless committed to keeping a 'route to justice open'. It is now proposing to renege upon that commitment as well. In short, the UK government is proposing to unilaterally abandon the SHA and introduce one of the most sweeping amnesties introduced in any jurisdiction since 1945. In doing so it is disregarding: its own long history of promises in this area; its international legal obligations; agreements made with another sovereign government (including a draft international treaty); the views of local political parties in Northern Ireland; and the results of its own comprehensive public consultation.

Compatibility with the NIO's Equality Duty, Ministerial and Civil Service Code

The government's policy development process regarding legacy has been self-evidently chaotic; it may also be unlawful. Under Section 75 of the Northern Ireland Act 1998 (the legislation which enacted the Good Friday Agreement), public authorities have a legal obligation to promote equality of opportunity.

21 The principles outlined in the Stormont House Agreement (2014), para 21 are 'promoting reconciliation; upholding the rule of law; acknowledging and addressing the suffering of victims and survivors; facilitating the pursuit of justice and information recovery; is human rights compliant; and is balanced, proportionate, transparent, fair and equitable.'

22 Baroness Goldie, Minister of State for Defence, HL Dev 20 July 2020 col 1932. https://hansard.parliament.uk/Lords/2020-07-20/debates/3746196E-EFCF-4639-91BC-2D997F50E14A/details

23 For example, on 26 October 2020, the Northern Ireland Affairs Committee was highly critical of the government for its lack of consultation and unilateralism. It stated: 'We are dismayed by the lack of consultation and engagement with representative groups by the NIO on its new proposals both before and after the publication of the WMS in March 2020. The WMS was a unilateral and emphatic announcement of intent rather than part of a meaningful consultation process.' HC 329 Northern Ireland Affairs Committee *Addressing the Legacy of Northern Ireland's Past: The Government's New Proposals* (Interim Report).

That legal duty is benchmarked against a public authority developing policy in line with its own published Equality Scheme through which the public authority can demonstrate how it has assessed the likely impact of its proposals on 'protected equality groups'.[24] Following complaints by CAJ and the Pat Finucane Centre in 2020 that the NIO had breached its own Equality Scheme in putting forward the March 2020 WMS, the Equality Commission launched a formal investigation in November 2020 and is due to report shortly. Despite being under investigation it remains to be seen whether the NIO, if it proceeds with its proposals, will first comply with its Section 75 obligations regarding formal consultation and equality impact assessment. We note that no 'equality screening' document was published alongside the Command Paper.

In addition, under the Civil Service Code of Ethics, officials are required amongst other things to 'set out the facts and relevant issues truthfully' and not to 'ignore inconvenient facts or relevant considerations when providing advice or making decisions'.[25] As noted above, the recent NIO command paper on legacy specifically fails to mention that, in its own analysis of its own consultation on the proposed legacy legislation, it had previously reported that (of those who expressed a view) there was majority in broad support for the institutional framework of the SHA, and that that was a 'clear majority of all respondents' opposed an amnesty/statute of limitations. If Ministers (rather than Officials) directed that omission from the command paper, then such a directive could in turn be in breach of the Ministerial Code, which requires that ministers do not 'ask civil servants to act in any way which would conflict with the Civil Service Code of Conduct'.[26]

Outline of this Report

The report below is divided into four detailed chapters considering different aspects of the UK government's command paper. As noted above, at different places in the report, we have felt it necessary to include 'fact checks' where the government command paper has fallen significantly short of the level of veracity that one might expect from an important official government publication on a topic of such sensitivity. In chapters one and three, we also question the applicability for comparative purposes of the two international case studies mentioned in the command paper – South Africa and Germany. We point out that key details are omitted from the government's presentation of these examples, details that seriously undermine the arguments being advanced in the command paper.

24 As part of arrangements for transparency in policymaking, the NIO Equality Scheme also commits to a consultation process in the development of policy. This would normally be for a minimum of 12 weeks and there is a very long list of consultees, including political parties, public authorities, trade unions, churches and NGOs. The NIO is then under a duty in taking a decision as to whether to proceed with a proposed policy to take into account the outworking of both the consultation and equality assessments. See further NIO Revised Equality Scheme 2019, available at Publication of the reviewed Equality Scheme for the Northern Ireland Office See https://www.gov.uk/government/publications/nio-equality-scheme

25 Cabinet Office (Updated March 2015) Statutory Guidance: The Civil Service Code available at The Civil Service code - GOV.UK (www.gov.uk)

26 Cabinet Office, (updated 23 August 2019) *Ministerial Code Setting Out the Standards of Conduct Expected of Ministers and How they Discharge their Duties*, p. 2 available at Ministerial Code - GOV.UK (www.gov.uk)

Chapter One looks in some detail at the proposed amnesty/statute of limitations. It charts the origins and evolution of this proposal, its scope and status under international law and its status as one of the most sweeping amnesties introduced anywhere in the world since 1945. In order to illustrate this point, the proposed amnesty is contrasted with that introduced by former Chilean dictator Augusto Pinochet in 1978.

Chapter Two considers the government's proposed Information Recovery Body (IRB). It juxtaposes the apparent powers of this institution with those of the existing investigative and judicial processes that have been engaged in legacy-related work as well as those proposed under the Stormont House Agreement.

Chapter Three considers the command paper proposals on Oral History and Memorialisation. It examines the background to these proposals and critiques their workability, particularly in the context of a sweeping unconditional amnesty whereby victims and survivors would be denied access to truth, justice or accountability.

Given the command paper's stated intent to end all judicial activity regarding legacy in Northern Ireland, Chapter Four looks in particular at the function of inquests, civil actions and judicial review in legacy issues to date. It contends that the government's arguments concerning delay in legal proceedings as a rationale for closing down such processes are ironic given that many legal proceedings have been delayed by the 'slow waltz' approach of public bodies to releasing information. It also illustrates the utility of coronial inquests and indeed civil actions as vehicles of truth and information recovery by reference to two illustrative case studies – the Ballymurphy Inquest and the civil action in the case of the Ormeau Road Bookmakers Massacre. It concludes that any effort to limit legacy-related judicial review would constitute a breach of the Good Friday Agreement and run contrary to the devolution of justice powers to Northern Ireland.

Chapter 1: An Amnesty for State and Non-State Actors

Introduction

The command paper calls for the 'application of a statute of limitations to Troubles-related offences'.[27] It states that the intention is 'to provide information, certainty, acknowledgement, and reconciliation, for all those directly affected by the Troubles and wider NI society'.[28] However, this effective amnesty for all Troubles-related offences is much more likely to undermine rather than achieve these objectives.

As noted above, the command paper is a policy paper that sets out the proposals in broad terms. Many questions remain unanswered on the proposed amnesty's scope. This chapter highlights these gaps in the analysis below. It begins by setting out the background and reaction to the statute of limitations proposal. It then examines the scope of the proposed amnesty and its potential status under the European Convention on Human Rights. Finally, the chapter considers how this amnesty would compare to international practice, including analysing how the proposals contrasts with the use of amnesties in South Africa and Chile.

Background and Reaction to the Statute of Limitations Proposal

Northern Ireland has not had a general amnesty since 1969 and in that instance, it was for public order offences associated with the civil rights protests and counter demonstrations. No general amnesty for conflict-related offences was seriously considered during the negotiations in the late 1990s to end the conflict. Since the 1998 Good Friday Agreement, which ended the conflict, a series of narrowly defined and carefully tailored forms of leniency have been used to advance the peace process through facilitating disarmament, information recovery, and the recovery of the remains of disappeared persons. These measures, which have had positive outcomes, all stopped short of being an amnesty and all took place against a backdrop where criminal prosecutions remained possible.

This approach was retained in the Stormont House Agreement 2014. Indeed, none of those who took part in those negotiations, including the UK government, actually argued in favour of an amnesty. The SHA did propose the establishment of an Independent Commission for Information Retrieval (ICIR). That mechanism would have the power to receive information about conflicted-related deaths confidentially. While it would provide credibility-tested information in family reports, it would be barred from disclosing any information that could expose

27 Command paper, para 34.
28 Command paper, para 32.

information providers to legal liability. However, as with the previous mechanisms, this was not an amnesty as only testimony was protected; not individuals. If this mechanism were created, this distinction would mean that individuals who provide information to the ICIR could face prosecution based on evidence becoming known from other sources.

The idea of a general amnesty has been part of public debate on a few occasions. For example, in 2013, the Attorney General for Northern Ireland called for what he termed 'a legislative stay on prosecutions'. However, these calls did not gain traction with legislators, who for the most part condemned the proposals.

This reflects the fact that at no stage during the 23-year peace process has there been widespread support for an amnesty. For example, the 2009 Consultative Group on the Past report in declining to recommend amnesty reported 'the strong view expressed by both politicians and victims in the Group's consultation that the route of investigation and prosecution should be kept open'.[29] More recently, as discussed above, the NIO response to its 2018 consultation on the Draft Northern Ireland (Stormont House Agreement) Bill reported that the majority of the 17,000 submissions it received,

> *argued that a Statute of Limitations or amnesty would not be appropriate for Troubles-related matters - many were clear that victims, survivors and families are entitled to pursue criminal justice outcomes and such a move could risk progress towards reconciliation.*[30]

This report also noted that:

Among organisations that represent former security forces, some argued against any type of statute of limitations or amnesty for former soldiers and police - they felt those they represented would have no difficulty in answering for their actions and would wish to see terrorist organisations and their members being held accountable. In addition, they felt that granting blanket immunity from prosecution could create a misleading impression of moral equivalence between security forces and terrorists.[31]

Given the broad and longstanding opposition to an amnesty in Northern Ireland, the command paper's proposals for a statute of limitations for *all* Troubles-related offences has unsurprisingly been met with widespread condemnation from victims' organisations, religious organisations, and other civil society groups. In addition, a motion in the Northern Ireland Assembly condemning the proposals was passed by consent demonstrating that all Northern Irish political parties oppose these plans.[32]

29 Consultative Group on the Past, *Report of the Consultative Group on the Past* (2009) 132 https://cain.ulster.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf

30 Northern Ireland Office, Addressing The Legacy Of Northern Ireland's Past: Analysis of the consultation responses (July 2019) 21 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836991/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses__2_.pdf

31 Ibid.

32 Northern Ireland Assembly, 'Motion: British Government Proposal for Amnesty' (20 July 2021) http://aims.niassembly.gov.uk/plenary/details.aspx?tbv=0&ptv=0&mcv=0&mtv=0&sp=0&spv=-1&per=1&it=0&pid=2&sid=p&pn=0&ba=1&doc=347222%20&fd=20/07/2021&td=20/07/2021

The publishing of the command paper also prompted the Irish Foreign Minister to publish an op-ed arguing that the plans would violate international human rights law and calling for prosecutions to remain open.[33] As noted above, UN Special Rapporteurs have also issued a joint statement expressing 'serious concern' about the proposals and calling on the British authorities to 'refrain from regressing on their international human rights obligations'.[34]

Given the sustained resistance to amnesty within Northern Ireland, it is clear that these proposals are not a reflection of the wishes of victims and other stakeholders in Northern Ireland. Instead, the push for amnesty comes primarily from the British government,[35] parts of which began exploring this idea in an increasingly expansive manner over the past five years. These moves were triggered by the opening of criminal proceedings against a small number of retired British soldiers, alongside legal scrutiny of the actions of UK armed forces personnel in Iraq and Afghanistan by domestic courts and the International Criminal Court. The efforts to 'protect' British soldiers from legal scrutiny ran in parallel to the government's professed commitments to the Stormont House Agreement as outlined in the introduction to this report.

For example, on 26 April 2017, the Defence Committee of the House of Commons, in an inquiry to which the Model Bill Team gave evidence, published a report calling on the British Government to enact a 'statute of limitations covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces'.[36] The Committee recommended that this protection also extend to former police officers and other security personnel. It did not take a position on whether these proposals should cover former paramilitaries although committee member (and shortly thereafter Committee Chairperson), Dr Julian Lewis, later told the *News Letter* that 'if the price of protecting our soldiers' is a broad amnesty 'my personal view is we owe it to our soldiers to pay that price'.[37] The report did not use the term amnesty, although that is in effect what the Committee proposed. The Committee did, however, state that the amnesty should be followed by 'the continuation and development of a truth recovery mechanism'.

While the language in the 2017 report explicitly called for a broad statute of limitations for all Troubles-related offences, in 2019 the Defence Committee argued that 'it is not proposing, and does not endorse, a blanket Statute of Limitations nor one that does not provide scope for re-investigation where compelling new evidence emerges'. Instead, the Committee contended

33 Simon Coveney, 'British plans for a Troubles amnesty would breach international obligations' *The Guardian* (15 July 2021) https://www.theguardian.com/commentisfree/2021/jul/15/british-amnesty-troubles-breach-international

34 UN Office of the High Commissioner on Human Rights, 'UK: UN experts voice concern at proposed blanket impunity to address legacy of "the Troubles" in Northern Ireland' (10 August 2021) https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27371&LangID=E . The UN Committee Against Torture had previously called on the United Kingdom as part of a discussion on accountability for offences related to the conflict in and about Northern Ireland to 'Refrain from enacting amnesties or statutes of limitations for torture or ill-treatment', which the Committee found to be inconsistent with states' obligations under the UN Convention Against Torture. See UN Committee Against Torture, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CAT/C/GBR/CO/6 (7 June 2019) para 41(f) https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CAT/C/GBR/CO/6&Lang=En

35 They have at times been supported in this work by right-wing parts of the British media and the DUP co-sponsored a cross-party private member's bill calling for an amnesty in Armed Forces (Statute of Limitations) Bill 2017-19.

36 House of Commons Defence Committee, 'Investigations into fatalities in Northern Ireland involving British military personnel' (April 2017) para 52 https://publications.parliament.uk/pa/cm201617/cmselect/cmdfence/1064/1064.pdf

37 'Top Tory Calls for End to Troubles Prosecutions "Gross Naivety"', *News Letter* (15 May 2017)

that it was calling for a *qualified* statute of limitations that 'recognises both the importance of investigation of serious offences and the possibility of compelling new evidence emerging'.[38] The Committee was careful to distinguish its proposals from an amnesty arguing that the statute of limitations would only apply to 'service personnel or veterans who have already been investigated and exonerated of the offences in question', whereas they understood an amnesty as being a measure that would preclude investigations.

This approach appears to have influenced the Government's first explicit move away from the Stormont House Agreement in the March 2020 Written Ministerial Statement by the Northern Ireland Secretary of State. Although this statement did not use the term statute of limitations, it outlined plans for a new approach to legacy offences under which only cases in which 'there is a realistic possibility of prosecution as a result of new compelling evidence' would have a full police investigation.[39] All other cases that did not reach this high bar would be permanently closed. This approach would have restricted criminal investigations, but it did not propose a bar on other investigative processes or civil remedies; nor did it rule out criminal investigations and prosecutions in all cases.

As noted above, the March 2020 Written Ministerial Statement was published to coincide with first reading in the House of Commons of the Overseas Operations (Service Personnel and Veterans) Bill, which subsequently received Royal Assent on 29 April 2021. This legislation sought inter alia to limit the criminal liability of British soldiers and veterans for offences committed during overseas operations. To achieve this, Articles 1 and 2 introduced a statutory 'presumption' against prosecution, which stipulates that once five years have elapsed from the date of an incident, it should be 'exceptional' for prosecutors to decide to initiate or continue to prosecute a service person or veteran for an offence committed during an overseas operation. Article 3 requires prosecutors when deciding whether to prosecute to give weight to problematic factors including the 'adverse effects' of conditions that the person was exposed to during their deployment on 'their capacity to make sound judgements and exercise self-control' and on their mental health, and the 'public interest in finality' in closing cases where there has been a previous investigation and there is no new evidence. If after applying these factors, prosecutors still decide to proceed with prosecution, they must also obtain the consent of the UK Attorney General. The Act also introduces what the government termed as 'longstop' that created an absolute bar for claimants bringing human rights or civil litigation claims for personal injury or death more than six years after the event.

The language of presumption in the Overseas Operations Act conveys that this statute does not close down the possibility of prosecution in all circumstances. In addition, Schedule 1 contains a list of serious offences that are excluded from this presumption relating to sexual offences (including sexual exploitation indecency with children and incest) and crimes falling within the jurisdiction of the International Criminal Court, namely genocide, war crimes and crimes against humanity.

38 House of Commons Defence Committee, 'Drawing a line: Protecting veterans by a Statute of Limitations' (July 2019) para 146 https://publications.parliament.uk/pa/cm201719/cmselect/cmdfence/1224/1224.pdf

39 UK Parliament, Statement made by Northern Ireland Secretary of State, Brandon Lewis, 'Addressing Northern Ireland Legacy Issues' (18 March 2020) https://questions-statements.parliament.uk/written-statements/detail/2020-03-18/HCWS168

As the Overseas Operations Act was not intended to apply to offences committed by armed forces personnel and veterans in Northern Ireland, the March 2020 Written Ministerial Statement announced the government's intention to ensure 'equal treatment of Northern Ireland veterans and those who served overseas'. However, while the Overseas Operations Act and related Northern Ireland focused proposals raised alarm among victims and human rights activists, the command paper goes much further than these previous initiatives in seeking to legislate for broad impunity for crimes committed by UK state personnel and paramilitaries. Thus, while there have been indications for some time that the UK government was moving in this direction, the extent of its turn away from accountability has provoked shock among many.

Scope of the Proposed Amnesty

The command paper indicates that the government is 'considering' a statute of limitations for Troubles-related offences.[40] The paper does define not 'Troubles-related offences'. It also does not indicate that it envisages excluding any serious human rights violations, including torture, disappearances, sexual violations, and killings from its scope. Indeed, in an accompanying oral statement, the Secretary of State for Northern Ireland indicated that it would 'apply equally to all Troubles-related incidents'.[41]

The command paper and accompanying statement did not refer to the individuals, institutions and organisations to be covered by the statute of limitations. However, the language of applying equally to all wrongdoing committed during the Troubles indicates that it will apply to those who worked on behalf of the state as well as to paramilitaries.

In addition, the paper does not define the temporal limits of Troubles-related offences. This prompted media speculation that, at the behest of paramilitaries, its scope may extend beyond the crimes committed before the Good Friday Agreement to also cover paramilitary violence during the peace process.[42]

The command paper was however more precise in stipulating the legal effects of the proposed statute of limitations arguing that it would bring 'an immediate end to criminal investigations into Troubles-related offences and remove the prospect of prosecutions'.[43] This is much broader than the earlier calls for the *qualified* statute of limitations as it closes down the possibility of criminal investigations in cases including those that have not previously been effectively investigated and cases in which compelling new evidence becomes known.

The legal effects would also be broader than previous proposals as in addition to closing down police investigations and criminal proceedings, the command paper indicates that the statute

40 Command paper, para 34.

41 Secretary of State for Northern Ireland, Brandon Lewis MP, Oral Statement (14th July 2021) https://www.gov.uk/government/news/secretary-of-state-for-northern-ireland-brandon-lewis-mp-oral-statement-wednesday-14th-july-2021

42 Allison Morris, 'Paramilitaries had been briefed on NI Troubles amnesty plan' *The Belfast Telegraph* (14 July 2021) https://www.belfasttelegraph.co.uk/news/northern-ireland/paramilitaries-had-been-briefed-on-ni-troubles-amnesty-plan-40654672.html

43 Command paper, para 34.

of limitations would bar the Police Ombudsman from investigating Troubles-related incidents,[44] current and future civil proceedings would be brought to an end, and inquests into legacy deaths would be halted.[45]

The only limitation to legal effects is that it would not apply retrospectively. This means that previously convicted individuals would not be pardoned.[46]

The command paper does not indicate that any conditions or requirements will be imposed on those benefitting from the statute of limitations. Instead, it will operate to offer automatic, unconditional impunity for perpetrators from all sides of the conflict.

Although the government paper uses the term 'statute of limitations', it at no point seeks to present its proposals as a statute of limitations. Statutes of limitations are used to set an explicit time limit after which criminal investigations and prosecutions are not permitted. The time limits are generally set to allow sufficient time for cases to be investigated and in many jurisdictions, statutes of limitations are not permitted for serious offences such as torture. In seeking to end immediately investigations for all cases, irrespective of whether they were previously effectively investigated, this proposal is unmistakably an amnesty.

Status of the Amnesty under International Law

International and domestic human rights law provide the international legal landscape against which the legality of the proposed amnesty should be assessed.

As discussed further below, the case law of the European Court of Human Rights (ECtHR) requires states parties to conduct effective, prompt, transparent and independent investigations into violations of the right to life and the right to freedom from torture. Under Article 2 and Article 3 of the Human Rights Act 1998, UK courts are obliged to take this case law into account. Any amnesty or statute of limitations that prevents effective investigations will conflict with these obligations. This was expressed by the ECtHR in the *Ould Dah* admissibility decision, when drawing upon the status of torture as both a human rights violation and a crime prohibited by a multilateral convention, it stated *in obiter* that 'the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts'.[47]

The ECtHR has only given limited consideration to the question of whether there are some circumstances under which amnesty may nonetheless be permissible. For example, in *Tarbuk v Croatia* (2012), the Court referred to the *Dujardin* decision by the European Commission on Human Rights in noting that:

44 Command paper, para 34.
45 Command paper, para 37.
46 Command paper, para 36.
47 *Ould Dah v France* App no 13113/03 (ECtHR, 17 March 2009).

> *the Convention organs have already held that, even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.*[48]

This indicates that for amnesties for violations of the right to life to be permissible the following standards should be met. The amnesty should be necessary, meaning that the state is enacting the amnesty in order to fulfil its legitimate aims, such as preventing a return to conflict. An amnesty enacted to grant impunity to soldiers and veterans more than twenty years after the conflict ended would be unlikely to meet this standard. In addition, in granting an amnesty the interests of individual members of the public are respected. This should ensure that, even where an amnesty limits the possibility of prosecutions, other elements of victims' and society's rights are respected, such as the rights to truth and reparations. Where an amnesty is used as part of measures to close down effective investigations as guaranteed for by Articles 2 and 3 of the European Convention on Human Rights (ECHR) as well as access to civil remedies, again it is highly unlikely to fulfil these standards.

The Grand Chamber of the European Court of Human Rights also addressed the question of amnesties for serious human rights violations in *Margus v Croatia* (2014). Its judgment referred to the 'growing tendency in international law' to see amnesties for grave breaches of fundamental rights 'as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights'. Although it raised the hypothetical possibility that even if it could 'be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims',[49] it found those circumstances did not apply in that case.

The *Margus* judgment suggests that the court may take into account the contribution of an amnesty to reconciliation and peacebuilding and the relationship of the amnesty to the fulfilment of other aspects of victims' rights. However, the tone of the language suggests that for serious human rights violations, even these types of circumstances may not be enough for an amnesty to be found permissible.

Amnesties have also been rejected by the UN Human Rights Committee, which interprets the International Covenant on Civil and Political Rights, to which the UK is a party. For example, General Comment No 31 states where public officials or State agents have committed torture and similar cruel, inhuman and degrading treatment, summary and arbitrary killings, and enforced disappearance 'the States Parties concerned may not relieve perpetrators from personal responsibility, as has occurred with certain amnesties'.[50]

International human rights law also restricts the application of statutes of limitations to human rights violations. For example, there is an International Convention on the Non-Applicability of

48 European Court of Human Rights, Tarbuk v Croatia, App No 31360/10 (11 December 2012) para 50.

49 European Court of Human Rights, Grand Chamber, Margus v Croatia, App No 4455/10 (27 May 2014) Para 139.

50 UN Human Rights Committee, General Comment No 31 The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) para 18.

Statutory Limitations to War Crimes and Crimes Against Humanity, however, the UK is not a party to this treaty. In addition, the soft law standards contained in the UN's Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (2005) provides 'statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law'.[51] It further states that 'Domestic statutes of limitations for other types of violations that do not constitute crimes under international law, including those time limitations applicable to civil claims and other procedures, should not be unduly restrictive.'[52]

How These Proposals Compare to Global Amnesty Practice

Amnesties are a common feature of conflict resolution around the world.[53] Based on a database created by one of the authors that compiles qualitative information the context, scope and legal effects of 289 amnesties used in response to conflict and peace processes globally from 1990 to 2016,[54] we contend that the United Kingdom's proposals for a broad, unconditional amnesty to be granted 23 years after the conflict ended would if enacted diverge significantly, and highly negatively, from global practice on amnesties.

First, the application of amnesty to all conflict-related offences without limitations for specific offenders, specific crimes, or specific time periods is extremely rare. It is much more common for states to tailor the scope of an amnesty narrowly to limit its negative consequences for victims and the rule of law. For example, only 25 per cent of conflict-related amnesties enacted from 1990 to 2016 extended to state actors (of these only 5 per cent applied exclusively to state actors). In addition, many amnesties excluded serious violations or crimes committed for personal gain from their scope. These types of limitations can allow the courts to investigate in order to determine whether amnesty should be applied to specific cases.

Second, only 37 per cent of conflict-related amnesties enacted between 1990 and 2016 were unconditional. In contrast, 63 per cent of amnesties require individual beneficiaries to undertake specific actions or refrain from specific actions in order to receive or retain amnesty. Where amnesties are granted unconditionally, they can be withheld or removed when individuals breach conditions. In most instances, the conditions were designed to ensure that amnestied persons contribute to the peace process and adhere to the rule of law.

51 UN General Assembly, resolution 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law (16 December 2005) para 6.

52 Ibid, para 7.

53 For example, 49 per cent of comprehensive peace agreements adopted between 1990 and 2018 provide for amnesty. See Louise Mallinder, *Amnesties and Inclusive Political Settlements* (Political Settlements Research Programme 2018)

54 Louise Mallinder, Amnesties, Conflict and Peace Agreement Database (2019) https://www.peaceagreements.org/amnesties/

There have also been examples where conditional amnesties have required individuals to contribute to truth and reparations for victims in exchange for amnesties. The best-known example of this is the South African Truth and Reconciliation Commission.

The Misrepresentation of the South African Case Study

The command paper draws on South Africa's experiences as a model of information recovery that has contributed to reconciliation. However, it is really quite remarkable that it omits some of the most salient details of the South African approach. In particular, (a) the fact that prosecutions remained available in the South African context, and (b) that (unlike the UK government proposal) obtaining an amnesty was conditional on offenders fully disclosing their political offences to the Truth and Reconciliation Commission.

This South African process thus used both a carrot and a stick to incentivise perpetrator testimony. Amnesties were offered to those who fully disclosed their involvement in political offences, including serious human rights violations. This was accompanied with the promise of prosecutions for those who did not apply for amnesty or who were found not to meet the criteria for receiving amnesty. Decisions on eligibility for an amnesty were made by judges and lawyers who were members of the Amnesty Committee of the Truth and Reconciliation Commission.

The grounds for denying amnesty could be because the offender's crimes did not fall within the scope of the limited amnesty (e.g., that they were not committed with political objectives) or because the offender was deemed to have not fully disclosed information relating to their wrongdoing.

The South African Truth and Reconciliation Commission received 7,116 amnesty applications and granted 1,167 full amnesties and 139 partial amnesties (where amnesty was granted for some instances but not for others).

Moreover, victims had the right to be present in amnesty hearings and to hear the testimony of amnesty applicants. They also had the right to make oral or written victim statements in which they could express the impact that the applicant's actions have had on the lives and communicate their views on the amnesty application. Victims had a right to legal representation and they could adduce evidence into consideration, give formal testimony, and cross-examine amnesty applicants. They also had a right to judicially review proceedings.

Where amnesty applications related to gross human rights violations, they had to be considered in a televised public hearing.

The level of applications received exceeded expectations and it is widely argued that the process obtained more truth than would have been possible by solely pursuing prosecutions. It resulted in information on gross human rights violations being revealed, in disappearances being resolved, in incidents in which individuals who 'had been suspected of involvement in

acts against their own people' being exposed as acts of terror by the state, and in individuals who had been wrongly accused being exonerated.[55]

However, retaining the possibility of prosecutions was central to encouraging security force personnel to apply for amnesty, particularly when some high-profile state security officers engaged in the process creating fear that they may incriminate their former comrades.[56]

Thirdly, while all amnesties are by definition intended to prevent criminal prosecutions, it is much less common for amnesties to restrict other judicial activities or investigative processes. For example, of the 289 amnesties granted between 1990 and 2016, only six per cent also sought to bar civil remedies and none have been identified that have sought to restrict coronial inquests. This indicates that the sweeping legal effects of the amnesty proposed by the UK government are without international precedent.

Fourthly, with respect to context, most conflict-related amnesties are granted while a conflict is ongoing, or as part of the immediate implementation of a peace process. In such context, the rationale for amnesty is often justified as being necessary to end the violence and ensure the peace.

It is very unusual to find amnesties that are enacted decades after a peace agreement has been signed. It has only been possible to identify two cases of post-conflict amnesties granted at least five years after the violence ended namely Portugal in 1996 and Peru in 2010. In both cases, as with the United Kingdom, the decision to grant amnesty was prompted by the desire to close ongoing criminal prosecutions. However, in Portugal, the amnesty did not extend to crimes against life and physical integrity. The Peruvian amnesty was broader in scope, and as a result, it faced severe national and international condemnation and was repealed after just 15 days.

This timing, particularly when combined with the reality that the possibility of prosecutions does not imperil Northern Ireland's peace process, and on the contrary, that efforts to foreclose it may be destabilising, again demonstrate the considerable extent to which the UK's proposed amnesty goes beyond international practice on amnesties.

To further illustrate how the UK's proposals compare with amnesties used in other societies, the table below sets out using the above criteria how if enacted, the UK's amnesty would create broader impunity than even the amnesty granted by the Pinochet regime in Chile, which is widely regarded as one of the most egregious examples of amnesty.

55 Piers Pigou, 'Degrees of truth: amnesty and limitations in the truth recovery project', in Eric Doxtader and Charles Villa-Vicencio (eds), *The Provocations of Amnesty: Memory, Justice, and Impunity* (David Philip 2003), 217–236.

56 TRC Report, Vol 5, ch 6, para 32. See also Louise Mallinder, 'Indemnity, Amnesty, Pardon and Prosecution Guidelines in South Africa' (Queen's University Belfast 2009) 81-82 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1375046

Comparison with the Amnesty Introduced by the Chilean Dictator Pinochet

	Chile's 1978 Amnesty Act	The United Kingdom's Proposed Amnesty
Crimes covered	Amnesty extended to serious human rights violations including extrajudicial killings, arbitrary detention, torture and disappearances	Amnesty proposed to extend to serious human rights violations including extrajudicial killings, arbitrary detention, torture and disappearances
Crimes excluded	The Chilean amnesty excluded certain egregious offences (e.g., sexual violence, abduction of minors)	The UK proposal does not exclude any offences
Actors covered	Amnesty primarily intended to apply to state actors, but left-wing guerrillas also covered	Amnesty would apply to all actors who committed offences during the Troubles including former soldiers and paramilitaries
Temporal coverage	Applied to only the first five years of the 17-year dictatorship	The UK proposals have no temporal limits and may extend to crimes committed by paramilitaries in Northern Ireland after the Good Friday Agreement
Legal effects: ongoing criminal proceedings	The Chilean amnesty formally excluded those who were currently subject to legal proceedings	The UK proposals would stop all ongoing proceedings
Legal effects: civil cases and other investigations	The Chilean amnesty formally only applied to criminal cases	The UK proposals would extend to criminal prosecutions, civil remedies, coronial inquests, and other judicial actions and investigative processes

In addition to this technical analysis of the terms of the amnesty design, a further significant distinction between these cases is that the Chilean amnesty was enacted by an illegitimate military dictatorship that was subject to strong international condemnation. In contrast, the UK is a leading democratic state with a permanent seat on the UN Security Council and membership of the G7 intergovernmental forum. It has a role to play in encouraging other states to abide by the rule of law and their international obligations. The enactment of a broad, unconditional amnesty would send a dangerous signal to other states that they too can legislate for impunity and evade their international legal obligations. It would also be highly damaging to the UK's international standing and soft power.

FACT CHECK: the vast majority of security force killings were lawful

VERDICT: it is not possible to stand over this claim, which also implies that most victims of the state were 'guilty' of serious offences

In support of the UK government's advocacy for such a sweeping general amnesty, the command paper states that 'Security Forces were responsible for around 10% of Troubles-related deaths - the vast majority of which were lawful…" [p21]. As we have argued previously, the 10% figure only refers to those directly killed by the state and does not include collusive actions which resulted in a death which involved state actors and republican or loyalist paramilitaries.[57] The issue of collusion apart, this still remains a very controversial claim. Using court records (in particular inquest records), newspapers and other open sources, Professor Fionnuala Ní Aoláin (QUB and Minnesota Law School) created a database of a total of 350 people killed by state actors between 1969-1994.[58] Many of these deaths occurred in the early (and most violent) period of the conflict. Between 1969 and 1974, 189 people were killed by state actors, the majority (170) by the army. There were no criminal prosecutions levied against state actors during this period. According to the database produced by Professor Ní Aoláin, 63% of those killed were undisputedly unarmed at the time of death, 12% (24 people) were confirmed as having been in possession of a weapon and a further 14 deaths were listed as being 'possibly armed'.[59]

As the official *Operation Banner* review notes, only a dozen or so serious cases involving army personnel killing or injuring others came to court during the 30 years of the Troubles.[60]

57 See further K. McEvoy (2017) Amnesties Prosecutions and the Rule of Law in Northern Ireland, Briefing Paper to the HC Defence Select Committee. Available https://www.dealingwiththepastni.com/project-outputs/expert-evidence/house-of-commons-defence-select-committee Obviously, any state actor involved in collusive activities could also be liable for historical prosecutions. By way of illustration, in the Police Ombudsman report into the murders at Loughinisland, the Ombudsman documents the involvements of paid state agents *"at the most senior levels within Loyalist paramilitary organisations"* including their involvement in the importation of large amounts of weapons from Apartheid South Africa in the mid to late 1980s. The Ombudsman further documents that, according to police figures, these weapons were used in at least 70 murders and attempted murders and that the weapons were imported when a Brian Nelson, a Force Research Unit (FRU – A British Army unit in the UDA) was dispatched to South Africa for this purpose. Office of the Police Ombudsman Northern Ireland (2016) *The Murders at the Heights Bar Loughinisland,* 18 June 1994, p445. Belfast: OPONI. In addition, as noted elsewhere, the Operation Kenova inquiry is investigating approximately 50 murders involving the alleged state agent Stakeknife. In addition to investigating the actions of Republican paramilitaries Operation Kenova's terms of reference explicitly include 'whether there is evidence of criminal offences having been committed by members of the British Army, the Security Services or other Government agencies, in respect of the cases connected to the alleged agent known as Stakeknife.' See further Operation Kenova *Terms of Reference* https://www.opkenova.co.uk/operation-kenova-terms-of-reference/

58 F. Ní Aoláin (2000) *The Politics of Force. Conflict Management of State Violence in Northern Ireland.* Belfast: Blackstaff Press.

59 F. Ní Aoláin (2000) 'The Politics of Force: Conflict Management and State Violence in Northern Ireland - A Brief Historical Overview.' *Minnesota Legal Studies Research Paper* No. 12-12, p.23.

60 British Army (2006) *An Analysis of Military Operations in Northern Ireland.* Available http://www.vilaweb.cat/media/attach/vwedts/docs/op_banner_analysis_released.pdf p. 46, para 431.

In relation to operational shootings the report cites 4 convictions for murder, one of which was overturned on retrial.[61]

The claim in the command paper that the 'vast majority' of killings by the security forces were 'lawful' is not backed by any evidence. Through a Freedom of Information request we sought a copy of any assessment or analysis by the NIO that led to this conclusion. Despite the statement being a clear-cut claim of legal fact the response from the NIO was that it would cost too much to search through their records to recover any documents that had informed it.[62] It would be reasonable to expect that such a conclusion in the command paper would be supported by some sort of prior assessment. No such evidence was presented to us.

In the absence of independent, effective investigations into killings by the security forces it is not possible to reach a conclusion as to whether they were lawful. It has now been widely accepted including in clear authority from the courts and in decisions by policing bodies that effective and independent investigations have not yet taken place in relation to most deaths at the hands of the security forces.[63]

In particular such a position has been long held by the courts in relation to the earliest period of the conflict where there were the highest number of direct killings by the British Army. During the period 1970-1973 an RUC Force Order was in place which meant that RUC detectives investigating a death caused by soldier did not interview the solider in question and the task was conducted by the Royal Military Police. As contemporary military documents produced for the Saville Inquiry confirmed 'the RMP investigator was out for information for managerial, not criminal purposes.'[64] This practice was strongly criticised by the former Lord Chief Justice of Northern Ireland, and was ultimately stopped at the insistence of the then newly appointed DPP for Northern Ireland Sir Barry Shaw, himself a former soldier.[65] More recently the courts held in *Thompson*, that the RMP process did not meet the requirements of Article 2 ECHR, even by the standards of 1972.[66] This process has also been alluded to more recently by O'Hara J in his ruling relating to the prosecution of Soldiers A and C, over the killing of Joe McCann in 1972:

> At that time, in fact until late 1973, an understanding was in place between the RUC and the Army whereby the RUC did not arrest and question, or even take witness statements from, soldiers involved in shootings such as this one. This appalling practice was designed, at least in part, to protect soldiers from being prosecuted and in very large measure it succeeded.[67]

It is important to emphasise that the only circumstances whereby the use of lethal force by the security forces would be 'lawful' would be where the victim at the time was reasonably believed to be engaged in activity that constituted an imminent threat of death or serious injury to another person and the only preventative measure possible was the use of potentially lethal force.

61 R v Thain (1984) R v Clegg (1993) (acquitted on retrial in 1999) and R v Fisher and Wright (1995).
62 NIO FOI/21/130, response of 26 August 2021.
63 See pages 9-10 of Model Bill Team, Prosecutions, Imprisonment and the Stormont House Agreement.
64 Saville Inquiry Volume IX, para 173.23.
65 Sir Robert (later Lord) Lowry, R v Foxford, [1974] NI 181, at p. 200.
66 In the Matter of an Application by Mary Louise Thompson for Judicial Review [2003] NIQB 80.
67 R v Solider A and C, [2021] NICC 3

If in such circumstances a bystander was killed by the security forces the legality of the use of force would depend on whether all feasible preventative precautions had been taken.[68]

For all of these reasons, the notable a lack of prosecutions and convictions of state actors at the time is not a reliable indicator of lawfulness. This claim in the command paper therefore implies many if not most victims of the state were 'guilty' of a serious offence at the time they were killed. It is notable that in some of the most high-profile mass state killings of the conflict such as the Bloody Sunday and Ballymurphy massacres, the official position has been that the use of force was so justified, until the facts of the incidents have been independently determined.

68 In accordance with Article 2 (right to life) of the ECHR, for fuller detail see: 'European Court of Human Rights, Guide on Article 2 of the European Convention on Human Rights, Right to life, Updated on 30 April 2021.'

Chapter 2: An Information Recovery Body (IRB)

Introduction

The command paper proposes that a new 'independent body', referred to as the Information Recovery Body (IRB)[69] be established to 'enable individuals and family members to seek and receive information about Troubles-related deaths and injuries'.[70] The stated intention is that this body should replace both the Historical Investigations Unit (HIU) and Independent Commission for Information Retrieval (ICIR) provided for under the Stormont House Agreement (SHA).

This section analyses the command paper's proposals on the IRB. It first sets out the functions of the HIU and ICIR proposed under the terms of the SHA as well as existing legacy mechanisms, in order to provide a comparator with the proposed scope of the IRB. It then examines the proposed powers, ECHR compliance, anticipated 'products' and case remit of the IRB.

It should be noted that there are significant details on the proposed IRB that are not included in the command paper on important matters such as its form and structure. However, it can reasonably be inferred that the UK government has formed a view on such matters as such details would have had to have been included in the draft Bill that had apparently been prepared, but was ultimately not introduced, into Westminster in July 2021.

Functions of the HIU and ICIR: Information Recovery as Key Product for Most Families

In relation to the Historical Investigations Unit (HIU), the SHA specified that 'Legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths'. Specifically:

- The HIU would be an independent body conducting police-type investigations, with full police powers (e.g., search, arrest, questioning), as well as disclosure powers.
- The HIU would also be able to investigate grave and exceptional police misconduct that relates to a Troubles-related death.

69 When the proposals were leaked to the *Times* and *Telegraph* in May 2021 this body was referred to as a 'Legacy Commission' it is now referred to in the paper as the 'Information Recovery Body' and hence 'IRB'.

70 Command paper, para 6.

- The main product of the HIU would be information recovery with the production of a Family Report in each case. Investigation reports, interim reports and reports to injured persons would also be produced.
- It would also be possible for the HIU to produce justice outcomes through referrals of prosecution files to the Public Prosecution Service (PPS), albeit there was broad consensus this would only occur in a small number of cases.
- The HIU would largely consider cases in chronological order. Its remit would focus on deaths that are outstanding Historical Enquiries Team (HET) or Police Ombudsman legacy cases (both pre-1998), or conflict-related deaths from 1998-2004 where there was new evidence. The PPS could also refer legacy cases to the HIU where there is new evidence.
- Transitional provision was made for the Police Ombudsman and PSNI to continue to work on and finish cases that are already substantively completed.
- The SHA was explicit that Troubles-related inquests would continue as a separate process.[71]
- The methodology of the HIU had two elements. One consisted of a paper-based review of information and the second was a full investigation (with police powers) where there are grounds for further investigative steps. A Family Report was to be produced in both scenarios. If a case went forward to the PPS for possible prosecution, the HIU was empowered to issue an interim report.

The SHA also provided for the creation of the Independent Commission for Information Retrieval (ICIR) 'to enable family members to seek and privately receive information about the Troubles-related deaths of their relatives'. Specifically, it indicated that:

- The ICIR would be an independent international body created by a treaty between the British and Irish governments. The treaty was agreed in 2015 (but has not entered into force).[72]
- The ICIR would be an information recovery body reliant on voluntary contributions. Protected statements could be made to the ICIR which could then not be used in prosecutions (similar to the Independent Commission for the Location of Victims' Remains). There would be no amnesty. The ICIR proposals contained a number of measures to ensure confidentiality for persons who provide information.
- The ICIR would seek information following an eligible family request. It could also receive testimony in the absence of such a request.
- The ICIR would provide written reports to families containing information that has been established as credible.
- All engagement with the ICIR by families, individual contributors and public authorities would be voluntary.

71 Stormont House Agreement, para 31.

72 Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Ireland Establishing the Independent Commission on Information Retrieval (15 October 2015) http://data.parliament.uk/DepositedPapers/Files/DEP2016-0057/Agreement_establishing_the_ICIR.pdf

The ICIR and HIU were also required under the SHA to provide information that could be used to inform analysis of themes and patterns.

The 'Package of Measures': UK Government's Response to its International Human Rights Obligations

In the absence of the establishment of the SHA mechanisms, there remains an *ad hoc* set of mechanisms in place that are a result of the 'package of measures' agreed by the UK further to address the breaches of Article 2 of the ECHR found by the European Court of Human Rights (ECtHR) from 2001 onwards.[73]

In summary, these include:

- Police Ombudsman: powers to conduct investigations using full police and disclosure powers into past police criminality, and to investigate grave and exceptional police misconduct. In practice, the Ombudsman legacy directorate functions operate largely as an information recovery and accountability mechanism with information in legacy cases being provided both to complainants (usually families of victims) and through Public Statements in the form of detailed reports. Reports such as the Ombudsman's Operation Ballast investigation and the report into the Loughinisland massacre have made public significant evidence of past human rights violations. The Ombudsman, like the PSNI, can also pass files to the PPS for prosecutorial decisions on criminal matters.
- Coronial Inquests: provide for a judicial inquiry led by a Coroner with powers to compel witnesses, disclosure etc. Powers of inquests were amended further to the package of measures.[74] The main outcome from these hearings is information recovery and accountability through a civil process. The most recent example relates to the inquest into the Ballymurphy massacre (discussed further in Chapter Four). Inquests which are due to report include the coronial investigation of the Kingsmill massacre.
- PSNI legacy investigations: the PSNI established the Historical Enquiries Team (HET), which was put forward as a component of the package of measures. The HET was limited to conducting desktop reviews. Cases could be passed to the PSNI for *investigation* with police powers although this did not happen with any 'state involvement' cases. The main product of these HET reviews for the vast majority of families were reports produced on the relevant case and given to the families. These provided a measure of resolution to some families, but were limited for others, particularly state involvement cases. The HET was ultimately replaced with the Legacy Investigation Branch (LIB) with police powers that

73 At the time of the GFA the existing justice and investigative mechanisms were not capable of delivering ECHR Article 2 compliant investigations. In a series of Strasbourg cases (McKerr group) procedural violations of Article 2 ECHR were found leading to the UK agreeing with the Council of Europe Committee of Ministers to adopt a remedial 'package of measures' reflected in the above mechanisms.

74 Following the SHA, the Lord Chief Justice has established a Legacy Inquest Unit to deal with over 50 legacy inquests (some relating to multiple deaths). The withholding of resources meant this unit did not become operational until April 2020.

has led to a small number of criminal cases, including of soldiers, resulting in decisions to prosecute from the PPS.

- PSNI 'call in': another component of the package of measures is the ability of the PSNI to 'call in' an external police force to investigate. The most prominent current legacy call ins relate to a number of investigations led by Jon Boutcher, including Operation Kenova, examining allegations of the role of an agent of the State in the IRA. Operation Kenova has full police powers and has passed prosecution files to the PPS. However, its major products will be public-facing reports of its investigative findings, including the 'Kenova Findings Report'. This, in addition to evidence gathered through the investigative process itself, provided to families will focus on information recovery. Kenova-head Jon Boutcher has described the investigation as 'a thorough search for the truth'.[75]
- Public Inquiries: public inquiries into legacy matters are also part of the package of measures. Public inquiries are often judge-led with a range of powers of compulsion. It is notable that the UK is yet to discharge a commitment to hold a public inquiry into the death of human rights lawyer Pat Finucane.
- Public Prosecutions Service (PPS): as part of the 'package of measures' there were reforms to the prosecutorial system in NI, as was also the case under the GFA. The reforms furthered independent decision making of the PPS and a more transparent framework for prosecutorial decisions, including duties to give reasons.
- Civil Litigation: also relevant and complementary to the package of measures is the ability of families to undertake civil litigation. This includes litigating for the purposes of compensation but also to ensure investigative duties are discharged, a route often taken to unblock obstacles to other elements of the package of measures discharging their functions. Such civil challenges are often reliant on compliance with the ECHR. For remedy, such litigation relies on the judiciary exercising powers independently from government. As discussed further in Chapter Four, the GFA guarantees the incorporation of the ECHR in NI law with 'direct access to the courts and remedies for breach[es]'. Civil proceedings, as well as criminal trials also provide a forum for information recovery where evidence can be presented and tested.

Taken together, the proposed HIU as outlined in the SHA and the existing package of measures have the legal capacity to deliver 'truth recovery with teeth'. This means that these mechanisms are able to engage in information recovery though the independent exercise of police-type or judicial powers (e.g., search and seizure, being able to compel access to intelligence information, the power of 'discovery' in the civil and inquest system) rather than having to rely only upon information volunteered to them.

It is notable that in his 2016 expert report into Northern Ireland Legacy, the UN Special Rapporteur, Pablo de Greiff, observed that the existing package of measures 'resemble more truth-seeking initiatives than justice measures'. He also commented that 'distinctions

75 Operation Kenova, ECHR Framework report v3.0, page 4, https://www.kenova.co.uk/about-kenova

between truth and justice initiatives are more often than not overdrawn'.[76] A key concern with the command paper by contrast is that it seeks to draw a simplistic distinction and does so in an entirely misleading manner. The command paper tries to misrepresent both the package of measures and the SHA as focusing on criminal justice outcomes, presenting the new proposals as a contrasting switch to an information-recovery approach. Furthermore, as the following section on the new proposed Information Recovery Body sets out, the proposed new mechanism would be the least likely means of delivering information recovery for families, not least due to the very limited powers it is proposed to have.

Powers of the Proposed Information Recovery Body (IRB)

Whilst claiming the IRB would have powers to 'find out what happened', the command paper expressly sets out that in fact the IRB would be limited to the following two sets of powers only:

- Powers to seek disclosure of information from UK state agencies.
- An ability to 'take statements' from individuals with information.[77]

The second set of 'powers' is permissive. Statements can be taken from persons who wish to volunteer information. Therefore, based on the information provided in the command paper, it appears that the only real powers the IRB will have at its disposal are powers to seek disclosure of documents from UK state agencies.

The command paper sets out that the IRB will follow the disclosure powers model in the draft SHA legislation.[78] It will hence (in a context whereby there has been regular obstruction by such agencies in providing disclosure in legacy cases) replicate deficiencies in the draft SHA legislation on HIU disclosure powers. In particular, there would be no sanction for non-compliance with a request for disclosure from the IRB.

As noted above, the SHA-proposed HIU, the Police Ombudsman, Operation Kenova, and the LIB all rely on police-type investigative powers. Inquests and public inquiries rely on judicial powers to compel disclosure and testimony. Based upon the information provided in the command paper, it appears that the IRB will have no such powers.

The IRB model does not involve an 'investigation'. It involves a review of papers it obtains which it appears can be supplemented by any information that might be volunteered to it.[79] The

76 UN Doc A/HRC/34/62/Add.1 Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence on his mission to the United Kingdom of Great Britain and Northern Ireland, (17 November 2016) para 20.

77 Command paper, para 15.

78 Command paper, para 20.

79 The command paper, whilst vague, echoes previous indications to the media that engagement with the IRB will be voluntary. Para 35 states the existence of the amnesty will encourage cooperation with the IRB from those who have relevant information. At no point does the command paper suggest there will be powers to compel relevant persons to give testimony to the IRB.

command paper is also clear that all criminal investigations (PSNI LIB, Call-in – Kenova, Police Ombudsman etc.) will be brought to an 'immediate end'.[80]

One of the lessons advanced by the Operation Kenova team is that a police-type homicide investigation can itself uncover information for families in many cases, even before a final report is presented or any decisions to prosecute are taken.[81] Again, the IRB process would not involve an *investigation* per se and would replicate limitations of other legacy processes that have been largely limited to a review of available papers. This would include the experience of the HET where reports of variable quality were produced (for a variety of reasons but including the limitation of the HET to paper-based reviews) and there was a reliance instead on the PSNI *per se* to conduct investigations in some cases. Our scepticism of the utility of paper-based reviews is also informed by the experience of the DeSilva review into the death of Pat Finucane, which focused on a review of 'volunteered' papers without the types of powers an independent public inquiry would have had to *inter alia* compel and cross examine witnesses and test the veracity and even authenticity of the papers provided to it.

New Criminal Offences for Unauthorised Disclosures

In following the draft SHA Bill the IRB legislation would create new criminal offences, punishable by up to two years' imprisonment, for IRB staff or persons providing services to the IRB, who make unauthorised disclosures of information to families or others.[82]

These provisions relate directly to what is sometimes referred to as the 'national security veto' wherein Ministers can redact out information and findings in IRB reports if they are considered to contain 'sensitive' information (defined as information which 'might' prejudice the 'national security' interests of the UK or information originally 'supplied by' MI5, MI6, GCHQ, any intelligence unit of the Police or armed forces i.e. including RUC Special Branch, or Force Research Unit-FRU).[83]

There is also nothing in the command paper to suggest that the statement-taking powers of the IRB would set aside the effects of section 1 of the Official Secrets Act 1989.

80 Command paper, para 34.

81 See written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041) to the Northern Ireland Affairs Committee 'What Lessons the Government Could Learn from Operation Kenova and apply to its new legacy investigation process 6.1 The truth can be uncovered. Although charging decisions on Operation Kenova's main investigation files are awaited (further Kenova evidential files are being delivered to the DoPP at the time of this submission) and the report of our findings are awaited, I believe we have already demonstrated that the truth can be uncovered as regards what happened to victims in unsolved legacy cases. It is of course right to stipulate that in some cases we have found very little, but in most cases we have discovered information that is not known to the families and should be shared with them as it would be in a homicide case anywhere else in the UK,' https://committees.parliament.uk/writtenevidence/7650/html/

82 See section 27 and schedule 11 of the Draft Northern Ireland (Stormont House Agreement) Bill.

83 With other NGOs, we previously developed a model wherein a judge could review the reasonableness or not of any redaction of information going forward to families on the grounds of national security. See further Model Bill Team (2017) *Dealing with the Past in Northern Ireland: A Proposed Model for Information Redaction under the Stormont House Agreement.* Available https://www.dealingwiththepastni.com/project-outputs/project-reports/dealing-with-the-past-in-northern-ireland-a-proposed-model-for-information-redaction-under-the-stormont-house-agreement

Former members of the security forces could therefore risk prosecution for giving statements to the IRB that related to security or intelligence information they were aware of from their time of service. In addition, the UK is also considering amending the Official Secrets Acts in a manner which will make it easier to criminalise journalists (and other public watchdogs, human rights defenders etc.) who rely on unofficially disclosed official documents or materials which expose state failings, including in relation to Troubles-related killings and other human rights violations.[84]

In summary: at a time when the UK Government is proposing an unconditional amnesty for conflict-related offences in the name of information recovery, it is concurrently considering creating new criminal offences that can be used against journalists, legacy investigators and human rights defenders who put evidence of human rights violations into the public domain. Such individuals would be the only people liable to be prosecuted for conflict-related matters.

Expectations of Disclosure from Paramilitaries

The section of the command paper concerning disclosure to the IRB by UK public authorities makes an odd statement as follows: 'It is also clear that disclosure cannot be one sided and we would expect all relevant parties to make a similar commitment to cooperation and to providing disclosure.'[85]

In relation to 'disclosure', this appears to suggest that paramilitary organisations would be expected to provide 'disclosure' to the IRB. It is widely known, however, not least as it is regularly rehearsed in legacy discussions, that paramilitary organisations did not typically keep records and therefore an 'expectation' of 'disclosure' from paramilitaries is largely meaningless in practice.[86] The method of recovering any relevant documents or other materials held by paramilitary and other suspects is through the use of police-type search powers, which the IRB would not have.

It is also possible that the above sentence anticipating a commitment from other relevant 'parties' is also in part a reference to the Irish government providing disclosure to the IRB. Unlike the SHA-planned ICIR which was to be created through a bilateral (UK-Ireland treaty), the IRB would be unilaterally established by the UK. It is therefore difficult to determine the extent to which the Irish government would cooperate with a mechanism over which they had no input,

84 See Rory Winters, 'Official Secrets Act reform could target journalists exposing state failings in Troubles' killings' *The Detail* (22 July 2021) https://thedetail.tv/articles/official-secrets-act-reform-could-target-journalists-exposing-state-failings-in-troubles-killings

85 Command paper, para 20.

86 Such discussions often take place with the contention that it is 'unfair' on the security forces to focus on their records. However, in fact such records usually focus primarily on paramilitaries. See for example: Written evidence submitted by Jon Boutcher, Officer in Overall Command, Operation Kenova (LEG0041) to the Northern Ireland Affairs Committee: 6.3 Records of events and those responsible. 'Most of the records held by the security forces reflect information on those terrorists responsible for legacy crimes. Some commentators express the position that terrorists did not keep records whilst the security forces were required to which is considered as unfair to the security forces. In my experience these records rarely reflect wrongdoing by the security forces they almost entirely show the wrongdoing of terrorists.' https://committees.parliament.uk/ writtenevidence/7650/ html/

which would in turn limit the capacity of families to access relevant legacy information from the Irish government.

Removal of Protections for Information Providers

The Stormont House Agreement 2014 envisaged the ICIR as a mechanism to enable victims and survivors 'to seek and *privately* receive information' about relatives' deaths.[87] The process was intended to be private due to the belief that information providers would be unlikely to take part in a public process due to the perceived risk of exposing themselves to criminal liability as well as any reputational or personal safety risks that might result from providing testimony on their actions.

To address these concerns of potential information providers and to remove obstacles to their participation, the Stormont House Agreement contained the following safeguards: 'The ICIR will not disclose information provided to it to law enforcement or intelligence agencies and this information will be inadmissible in criminal and civil proceedings'[88] and that 'the ICIR will not disclose the identities of people who provide information.'[89] These protections were included in the draft 2018 Northern Ireland (Stormont House Agreement) Bill.

The command paper contains no mention of the above safeguards for information providers, and the word 'private' is removed from the language on the IRB's information recovery functions. On the contrary, paragraph 19 of the command paper suggests that one outcome of the proposed information recovery process would be that

> *it could be possible to arrange (at the initiation of the family, and with the consent of all parties) face-to-face victim-perpetrator mediation sessions, offering families a sense of accountability and justice through restorative means.'*

Little detail is provided as to how this might work in practice, or indeed, how the State's Article 2 ECHR responsibilities (including to prevent potential violence from being inflicted against any participant in such a process) would be upheld.

The addition of this mediation process indicates that victims and families could know the names and faces of those responsible for the killing or injuries that have caused their suffering. In addition, the removal of the confidentiality protections could mean that information provided to the IRB could become public (except for the restrictions on disclosing information that could pose a threat to life or national security). No details are provided as to how the IRB archive of information would be managed or secured.

87 Stormont House Agreement 2014, para 41 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf

88 Ibid, para 46.

89 Ibid, para 49.

Likelihood of Voluntary Cooperation

As it does not appear that the IRB would have powers to compel testimony, it can be inferred that it would only receive testimony provided voluntarily. This idea of voluntariness is conveyed in paragraph 15, which states that

The Government is increasingly of the view that this approach [of removing prosecutions] would maximise opportunities for information recovery, with perpetrators and witnesses more likely to come forward with potentially useful information than under previous models where such information could be used against them.

Similarly, paragraph 35 states that the amnesty

> *could … pave the way for the delivery of the robust information recovery process … to be successful, helping as many families as possible, by encouraging those with potentially useful information about a Troubles-related death or serious injury to cooperate with the information recovery body. In our view, trust in any information recovery mechanism would be severely weakened while there were ongoing concurrent criminal investigations, and the information that we believe to be crucial for families, and wider reconciliation efforts, would be lost forever.*

Thus, the command paper expresses the view that introducing a broad, unconditional amnesty would lead to greater cooperation by offenders with the IRB. However, the command paper presents no evidence to support this assumption. Nor does it provide a justification for the removal of the other safeguards contained in the Stormont House Agreement that were intended to encourage participation. Indeed, in a recent interview with the *Sunday Times*, the Secretary of State stated that 'I am not suggesting for one minute that I can see republican terrorists stepping up and owning the heinous crimes they committed… I am not expecting that to happen.'[90]

There are a number of other reasons to be sceptical of the command paper's assumption that unconditional amnesty would lead to enhanced cooperation.

First, the experience of the Independent Commission on the Location of Victims' Remains, on which the Stormont House Agreement modelled its information recovery proposals, demonstrates that perpetrator cooperation in information recovery is possible without amnesty.

Second, if the UK government acts unilaterally and in bad faith through the introduction of its command paper proposals, it may well delegitimise the information recovery processes in ways that will make victims, witnesses and perpetrators reluctant to engage and may discourage paramilitary organisations from encouraging their members to take part.

90 Caroline Wheeler, 'Justice System is holding back peace, argues Brandon Lewis' *Sunday Times* (29 August 2021) https://www.thetimes.co.uk/article/justice-system-is-holding-back-peace-argues-brandon-lewis-lwrp5lh6n

Third, there is plenty of experience on Northern Ireland related legacy work that suggests that without powers of compulsion, cooperation will not be forthcoming. For example, this has regularly manifested itself in relation to Police Ombudsman investigations, which have faced refusals to cooperate with legacy investigations from a number of retired officers.

Fourth, there is an obvious risk, which is unexplored in the command paper, that the removal of confidentiality may create a new disincentive for perpetrators to engage in information recovery.

Fifth, as discussed above, the command paper does not make any reference to provisions setting aside offences in the Official Secrets Act. The endurance of its penalties for legacy offences would render former members of the security forces liable to prosecution for giving statements to the IRB and could thus deter them from disclosing information.

Compatibility of Proposed IRB Model with the European Convention on Human Rights

A central issue regarding the credibility of the proposed IRB is whether it will be in compliance with the European Convention on Human Rights (ECHR). As noted in Chapter One, Article 2 of the ECHR requires effective, independent investigations into deaths, and similar procedural requirements are attached to Article 3 (prohibition of torture and inhuman and degrading treatment). The command paper, whilst stating that the IRB would be 'independent of government', is silent on any further detail regarding the structure, staffing, resourcing and other matters in relation to the IRB. It is notable that the phrase used is 'independent from government', which does not rule out the IRB being part of an existing policing body.

Whilst there has rightly been considerable focus on the 'independence' requirements of Article 2 in relation to legacy cases, it is important to stress that investigations are also required to be 'effective'. Thus, the lack of powers to compel members of the security forces responsible for shootings to attend inquests as witnesses was previously among the key findings of the European Court of Human Rights in the NI cases that a procedural violation of Article 2 of the ECHR had taken place.[91]

The core principles of the procedural obligation were set out in these NI cases from 2001 onwards in relation to the use of lethal force by the security forces. The Court held that for an investigation to comply with Article 2 of the ECHR, it:

> *must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances… and to the identification and punishment of those responsible. This is not an obligation of result, but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate*

91 https://rm.coe.int/09000016805d5e90

record of injury and an objective analysis of clinical findings, including the cause of death … and concerning forensic evidence … Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.[92]

In our previous work on a 'Model Bill' for the SHA, we sought to set out the parameters of what a HIU investigation would need to cover in order to ensure Article 2 compliance. These criteria were derived from ECHR case law and were deliberately listed on the face of the 'Model Bill' as follows:

3) The purpose of an investigation must be to—

(a) establish as many as possible of the relevant facts;

(b) identify, or facilitate the identification of, the perpetrators;

(c) establish whether any relevant action or omission by a public authority was lawful (including, in particular, whether any deliberate use of force was justified in the circumstances);

(d) establish whether any action or omission of a perpetrator was carried out with the knowledge or encouragement of, or in collusion with, a public authority;

(e) obtain and preserve evidence;

(f) identify material which is or may be relevant to motive (including, in particular, racial, religious or other sectarian motive);

(g) identify acts (including omissions; and including decisions taken by previous investigators or other public authorities) that may have prevented the death from being investigated or a perpetrator being identified or charged; and

(h) take any other action that the HIU thinks appropriate.[93]

These are the kind of provisions required to render any legacy mechanism 'effective'. Given the limitations of its powers to disclosure and voluntary witness statements, it is clear to us that the IRB is not going to be capable of delivering effective investigations that are compatible with the legal obligations under the ECHR.

92 See McKerr v UK para 113, https://hudoc.echr.coe.int/eng#{%22dmdocnumber%22:[%22697328%22],%22itemid%22:[%22001-59451%22]} for further information on the Article 2 duties relating to effectiveness see the 'independent interim report by Alyson Kilpatrick BL examining the article 2 European Convention of Human Rights (ECHR) compliance of Operation Kenova' https://www.kenova.co.uk/review-of-operation-kenova-published

93 Clause 11(3) of model implementation bill: https://www.dealingwiththepastni.com/project-outputs/project-reports/stormont-house-agreement-model-implementation-bill

IRB Caseload and Prioritisation

The case remit of the IRB is to encompass a 'death or serious injury in the United Kingdom as a result of a Troubles-related incident'.[94] There is no definition of a 'Troubles-related incident' and no start or cut-off date for the IRB case remit. As noted in Chapter One, there is also no cut-off date (or definition) for the proposed Statute of Limitations amnesty for 'Troubles-related offences'. Implicit in the proposals is that the IRB case remit would align with the amnesty, as the stated rationale for the IRB is for persons to volunteer information knowing they are covered by the amnesty.

The Early Release Scheme under the GFA concerns conflict-related offences before April 1998. Pre-1973 offences fell outside of the scheme on a technicality.[95] The Early Release Scheme applies to both the security forces and non-state actors. The SHA draft bill would have expressly remedied the anomaly of pre-1973 offences falling outside the scope of the scheme by extending it to offences from 1968 on and keeping the cut-off date at April 1998.[96] The HIU however would have a different cut-off date for *investigating* legacy cases within its remit, set at 2004 (with the caveat that 1998-2004 cases would only be investigated when new evidence emerges). This was not related to or aligned with the early release scheme with persons subsequently convicted of 1998-2004 offences liable to serve a full term rather than being eligible to serve a reduced sentence under the early release scheme (presently two years). The rationale for 2004 related to the PSNI not being able to stand over the efficacy of murder investigations prior to 2004 when reforms were implemented further to Police Ombudsman and HMIC recommendations.

There is also no definition of 'serious injury' in the paper. The Model Bill Team have previously pointed out that human rights abuses and violations that would constitute torture and broader breaches of Article 3 ECHR carry the same duties of independent, effective investigation as deaths and called for the HIU remit to be extended to cover same. Acts of torture in the conflict would include punishment shootings, torture in custody and gender-based violence. Article 2 duties can also arise in situations where an individual has sustained life-threatening injuries or has disappeared in violent or suspicious circumstances (whether by state or non-state actors). It is not clear in the paper as to whether the intention is for the IRB remit to be extended to serious injuries of the severity triggering an ECHR Article 3 duty or a broader definition of serious injury.

The definition in the command paper also indicates that a death must have occurred in the UK, which appears to preclude persons who were killed in the Republic of Ireland or elsewhere but for which many of the serious related criminal offences (conspiracy to murder, kidnap etc.) may have occurred in Northern Ireland.

94 Command paper, para 12.

95 The concept of 'scheduled' offence, which did not exist until 1973 was relied upon in the legislation to separate conflict-related offences from other crimes.

96 For further discussion see Response to NIO Public Consultation by Model Bill Team (2018) pages xlviii, 18.

The command paper states that the primary focus of the IRB would be to initiate its 'investigations' at the request of next of kin/family members or individuals (the latter presumably in relation to serious injuries). It also states that an IRB 'investigation' would not take place if families did not wish it to 'unless it would be required by international obligations'.[97]

The 'international obligations' that may require an effective investigation to take place would encompass both obligations under the ECHR and UN Convention Against Torture. Under the ECHR Article 2, the State of its own motion (rather than the next-of-kin or other family members) must initiate an effective, independent, public investigation into any death where it appears a substantive obligation under Article 2 has been or may have been violated, including where it is possible that the state was in some way implicated.

At present, there are a variety of ways that a legacy investigation can be state initiated, including by the PSNI, Police Ombudsman, DPP and Attorney General. It appears, however, that the intention is close down such avenues. There is also a raft of existing cases that have already been identified as requiring an Article 2 ECHR compliant investigation due to deficiencies in original investigations. The state's obligation to conduct an Article 2 compliant investigation can also be revived when new evidence is found.

There appears, however, to be no mechanism for an Article 2 compliant investigation under the proposed IRB. Not only would an IRB investigation be ineffective (in the absence of investigative powers); it is also unclear whether the IRB would meet independence requirements.

In addition, there appears to be no provision for own motion or referrals to the IRB to examine a case outside a next of kin/family referral. There is provision to overrule a family's opposition to the IRB opening a case where required by international obligations, but on face value this would appear only to capture the circumstance where a family had requested the IRB open a case and then changed their mind.

The command paper is silent on how the IRB would engage in case prioritisation, particularly in an initial stage in the run up to the IRB commencing when there could be a significant volume of requests. It is not clear if, for example, deaths would take priority over serious injuries, or whether the caseload would be usually worked through chronologically (as was proposed for the HIU), or whether a 'first come first served' approach would be taken.

Under the SHA and the 2018 draft bill, which was supposed to enact it, there were detailed provisions for transitional arrangements whereby PSNI and Police Ombudsman investigations that were already substantively progressed would be completed rather than being passed to the HIU. In the case of the IRB, the command paper is clear that there would be no transition but rather an 'immediate end' to any criminal investigation into a Troubles-related offence, with the PSNI and OPONI statutorily barred from investigating Troubles-related incidents. Legacy inquests and civil proceedings would also end.

97 Command paper, paras 12 and 13.

IRB 'End Products'

The command paper proposes that the IRB would compile 'all relevant, reasonably verifiable information', which would be presented in either a written report or 'official record of the incident' that would be made available to the individual or family member.[98] In the absence of details as to its powers, it is unclear how the IRB intends to cross-check and verify information.

Under the SHA, the HIU was to produce a Family Report in all cases. Whilst the IRB would produce written reports in some cases it may instead produce an 'official record.' It is not clear what this would be composed of or what the rationale is for such a differential approach. There is no provision for public statements by the IRB or its information otherwise being made available.

There is also no commitment in the command paper to IRB reports or 'official records' containing any 'findings' (including on the above matters as required by the ECHR). The Police Ombudsman in recent years has been subjected to sustained legal challenge over the Office's powers to make determinations and findings in the public statements that result from its investigations. Whilst the powers of the Ombudsman to make such findings have been upheld, there is no stated intention for the IRB to do so in its reports.

Whilst the SHA did not mention the term 'national security', the command paper is explicit that the IRB would be subject to a national security veto over its onward disclosure to families.[99] It appears that the intention is to replicate the model in the draft SHA legislation. As discussed above, this would allow Ministers to redact IRB reports and official records before they are provided to families to remove 'sensitive' information, which could include evidence of human rights violations committed by agents of the state.

The command paper also states that the IRB process would 'provide opportunities for meaningful acknowledgement and recognition of suffering in ways that have been difficult to facilitate thus far'.[100] As discussed above, it uses the example of a face-to-face victim-perpetrator mediation session as justice through 'restorative' means as one such possibility. The command paper goes on to argue that the proposals comply with the SHA Principle of 'Facilitating the pursuit of justice', as whilst shutting down all criminal justice routes, the proposals provide for such 'restorative justice' sessions.[101]

Even by the standards of this command paper, this really is quite a stretch from the original meaning of this SHA Principle. Furthermore, notwithstanding the broader questions of

98 Command paper, para 16.

99 Command paper, paras 20-21.

100 Command paper, para 19.

101 Command paper Annex A page 25. '[SHA Principle] *Facilitating the pursuit of justice and information recovery* - By ending the relentless pursuit of criminal justice outcomes - which almost never delivers for families - our proposals would help provide a sense of restorative justice which could be delivered to many, such as through voluntary victim-perpetrator mediation sessions. Moreover, a body focused on information recovery, free from the operational constraints caused by concurrent criminal investigations, would be empowered to provide information to those who have waited too long already, as quickly as possible. Going beyond the ICIR proposed at SHA, this body would also provide information to those who sustained serious injuries during the Troubles. This would seek to provide justice to families through recognition and acknowledgement of what happened to them and their loved ones.'

the applicability of restorative justice in relation to serious human rights violations, such approaches are generally complementary to, rather than a substitute for, justice routes. As detailed below with regard to the oral history provisions of the command paper, any effort to obviate the rights of victims and survivors to truth justice, justice and accountability which is framed as 'restorative justice' damages the credibility of restorative justice and the role that it can play in post conflict peace-building.[102]

Fact Check: Does the Command paper provide for ending all Troubles prosecutions?

Verdict: Not Quite

Journalists and whistle blowers could still be prosecuted with no public interest exemption for those who reveal or publicise past human rights violations

The command paper proposes a way forward that would 'remove criminal prosecutions' through a Statute of Limitations for Troubles-related offences.[103] However, at the same time the command paper also indicates that it would provide for a model of disclosure that would *create* new criminal offences and provide for new prosecutions of members of the IRB or others who release 'sensitive' information to families or into the public domain without authorisation.[104] There would be no public interest exemption, even for information that reveals human rights violations. 'Sensitive information' relates to the undefined national security interests of the UK or the actions deriving from the intelligence agencies and covert branches of the police and army.

At the same time, the government is also considering amendments to the Official Secrets Acts that would make it easier to prosecute journalists for publishing official material obtained without authorisation, including that revealing evidence human rights violations.

There are also existing provisions under the Official Secrets Act that make it an offence for state actors to disclose information – including in any statement – relating to security

102 See further K. Clamp, *Restorative Justice in Transition* (Routledge 2014).
103 Command paper, para 34.
104 Command paper, para 20.

or intelligence that they are aware of due to their past work.[105] There is no proposal in the command paper to set this provision aside for the IRB. Without such a provision, a former member of the security forces could still be prosecuted for providing a statement to the IRB or elsewhere, that reveals information that the UK Government or intelligence bodies wish to continue to conceal.

As information 'officially' flowing from the IRB will be subject to ministerial approval and redaction, it appears the whole system is designed to strictly control which information is ultimately provided to families, with powers retained or commenced to allow prosecution of journalists, whistle blowers and others who release or publish information outside of this system of control.

Fact Check: Current and Proposed Legacy Mechanisms are Focused on 'Criminal Justice Outcomes' and not 'Information Recovery'

VERDICT: False

There is a clear narrative throughout the command paper that both the existing 'package of measures' and institutions proposed under the SHA focus on 'criminal justice outcomes' (i.e., prosecutions and convictions) and that the proposed IRB will amount to a departure from this approach to instead pursue 'information recovery'.

The command paper states: 'Rather than pursuing a goal (convictions) that will fail almost every family, we want a process of information recovery that will deliver for every family that wants it.'[106] It describes this process as one that 'moves away from criminal justice outcomes'.[107] Boldly and erroneously claiming that 'persisting with criminal justice outcomes' conflicts with the GFA and SHA,[108] the stated justification for proposing the IRB is to instead 'focus on the recovery and provision of information'.[109] Elsewhere in the command paper the pursuit of 'criminal justice outcomes' is blamed for diverting 'finite resources' away from 'positive outcomes' for the 'vast majority of families' who 'miss out on the opportunities to successfully

105 See for example section 1 of the Official Secrets Act 1989 (https://www.legislation.gov.uk/ukpga/1989/6/section/1) 1 Security and intelligence.
(1) A person who is or has been—
(a) a member of the security and intelligence services; or
(b) a person notified that he is subject to the provisions of this subsection,
is guilty of an offence if without lawful authority he discloses any information, document or other article relating to security or intelligence which is or has been in his possession by virtue of his position as a member of any of those services or in the course of his work while the notification is or was in force.
(2) The reference in subsection (1) above to disclosing information relating to security or intelligence includes a reference to making any statement which purports to be a disclosure of such information or is intended to be taken by those to whom it is addressed as being such a disclosure.

106 Command paper, para 5.

107 Command paper, para 7.

108 Command paper, para 10.

109 Command paper, para 11.

recover information'.[110] The Secretary of State in his foreword to the proposals even goes as far as to blame the application of the rule of law for preventing information recovery, reconciliation and 'wider society moving forward'.

These claims wilfully ignore the fact that the overarching thrust of the proposed SHA mechanisms was grounded in information recovery facilitated by mechanisms 'with teeth'. The ICIR was entirely focused on information recovery in individual cases, as was the Oral History Archive at a more thematic level, and both were to contribute to broader work on overarching themes and patterns. The HIU along with the inquest system could engage in information recovery 'with teeth' through the exercise of police or coronial powers, with the main product of the HIU being family reports. **It is simply not true to suggest that the present proposals represent a *change of direction* towards information recovery.** The potential for a criminal trial, where evidence can be tested under judicial independence, can also lead to information recovery, as can civil litigation, and yet the NIO's recent proposal is to now close down access to both.

The presentation in the command paper of the current legacy mechanisms is focused on 'criminal justice outcomes'. In fact, some mechanisms – inquests, public inquiries, do not relate at all to criminal justice outcomes at all. Whilst retaining the possibility of prosecutions, the main product of Police Ombudsman legacy investigations has long been public reports, contributing to truth recovery and reform as a guarantee of non-recurrence. Similarly, Sir Hugh Orde, who established the Historical Enquiries Team (HET), was similarly clear that main work of the HET was focused on providing the maximum information possible to families.[111] To frame all of this work as 'prosecution focused' is highly misleading and disingenuous.

The command paper also critiques the work of Operation Kenova, noting that it has not yet led to any prosecutions. Whilst in fact Kenova has passed prosecution files to the PPS, this again overlooks and disregards the significant level of information recovery provided to families to date through the investigative process and the public-facing reports that Kenova (and its other operations) are to produce into over 200 deaths.

In addition, the paper states that the PSNI Legacy Investigation Branch is currently considering almost 1,200 cases, which would take 'over 20 years using current resources'. However, these figures do not represent the small number of cases currently live before the LIB. Rather the figure relates to the outstanding number of cases not yet completed by the HET, which were to

110 Command paper, para 5.

111 The Command paper states 'The Historical Enquiries Team had an annual budget of £30million and 100 staff. After 10 years, just 3 of the 1615 cases it reviewed resulted in successful convictions for murder.' This deliberately This entirely overlooks the fact that the HET produced hundreds and hundreds of family reports, which were always to be its main product in each of its cases. As Sir Hugh Orde has argued:
'The fact that evidential opportunities lost at the time would be hard to recover did not render the initiative worthless. We had to shift the focus to ensure that, mindful of our primary role as investigators, the driving force behind this initiative would be to deliver a meaningful outcome for the families… The phrase, 'the principle of maximum permissible disclosure' meant exactly what it said; we would tell the family everything we found, however difficult or challenging that may be, subject only to legal restrictions, for example Article 2 issues – in other words information that could put another life at risk would not and could not be disclosed.' Sir Hugh Orde, War is Easy, Peace is the Difficult Prize, The Annual Lord Longford Lecture 2 December 2009, Available at https://www.longfordtrust.org/longford-lecture/past-lectures/lectures-archive/sir-hugh-orde-war-is-easy-peace-is-the-difficult-prize/

be picked up by the SHA HIU and not the LIB. Had the UK set up the HIU after the SHA, the HIU caseload would already by now have been substantively progressed.

Moreover, as noted above, whilst the focus of the IRB will also be on 'information recovery' it has fewer powers than any of the existing or proposed comparable mechanisms and is therefore far less likely to lead to information recovery in practice.

Finally, it is also worth noting that, whilst the government's command paper argues its motivation for the changed approach is 'information recovery', on other occasions Ministers have quite openly stated that the motivation for the changed approach is to prevent investigations and prosecutions of soldiers.

Fact Check: IRB powers to 'access information and find out what happened'[112]

VERDICT: False

The proposed IRB would have fewer powers to recover information than both the existing and planned mechanisms under the SHA. The IRB's powers would be limited to seeking disclosure of documents from UK public authorities and taking voluntary statements. The IRB is therefore far less likely to be able to 'find out what happened' than other existing or planned mechanisms. It is also highly unlikely to secure the voluntary 'buy-in' anticipated.

The IRB would therefore not 'deliver as much information as possible' and moreover would be established concurrently with legislation to shut down all other legacy mechanisms that have broader powers to recover information, including the Police Ombudsman, PSNI, Operation Kenova and inquests.

In stark contrast to the stated ambition of ensuring that information is recovered as quickly as possible for victims' families, the UK Government has repeatedly procrastinated and delayed setting up the institutions under the 2014 SHA and has deliberately withheld resources to prevent the SHA programme of legacy inquests proceeding. Had the 2014 SHA been implemented at the time the legacy inquests programme would at this point be in the process of completing its work. The HIU would also by now have completed much of its work and the ICIR and Oral History Archive would be well established.

112 Command paper, para 11.

Chapter 3: Oral History and Memorialisation

Introduction

The command paper moves oral history and memorialisation front and centre of a new apparently victim-centred and reconciliation-oriented approach to addressing the legacy of the past. This chapter begins with a brief overview of the oral history proposals developed under the terms of the Stormont House Agreement. It then critiques the British government's new proposals.

It is difficult to engage in detailed and probing analysis of what is now proposed in relation to oral history and memorialisation given the vague and sweeping nature of the proposals and the corresponding absence of detail as to how they might work in practice. This chapter nonetheless seeks to identify obvious gaps and highlights some of the more erroneous assumptions underpinning the new proposals.

It concludes by reflecting on a new model of governance for legacy-related oral history and memorialisation work. However, it should be stressed that the workability of these suggestions is premised on the need to deliver Article 2 and Article 3 of the ECHR compliant information recovery and to thus uphold the rule of law. Oral history and memorialisation initiatives are complementary to such an approach and should categorically not be seen as a 'soft' alternative.

The Background to the Oral History and Memorialisation Proposals

Since the signing of the Good Friday Agreement there has been widespread recognition that oral history and memorialisation could make an important contribution to dealing with the past.[113] The inclusion of an Oral History Archive (OHA) as one of four key legacy mechanisms was a welcome element of the 2014 Stormont House Agreement. Building on the valuable work of Eames-Bradley[114] and Haass-O'Sullivan[115], it recognised the need to engage perspectives beyond those that are typically captured in the courtroom. When done properly, oral history offers a powerful means of giving voice to those whose stories have been wilfully or carelessly

113 For example, an all-Ireland survey of a stratified sample of the general population (conducted for the 'Apologies, Abuses and Dealing with the Past' project) ranked the importance of storytelling opportunities to dealing with the past at 8 out of 10. See 'Summary Results of a Public Opinion Survey' (2018) 8 https://apologies-abuses-past.org.uk/outputs/reports/

114 Consultative Group on the Past, *Report of the Consultative Group on the Past* (2009) 96-105. https://cain.ulster.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf

115 An Agreement Among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags and Emblems; and Contending with the Past (2013) 35-36. https://www.northernireland.gov.uk/publications/haass-report-proposed-agreement.

ignored. It captures the messy and complex realities of the conflict that shaped our relations with family, friends, neighbours, Churches, schools, employers and so forth. Taken together, these diverse perspectives can help to humanise 'the other'. They can also usefully inform work on the broader patterns and themes of conflict such as the gender dimensions of conflict, urban and rural experiences of violence, and intergenerational trauma. This could make an invaluable contribution towards moving our society forward in a spirit of mutual understanding and respect.

The Draft Northern Ireland (Stormont House Agreement) Bill published in 2018 set out in Part 4 the provisions for the establishment of an Oral History Archive (OHA) under the 'charge and superintendence' of the Deputy Keeper of the Public Records Office of Northern Ireland (PRONI). We opposed this proposal, citing incompatibility with the key principle of independence and freedom from political interference.[116] Other key critiques of the proposed OHA were set out in our comprehensive response to the government's consultation on the Bill.[117]

The NIO's own analysis of its 2018 consultation on the Draft Northern Ireland (Stormont House Agreement) Bill reported that the majority of the 17,000 submissions it received were 'broadly supportive' of the OHA (p.26).[118] As an alternative to the OHA being placed within PRONI, the Model Bill team proposed a 'hub and spokes' model, stressing the need to work with and through existing oral history groups in order to provide central support, guidance and funding. The fact that the government appears to have it changed its viewed on the suitability of confining the OHA to PRONI and is instead now open to the type of 'hub and spokes' or aggregator model that we put forward is welcome.

What will not work, however, is any attempt to substitute PRONI with an alternative 'state-centric' governing authority or a consortium that is unwieldy to the point of impotence. The need for independent and transparent oversight remains paramount if the proposed oral history initiatives are to secure genuine cross-community buy-in and thus contribute to real and meaningful reconciliation.

116 A Bryson (2015) *The SHA Oral History Archive, PRONI and the Meaning of Independence.* The Stormont House Oral History Archive, PRONI, and the Meaning of Independence- Guest Post by Dr Anna Bryson – RightsNI

117 Model Bill Team (2018) Addressing the Legacy of Northern Ireland's Past: Response to the NIO Consultation. qub-uu-caj-response-to-nio-consultation-aug-18.pdf

118 Northern Ireland Office, Addressing The Legacy Of Northern Ireland's Past: Analysis of the consultation responses (July 2019) 26 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/836991/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses__2_.pdf

Critique of The Command Paper Proposals on Oral History and Memorialisation

The government's new proposals are couched in the context of broader societal reconciliation and the need to deliver 'positive outcomes for as many of those directly affected by the Troubles as possible – as well as for society in Northern Ireland as a whole'.[119] To advance this broad objective, the government proposes to 'establish a major oral history initiative – to be delivered via new physical and online resources and through empowerment of the museums sector in NI – supported by rigorous academic research projects, to further mutual understanding and reconciliation in both the short and long term while realising ideas put forward at Stormont House'.[120]

The purpose of this broadly defined initiative is described as a means to 'create opportunities for people from all backgrounds to share their experiences and perspectives related to the Troubles – and to learn about those of others.' It is also suggested that 'balance and sensitivity' would be central to the initiative and that a concerted effort would be made to 'engage with those voices who many not have been heard previously, via a review of what is missing in the existing oral history landscape and through an emphasis on supporting community-led groups in carrying out this work'.[121] However, there is no detail provided as to how such 'balance' would be achieved in practice. In particular, it is unclear how this might weigh on the rights of individuals to recount their subjective accounts and experiences - or indeed where responsibility for determining such 'balance ' would lie.

The command paper also expresses the hope that this broad process would enable 'cathartic acknowledgement' and that it would facilitate 'thoughtful new physical and online resources', presenting new and existing oral histories and other material to wider society in a way that is 'holistic, balanced and contextualised'.[122] There is again a conspicuous absence of detail on how this would materialise in practice. There is reference to the potential benefits for younger generations in paragraph 26 although, as noted in the Introduction, there is not a single reference to gender issues throughout the 30 pages of the command paper.

The government proposals suggest that multidisciplinary academic work, including factual timelines, statistical analysis and themes and patterns reporting could support the oral history work. It is claimed that this would help to 'build an understanding of history that reflects the complexity of the events of the past, as well as the broader landscape and context in which they took place'.[123]

119 Command paper, para 2.
120 Command paper, para 6.
121 Command paper, para 24.
122 Command paper, para 25.
123 Command paper, para 28.

We support the idea of commencing with an inventory of what has already been done and of identifying key themes for development based on a gap analysis. However, we are deeply sceptical of the utility of the proposed timeline of the conflict.[124]

Paragraph 30 of the command paper states that: 'Building on what we have heard previously, our ambition would be for this work to be led by a partnership of academics, museums, and other relevant organisations, leveraging existing expertise while ensuring value is added to the good work which is already being done in this sector'. It is suggested that 'in time, such a consortium could serve to unlock other opportunities for collaboration and inclusive debate on other reconciliation, memorialisation, and educational initiatives that have previously proved challenging to progress'. This vague and unsubstantiated statement requires considerable clarification. There is, for example, an underlying assumption that the proposed and undefined consortium of local museums, archives and academic institutions (many of whom are competing with one another for scarce public funds) would work effectively together in mapping out and delivering a diverse range of oral history and memorialisation initiatives. Whilst local academic institutions, museums and archives have of course successfully collaborated on discrete post-conflict projects, the scale and sensitivity of what is envisaged here calls for the type of independent and transparent oversight referred to above. One suggestion as to how this might be done is discussed below.

The German Case Study

To highlight what is possible in the broad field of memorialisation, the proposals place a spotlight on Germany. As with the South African Truth and Reconciliation Commission example discussed in Chapter One, this international reference appears to have been chosen at random: it is only partially explained and its relevance to the Northern Ireland context is unclear.[125] The two parliamentary commissions in Germany were heavily criticised for being top-down, politicised, western-centric and elitist - speaking for and on behalf of victims rather than comprehensively capturing the voices and experiences of those who lived under the previous East German regime.[126]

124 As noted in the Report of a workshop on Dealing with the Past in Northern Ireland at Oxford University in October 2016: 'Greater clarity about the purpose of a timeline is necessary. Otherwise, we risk creating misunderstandings among the wider public about the nature of academic research. One advantage of historical scholarship is precisely the lack of importance attached to polemical arguments over 'who fired the first shot?' Dealing with the past in Northern Ireland will require engaging with more complex questions of causation and responsibility.' See https://irishhistoriansinbritain.org/?p=321 The Hertford workshop included a dozen established scholars working in departments of History, Politics and Sociology in Northern Ireland, the Republic of Ireland and Britain: Dr Huw Bennett (University of Cardiff); Dr Maire Braniff (University of Ulster); Dr Anna Bryson (Queen's University Belfast); Professor Marianne Elliott (University of Liverpool); Dr Katy Hayward (Queen's University Belfast); Professor Ian McBride (Hertford College, Oxford); Professor Fearghal McGarry (Queen's University, Belfast); Dr Marc Mulholland (Oxford); Dr Niall Ó Dochartaigh (NIU Galway); Dr Simon Prince (Canterbury Christ Church); Professor Jennifer Todd (University College Dublin); Dr Tim Wilson (University of St. Andrews).

125 For analysis of the complexities of the relationship between archives and the South African Truth and Reconciliation see Verne Harris, *Exploring Archives: An Introduction to Archival Ideas and Practice in South Africa.* National Archives of South Africa, 1997; 'The Archival Sliver: Power, Memory, and Archives in South Africa'. *Archival Science* 2, no. 1–2 (March 2002): 63–86. https://doi.org/10.1007/BF02435631 .

126 See for example, Jennifer A. Yoder 'Truth Without Reconciliation: An Appraisal of the Enquete Commission on the SED Dictatorship in Germany' *German Politics* (1999) 8:3, 59-89.

Moreover, the command paper fails to mention the key contextual point in the German case which is the fact that the primary driver for post-reunification transitional justice was the opening of the Stasi (secret police) files and the establishment of an organised process by which citizens could access data previously held by the Stasi relating to themselves.[127] There is no suggestion in the command paper that the UK government is planning to provide open access to analogous files held by the PSNI, M15, MOD or other security agencies pertaining to the Northern Ireland conflict.

The proposals note the need to connect oral history and memorialisation with broader initiatives designed to advance reconciliation. Whilst this is of course quite valid in principle, the scattergun illustrations that follow and their linkage to dealing with the past are tenuous and vague. It is not at all clear, for example, how the proposal to establish a cross-border university in the North West connects to post-conflict oral history.

In general, the proposals in the command paper on oral history and memorialisation are lacking in detail, generalist and significantly under-developed given the seven years the government has had to develop their thinking since the signing of the SHA in 2014.

Erroneous Assumptions Underpinning the Oral History and Memorialisation Proposals

There is a consistent and unsubstantiated assumption running through the command paper that the type of oral history and memorialisation proposals envisaged can only be achieved through what is described in paragraph 40 as 'an approach that moves away from the pursuit of criminal justice outcomes'. In Annex A, it is further suggested that moving away from investigations would 'better accommodate other valuable initiatives, including an oral history project that will facilitate storytelling and understanding, and a balanced approach to memorialisation'.

There is no substantive evidence to support the assertion that a move away from Article 2 of the ECHR compliant investigations will facilitate oral history and memorialisation initiatives. On the contrary and as discussed in Chapter One, the command paper's proposals for a statute of limitations for all Troubles-related offences have been met with widespread opposition domestically and internationally, including from many traditionally strong advocates of the 'value-added' of story-telling and memorialisation work.[128]

127 See interview with Dagmar Hovestädt on the significance of opening the Stasi Records Archive in Germany, *Oxford Law Faculty*, https://www.law.ox.ac.uk/role-archives-transitional-justice/dagmar-hovest%C3%A4dt

128 For example, WAVE Trauma Centre echoed the concern we outlined in a blog on eamonnmallie.com that a 'soft-focused' oral history approach was being offered up as a consolation prize in lieu of other routes to justice and accountability, adding 'there should be no legacy stitch-up'. @WAVE Trauma Centre, 13 July 2021, 23.40. The acclaimed artist, Colin Davidson, whose 'Silent Testimony' exhibition is widely regarded as a powerful example of memorialisation has also described the British government's current proposals for an amnesty as 'obscene and inhumane' adding that 'we cannot stand by and watch this happen'. @colin_davidson, 17 July 2021, 10.30.

Lessons have been learned from the mistakes made during the Boston College Tapes project,[129] and the strong tradition of oral history in the jurisdiction has (in spite of a significant funding deficit) continued to develop alongside prosecutorial, inquest, investigative and civil action processes.[130]

At different points in the legacy negotiations, there have been quiet suggestions that the oral history proposals could potentially be disaggregated from the other mechanisms designed to deliver truth, justice and accountability. Such an approach we believe would fundamentally undermine the credibility and value-added of oral history and memorialisation. Rather than dismantling the Stormont House Agreement we believe that much more thought needs to be given to how these mechanisms would work together in practice. For example, there is no reference in the command paper to the fate of the proposed information recovery archives and how this material and indeed the oral history archive(s) would inform work on broader patterns and themes.

It is also notable that the command paper proposes to fold 'vital aspects' of the Implementation and Reconciliation Group agreed under the terms of the Stormont House Agreement into the new proposals on oral history and memorialisation. This includes the prospect of giving 'serious consideration' to 'statements of acknowledgment' by 'the various actors of the Troubles'.[131] It has always been our strong view that such a process has significant potential and merit alongside the other mechanisms contained in the SHA including the 'truth recovery with teeth' powers associated with the HIU. As with oral history initiatives, apologies or statements of acknowledgement can only deliver for victims *alongside* truth, justice and accountability, not as an alternative to such measures. In a context whereby the SHA was being implemented in full, such efforts could indeed be a vitally important contribution.[132] However, in light of the widespread opposition to the government's current proposals, it is very difficult to envisage any of the key actors coming forward to apologise for anything or indeed to envisage victims viewing any such apology or acknowledgement with anything other than disdain.

129 In 2010, the Boston College oral history project (led by journalist Ed Moloney) brought post-conflict oral history in Northern Ireland to international attention. Public attention was drawn to the archive of interviews with loyalists and mainly dissident republican ex-combatants following the publication of information recounted by two recently deceased interviewees in a book and documentary and in media coverage of a follow-up interview with another contributor. The British Government (on behalf of the PSNI) subsequently subpoenaed the interviews held at the Burns Library in Boston College under the terms of the UK / US Mutual Legal Assistance Treaty (MLAT). This highlighted a critical discrepancy regarding assurances given to interviewees that were never likely to be legally enforceable. For an overview of the legal challenges that followed and the broader jurisprudential context, see W. Havemann, 'Privilege and the Belfast Project' (2010) 65 *Stanford Law Review Online*. See further T. Palys and J. Lowman (2012), 'Defending Research Confidentiality: "To the Extent the Law Allows": Lessons from the Boston College Subpoenas, 10:4, *Journal of Academic Ethics* 271-97.

130 See A. Bryson, 'Victims, Violence, and Voice: Transitional Justice, Oral History and Dealing with the Past' (2016) *Hastings International and Comparative Law Review* 39, pp. 312-316.

131 Command paper, para 27.

132 See report prepared for the UN by K. McEvoy, A. Bryson and C. Placzek, 'Apologies in Transitional Justice' https://apologies-abuses-past.org.uk/outputs/reports/

Towards a New Model of Governance

The government proposals appear to countenance some version of a 'Government Special Purpose Vehicle' (GSPV). As noted, we welcome the general move away from the originally proposed state-centric OHA model towards a more pluralistic and flexible approach. Rather than tasking one or more Northern Ireland-based archive, museum or third-level institution with responsibility for overseeing this vitally important programme of work we feel that an 'honest broker' must be engaged to guarantee the independence and ethical governance of the Oral History and Memorialisation-related work, to comprehensively address the needs of victims and survivors, and to provide objective criteria for funding calls and assessment of applications. As we have argued previously, one possible solution would be to look to the type of body that regulates publicly funded academic research. For example, the Arts and Humanities Research Council (AHRC) funds – in accordance with clear and transparent priority themes and assessment criteria – world-class peer reviewed research across the arts and humanities. Through its 'Connected Communities' programme it has successfully facilitated partnerships with dozens of community-based organisations.

To facilitate the safeguarding, preservation and sharing of existing collections, the collection of new oral history accounts, the creation of a centralised digital hub, and the all-important work on patterns and themes the government could ring-fence funds to facilitate oral history and memorialisation work and then administer these via such an independent body. As noted in a recent blog, the phases of funding might include: Preservation, Training, Capturing Unheard Voices, Sharing New Perspectives and Exploring broader Patterns and Themes.[133]

The related work on patterns and themes is essential if we are to holistically address the needs of victims and survivors, narrow the space for 'permissible lies', and highlight appropriate steps to ensure that past violations do not recur. At the heart of difficulties about how we deal with legacy issues is of course the fact that there is precious little agreement on the causes and consequences of past violence. Oral history offers an important means of opening up the space for healthy and respectful debate on those differences and can thus function as a catalyst for reconciliation.

However, in order for this to happen, the new oral history proposals must be co-ordinated to complement the other legacy mechanisms. Putting it simply, any improvement in the government's approach to post-conflict oral history will only become relevant in a context wherein Article 2 and Article 3 of the ECHR compliant truth recovery is delivered through appropriately empowered institutions and the right of families to go to court remains unaffected. Any attempt to promote oral history while simultaneously closing down effective routes to truth and accountability will not work. Moreover, they could do untold damage to the credibility of oral history and its capacity to help finally address the legacy of the past.

133 A Bryson (2021) NIO Legacy Proposals: 'Soft' Options Will Not Suffice. NIO Legacy Proposals: 'Soft' Options Will Not Suffice - By Dr Anna Bryson - Eamonn Mallie

Chapter 4: Inquests and Civil Cases

Introduction

The command paper asserts that civil, coronial processes relating to the Troubles, like criminal processes, 'involve an approach that can create obstacles to achieving wider reconciliation'.[134] In response to this unsubstantiated claim, it makes the shocking and unprecedented proposal to end judicial activity in relation to 'Troubles-related conduct across the spectrum of criminal cases, and current and future civil cases and inquests'.[135] These proposals undermine the rule of law and deny access to justice for victims of human rights abuses in contravention of its human rights obligations in particular under the European Convention on Human Rights (ECHR) and the Human Rights Act 1998.[136]

In support of its proposal to close down all access to the courts regarding legacy in Northern Ireland, the command paper points to 'the time and effort' required in such cases and argues that 'litigation processes often fail to deliver for families and victims'.[137] It is true that there have been significant delays in a range of legacy related judicial proceedings in Northern Ireland. However, it is important to note that the delays in these proceedings are typically caused by state agencies who have demonstrated a deliberate pattern of obstruction and prevarication in the provision of information to victims, survivors and statutory bodies such as the Police Ombudsman and even the Courts.[138] For example, in the Police Ombudsman report into the murders at Loughinisland, the then Ombudsman Dr Michael Maguire refers to police intelligence documents being marked as 'Slow Waltz', which connotes a deliberate strategy of delaying access to such materials including to other investigating officers.[139]

The 'Slow Waltz' process is not limited to intelligence files. The experience of those engaged in these judicial processes is one that is beleaguered with obfuscation and delay. High Court legacy cases are regularly challenged by Defendants such as the PSNI, MOD and NIO as a default position, followed by contested discovery applications and Public Interest Immunity applications requests for Closed Material Procedures where material is deemed sensitive.

134 Command paper, para 37.

135 Command paper, para 38.

136 As the former President of the UK Supreme Court Lord Neuberger said in response to the government's analogous plans under the Internal Market Bill to enable the government to breach international law and exempt some of its powers from legal challenge: 'Once you deprive people of the right to go to court to challenge the government, you are in a dictatorship, you are in a tyranny … The right of litigants to go to court to protect their rights and ensure that the government complies with its legal obligation is fundamental to any system … You could be going down a very slippery slope.' 'Brexit Strategy Risk UK "Dictatorship" Says Ex-President of Supreme Court', *The Guardian* (7 October 2020) https://www.theguardian.com/law/2020/oct/07/brexit-strategy-puts-uk-on-slippery-slope-to-tyranny-lawyers-told

137 Command paper, para 38.

138 CAJ (2015) THE APPARATUS OF IMPUNITY? Human rights violations and the Northern Ireland conflict https://caj.org.uk/wp-content/uploads/2017/03/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf

139 OPONI, *The Murders at the Heights Bar, Loughinisland,* 18 June 1994 (August 2020) 80, Available https://www.policeombudsman.org/Investigation-Reports/Historical-Reports/The-murders-at-the-Heights-Bar-in-Loughinisland-Po

In addition, in light of the recent government proposals to replace judicial proceedings with information recovery, it is worth noting that the UK Government has locked for a further 45 years public record files concerning the deaths of two school children who died as a result of plastic bullets fired by security forces on the grounds of 'national security' – again denying their families access to the truth.[140]

In short, the government's 'time and effort' rationale for ending access to the courts for legacy cases conveniently ignores the fact that state agencies have been responsible for such processes proceeding at the pace of a 'slow waltz'. Moreover, as argued above, given the deep organisational culture within many state agencies to resist disclosure of conflict-related materials - even when those seeking the information have full police powers or judicial powers of discovery - it is simply not credible to suggest that a proposed Information Recovery Body without clearly defined legal powers would achieve voluntary information retrieval from the relevant state agencies.

Inquests and Article 2 of the European Convention on Human Rights

In Northern Ireland, inquests are held under the Coroners Act (Northern Ireland) 1959 and the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (as amended). These are inquisitorial, not adversarial proceedings and a Coroner does not decide any question of criminal or civil liability. As Lord Bingham outlined in the House of Lords Judgement in the Jordan & McCaughey judgment (an appeal concerning two NI legacy inquests),

> *the purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of case. The coroner must decide how widely the inquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it.*[141]

The particular role of inquests as a means of discharging the UK's investigative obligations under Article 2 ECHR was addressed in detail in the 'McKerr group of cases'[142] emanating from Northern Ireland. Between 2001-2003, the European Court of Human Rights (ECtHR) held in all 6 cases that there had been a violation of the right to an effective investigation into these deaths which involved the police or security forces or where there were allegations of collusion between the security forces and paramilitary organisations. With reference to the flawed nature of inquests historically, the Court found that there had been a violation of Article 2 in the way that inquests were previously conducted in the jurisdiction. In particular the Court criticised: the lack of compellability of witnesses; the inability to reach verdicts which could play a role

140 Seamus McKinney, 'Disgust at Discovery That Plastic Bullet Death Files are Closed for up to 84 years' *Irish News* (24 April 2018) https://www.irishnews.com/news/northernirelandnews/2018/04/24/news/plastic-bullet-files-ordered-closed-for-up-to-84-years-1312047/

141 *Re Jordan & McCaughey* [2007] UKHL 14; [2007] 2 AC 226, para 37.

142 Jordan v UK [2001] ECHR 327; Kelly & Ors v. UK [2001] ECHR 328; McKerr v. UK [2001] ECHR 329; Shanaghan v. UK [2001] ECHR 330; McShane v. UK [2002] ECHR 469; Finucane v. UK [2003] ECHR 328

in securing a subsequent prosecution; the absence of legal aid; the non-disclosure of witness statements at an inquest; lack of promptness; and the limited scope of inquests (e.g., excluding legitimate concerns regarding collusion).

As discussed further above, in response to these judgments the UK government put forward a 'package of measures' to remedy the violations found by the ECtHR. Of particular relevance for current purposes, was a series of reforms to ensure that they were in compliance with Article 2 of the ECHR. This included the establishment of an exceptional legal aid scheme; changes to the rules of disclosure; permitting compellability of witnesses; and new practices relating to verdicts of coroner's juries at inquests.[143]

Once a member state has been found guilty of an ECHR human rights violation by the ECtHR, the Committee of Ministers of the Council of Europe oversees implementation of ECtHR judgments. The Committee of Ministers continues to supervise the execution of the 'McKerr Group of Cases'. While the reformed inquest system has the potential to carry out Article 2 ECHR compliant investigations, under-resourcing has contributed to systemic delays in both processes. These delays have been the subject of repeated criticism by the Committee of Ministers. Indeed, further challenges taken to the ECtHR in 2013 found that there had been procedural violations of Article 2 due to excessive delay in the inquest proceedings in the cases of Hemsworth[144] and McCaughey.[145] The UK was advised to take as a matter of priority, all necessary and appropriate measures to ensure, in similar cases of killings by the security forces in Northern Ireland where inquests were pending to comply with Article 2 of the ECHR.

In 2016, in response to ongoing systemic delays in legacy inquests the Lord Chief Justice announced a Five-Year Plan, which included the establishment of the Legacy Inquest Unit (LIU) under his remit as President of the Coroners Courts. The LIU provides legal and administrative support to the Presiding Coroner and Coroners as they discharge their functions of investigating 'legacy inquests'. It was proposed that the caseload would be completed within 5 years. However, this plan too was subject to delay including through the unlawful blocking of the Department of Justice's funding bid by the DUP First Minister, which was successfully challenged in judicial review proceedings.[146] It was subsequently awarded funding in February 2019 and anticipated commencing its 5-year plan in 2020. However, this too was delayed due to the pandemic. The Committee of Ministers 'noted with satisfaction' the establishment of the LIU, which is also supported by increased capacity in the PSNI, the Public Prosecution Service and other justice agencies.

The Presiding Coroner has issued a number of statements on the proposed timetabling of inquests within the 5-year plan and, to increase efficacy, detailed guidance including Case Management Directions and a Case Management Protocol for the management of legacy inquests and in particular, the issue of disclosure has been provided.[147] Under section 8 of the Coroners Act (Northern Ireland) 1959, there is an ongoing obligation on relevant public

143 Brice Dickson, *Law in Northern Ireland* (2nd edn, Hart, 2013) 145.
144 Hemsworth v UK- 58559/09 - [2013] ECHR 683 (16 July 2013) http://hudoc.echr.coe.int/eng?i=001-122371
145 McCaughey v UK - 43098/09 - [2013] ECHR 778 (16 July 2013) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122370%22]}
146 'Foster Decisions on Inquests Unlawful and Flawed', *BBC News* (8 March 2018).
147 https://www.judiciaryni.uk/legacy-inquests-general#toc-2

authorities to provide disclosure to the Coroner. However, as discussed below, there have been serious concerns about public authorities including the PSNI and MOD failing to comply promptly with these legal obligations resulting in protracted delay and litigation.[148]

As of August 2021, 10 inquests into 15 deaths have been completed with their findings published, 4 inquests into 13 deaths have been completed with findings pending, and 42 inquests into 69 deaths are pending.[149] A number of these inquests, were held as result of referrals made by the Attorney General for Northern Ireland including where there were previously flawed inquests that did not comply with the investigative requirements under Article 2 of the ECHR. Under section 14 of the Coroners Act (Northern Ireland) 1959, the Attorney General for Northern Ireland may direct any coroner to conduct an inquest into a death where the Attorney General has reason to believe that a deceased person has died in circumstances, which in their opinion make the holding of an inquest advisable.[150]

Case Study: The Ballymurphy Inquest as an Illustration of the Power of the Coroner's Court to Establish the Truth

There is inevitable widespread suspicion in Northern Ireland regarding the timing of the July 2021 command paper. Few would deny that it is no coincidence that the proposal to close down inquests was inspired by the recent high profile inquest verdicts into the Ballymurphy Massacre on 11 May 2021. The Parachute Regiment of the British Army were deemed responsible for killing ten innocent civilians in Ballymurphy in West Belfast in a series of incidents between the 9 and 11 August 1971 as part of Operation Demetrius (the introduction of internment without trial). The British Army had claimed at various times that those killed were 'Republican gunmen and women', claims that were always fiercely denied by their families.[151]

After 100 days of evidence Mrs Justice Keegan (now Lady Chief Justice) delivered her verdicts and findings in which she held that all 10 victims were entirely innocent and that the force used by the British Army was not justified and in breach of Article 2 of the ECHR.

Of particular significance was the family-centred nature of these proceedings and the fact that the next of kin received substantial disclosure besides material subject to Public Interest Immunity Certificates, national security or ECHR grounds (Article 2 and 8). Significantly, they also had the opportunity to test the veracity of evidence through examination of the witnesses. This process provided the next of kin with information, answers and results previously denied to them.

148 For e.g., the inquest into the death of Roseanne Mallon. See page 108, The Apparatus of Impunity, CAJ, 2015: https://caj.org.uk/wp-content/uploads/2017/03/No.-66-The-Apparatus-of-Impunity-Human-rights-violations-and-the-Northern-Ireland-conflict-Jan-2015.pdf

149 Information provided by the Legacy Inquest Unit on 11 August 2021

150 The Attorney General has to date referred 32 inquests into 54 deaths. Information provided by the Legacy Inquest Unit on 26 August 2021.

151 See e.g. M Jackson (2007) *Soldier: An Autobiography*. London: Bantam Press.

Indeed, such is the public interest significance of the findings from this inquest that it has been allocated its own section in the Legacy Inquests page of the Judiciary NI website.[152]

The Ballymurphy inquest demonstrates clearly the capacity of inquests to access relevant information and discharge the UK's Article 2 ECHR investigative obligations and provide accountability and truth recovery that was previously denied to the next of kin for decades.

Civil Cases

As noted above, the UK government command paper proposals with regard to ending judicial activity extends to include 'current and future civil actions'.[153] The paper goes on to claim that 'of the over 1000 civil claims against the MOD, NIO and other state agencies, very few are at trial stage and a significant number are yet to progress beyond the initial stage of a court order being issued').[154]

While it is difficult to get accurate and reliable data on civil actions, it is true that in the absence of a set of wider truth recovery mechanisms (such as those proposed under the SHA), families and survivors affected by the conflict have availed of civil proceedings in their pursuit of information and truth recovery and justice. Through this judicial process, defendants such as the PSNI, MOD and NIO have been directed to provide substantial discovery of relevant documentation to the legal representatives of families and survivors. This includes information previously denied to next of kin, including through statutory processes such as Police Ombudsman investigations where the PSNI has failed to comply with its disclosure obligations. Sensitive material such as that subject to Public Interest Immunity and Closed Material Procedures are routinely withheld from the public component of such civil actions on national security grounds. Nonetheless, even the provision of non-sensitive material can provide substantial information about the death of a loved one or unlawful treatment that was previously withheld from families and survivors.[155]

Case Study: The Utility of Civil Actions as a Route to Information Recovery: The Ormeau Road Sean Graham Bookmakers Atrocity

In 1992, five Catholic civilians were murdered and seven others were injured in the Sean Graham Bookmaker shop on the Ormeau Road Belfast by the Ulster Defence Association/Ulster

152 Summary of Judgement In the Matter of a Series of Deaths that Occurred in August 1971 at Ballymurphy West Belfast 11th May 2021 https://www.judiciaryni.uk/ballymurphy-inquest

153 Command paper, para 38.

154 Command paper, para 38.

155 The ECtHR has considered such civil proceedings as one important constituent element of a state's procedural obligations to conduct effective investigations into human rights violations under Article 2 (deaths) and Article 3 (torture, inhuman or degrading treatment) of the ECHR. See *Janowiec v Russia* (Nos. 55508/07 and 29520/09) Labita v. Italy [GC], no. 26772/95, § 131, ECHR 2000-IV, and McCann and Others v. the United Kingdom, 27 September 1995, § 161, Series A no. 324).

Freedom Fighters (UDA/UFF). It later emerged that one of the weapons used was part of a shipment of weapons from South Africa organised by Brian Nelson, a British military intelligence agent. Another weapon used was a British army issue weapon. Having allegedly been stolen from a Malone Road British Army barracks, it was handed over by an RUC agent to his Special Branch handler and ultimately returned to the UDA/UFF. These and other factors mean that this is a high-profile collusion case.

Given the collusion allegations against the RUC, the case is the subject of an investigation by the Office of the Police Ombudsman for Northern Ireland (OPONI). In 2019 the then Police Ombudsman Dr Michael Maguire delayed publication of a report into the killings when it became clear that not all relevant materials held by the PSNI had been properly disclosed to the OPONI. Lawyers representing families affected by the killing had launched a parallel civil action. The civil action has two components. One aspect features the open court proceedings and the other are the 'Closed Material Procedures' wherein the more sensitive security information is assessed by the judge in camera.

Despite the limitations of the open court proceedings, lawyers representing the families were able to access via discovery significant materials, which had not been made available to the OPONI - despite the latter having full police powers of search, seizure, right to access intelligence information and so forth.[156]

In short, the Sean Graham civil action speaks directly to the importance of the power of discovery in such legal actions as a tool of information recovery. In this instance, it highlighted important information that the OPONI would not otherwise have been able to access, despite the full police powers of the latter.

Judicial Review

The command paper does not explicitly include judicial review (JR) in its proposal to 'end judicial activity in relation to Troubles related conduct'. However, in paragraph 38 where it refers explicitly to 'the spectrum of criminal cases, and current and future civil cases and inquests', it is notable that a table is inserted which is entitled 'Civil Cases, JRs and Inquests'.[157] In 2019, the Conservative Party manifesto included a commitment 'to ensure that judicial review is not abused to conduct politics by other means'. In July 2020, the government launched an independent review of administrative law, the remit of which included consideration as to 'whether judicial review should be codified in law and whether judges should be able to decide on certain executive decisions.'[158] In the Queen's Speech in May 2021, the UK government announced its intention to introduce a Judicial Review Bill 'that will protect the judiciary from being drawn into political questions and preserve the integrity of judicial review for its

156 'Belfast Bookies Massacre Families Believe "Dark Forces" Kept Papers from Ombudsman Says Solicitor' *Belfast Telegraph* (14 February 2019); 'Sean Graham Shop Killings: Police Sorry for Disclosure "Error"' *BBC News* (14 February 2019) https://www.bbc.co.uk/news/uk-northern-ireland-47231937

157 Command paper, para 38.

158 See House of Lords Library (18th January 2021) Judicial Review: Time for Change? https://lordslibrary.parliament.uk/judicial-review-time-for-change/

intended purpose.'[159] Given the oblique references to judicial review in the command paper, and widespread concerns regarding the current UK government's aversion to being held accountable through JR,[160] it is worth briefly reflecting on the importance of judicial review with regard to legacy matters in Northern Ireland.

Judicial review has played a key role for families and survivors in challenging public authorities on a range of legacy-related matters including failure to: conduct article 2 and article 3 compliant investigations; fund legacy inquests; and conduct a proper investigation into whether the Omagh Bomb could have been prevented.[161]

Any attempt to interfere with the right of victims and survivors to judicially review legacy-related decisions by public authorities will be fiercely resisted. Moreover, any such a move would be in breach of the Good Friday Agreement (GFA), both in terms of its commitment to the incorporation of the ECHR into domestic law and in terms of the devolution of powers in Northern Ireland.

Incorporation of the ECHR is a fundamental aspect of the GFA. The Agreement commits to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights, with direct access to the courts, and remedies for breach of the convention, including power for the courts to overrule Assembly legislation on the grounds of inconsistency'.[162] Any interference with the rights of victims and survivors to challenge legacy-related decisions via judicial review would represent a clear contravention of the GFA.

Moreover, as noted above, decisions relating to any reform of judicial review in Northern Ireland are quite clearly a devolved matter. Paragraph 26 of the GFA makes clear that the Northern Ireland Assembly has the authority to pass primary legislation for devolved matters with the Assembly having the 'option' to include NI provisions in UK wide legislation from Westminster 'in areas where parity is normally maintained.' Under the terms of the GFA, the only express reason for the UK Parliament to legislate on a devolved matter is in order to comply with the UK's international legal obligations[163] as occurred with the reform of abortion law in Northern Ireland. The Northern Ireland Human Rights Commission had successfully argued in that instance that the UK government was in breach of its international legal obligations to provide

159 Queen's Speech May 2021 'Background Briefing Notes' https://www.gov.uk/government/publications/queens-speech-2021-background-briefing-notes;

160 'Plans to Restrict Judicial Review Weaken the Rule of Law MPs Warn: Cross Part Letter to the Justice Secretary Says Proposals Undermine Governmental Accountability' *The Guardian* (2 June 2021) https://www.theguardian.com/law/2021/jun/02/plans-to-restrict-judicial-review-weaken-the-rule-of-law-mps-warn

161 E.g. Re Margaret McQuillan (19th March 2019) Court Finds that Chief Constable has not Demonstrated Practical Independence on the Part of the PSNI Legacy Investigative Branch Summary of judgment - In re Margaret McQuillan - 19.3.19.pdf (judiciaryni.uk) Re Bridgid Hughes; 8th March 2018 Court Delivers Judgement on Funding for Legacy Inquests soj-In-re-Brigid-Hughes.pdf (judiciaryni.uk); Re Michal Gallagher (23rd July 2021) Summary of Judgement https://www.judiciaryni.uk/judicial-decisions/summary-judgment-re-michael-gallagher-omagh-bomb

162 The Rights, Safeguards and Equality of Opportunity section of the GFA provides an unqualified commitment that "2. The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency." There is no qualification to events in Northern Ireland nor an arbitrary cut of date as to when this commitment will apply

163 Para 33b.

abortion services.[164] However, as noted above, two United Nations Special Rapporteurs, the Irish government and others have argued that the government's proposed sweeping amnesty is likely to be in breach of its binding legal obligations - thus it would appear highly unlikely that such obligations will provide a rationale for interference with the right of victims and survivors to seek judicial review in legacy-related matters.

164 See further S. Sheldon et al (2020). 'Too much, too indigestible, too fast'? The decades of struggle for abortion law reform in Northern Ireland. *The Modern Law Review*, 83(4), 761-796.

Conclusion

In reviewing the contribution of inquests, civil actions and judicial review to dealing with the legacy of the conflict in Northern Ireland, we return more broadly to the centrality of the rule of law as an organising framework around which any legacy process must be constructed. As the joint communiqué from the two governments referred to in the introduction noted, any process that is designed to support information recovery and reconciliation as well as respond to the needs of victims and survivors and society as a whole must 'comply fully with international human rights obligations'. As we also note above, the Stormont House Agreement had adherence to the rule of law as one of its key underpinning principles.

It is our view that the UK government position as expressed in command paper 498 of simultaneously introducing a sweeping unconditional amnesty, closing down all current and future investigative and judicial investigations, and setting up an Information Recovery Body with ineffective investigative powers would be in clear breach of binding human rights standards. As noted above, this has already been the assessment of the UN Special Rapporteur on transitional justice who has reported his 'deep concern' to the UN Human Rights Council regarding the proposed UK plan. His views are worth reproducing. He assessed the plan as providing for 'blanket impunity for grave human rights violations and thwart[ing] victims' right to truth and justice, placing the United Kingdom in flagrant violation of its human rights obligations'.[165] The UK proposals would also fundamentally undermine the rule of law. In addition, such an initiative would also breach the guarantees in the Good Friday Agreement – both in terms of interfering with the right of direct access to the courts to challenge alleged breaches of the ECHR but also with regard to the devolution of justice to Northern Ireland. Quite apart from the legal flaws in this proposal, the widespread political opposition to its content from across the political spectrum in Northern Ireland, civil society and from the Irish government would suggest that it is also politically unworkable and unfixable.

The joint communiqué provided for a process of intensive engagement on legacy issues in Northern Ireland that would build on discussions to implement the SHA and in which the views of all participants would be taken into account. The UK government has now 'set out its stall' in a command paper that is clearly incompatible with its human rights obligations. The broadest political consensus remains with the SHA, which could be implemented in a human rights compliant manner, and on which a body of implementation work has already been substantially advanced.

From our perspective, given the lack of confidence and good faith in the current UK government's position on legacy, trust will only built by the UK accepting:

(a) that the rule of law must be central to the legacy process and as a result the government's ability to introduce an amnesty will inevitably be curtailed and will also require genuine Article 2 and Article 3 ECHR compliant investigations.

165 UN Doc A/HRC/48/60/Add.2 Follow-up on the visits to Burundi, the United Kingdom of Great Britain and Northern Ireland and Sri Lanka, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli*, 5 August 2021, Paragraph 21.

(b) that the Stormont House Agreement remains the basis for maximising political consensus on legacy.

(c) that protecting the Good Friday Agreement in all its parts remains the cornerstone of the Northern Ireland peace process.

As we have argued previously, there are ways of lawfully reducing conflict related sentences from two years to zero while still upholding the rule of law, implementing almost all of the SHA (other than 'jail time') and acting in a way that is compatible with the Good Friday Agreement.[166]

We would respectfully urge the UK government to return to such a lawful, honourable and politically workable position.

166 Model Bill Team (2020) *Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland* https://www.dealingwiththepastni.com/resources/

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