



## BRIEFING PAPER

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# Investigation of former armed forces personnel who served in Northern Ireland

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# Summary

Operation Banner in Northern Ireland was the longest continuous deployment of Armed Forces personnel in British military history, during which over 250,000 military personnel served.

Between August 1969 and July 2007 1,441 military personnel died as a result of operations in Northern Ireland. 722 of those personnel were killed in paramilitary attacks.

During the same period the British military were responsible for the deaths of 301 individuals, over half of whom were civilians.

In total, it is estimated that 3,520 individuals lost their lives during the Troubles.

## **Military law and the rules of engagement**

Military personnel are, at all times, subject to both Service law and civilian law, wherever they are serving in the world. As such, Armed Forces personnel are not immune from prosecution for offences committed whilst serving.

For every military operation personnel are issued with a specific set of Rules of Engagement which establish the circumstances and limitations under which personnel can use armed force. They are operation, not Service, specific and are intended to help commanders and soldiers to operate within the law or any political restraints under which they may be operating. They do not, however, have any legal force.

The Rules of Engagement for personnel serving in Northern Ireland were contained in what was commonly referred to as "The Yellow Card". The original version of the Card, which extended to 21 distinct rules, was considered too detailed and complex, and was subsequently amended in 1980 to contain just six rules. Among them was the directive that only the minimum force necessary was to be used and that firearms should only be used as a last resort. The Card was amended again in 1994, following a court judgement in the case of Private Lee Clegg the previous year.

## **Prosecutions of Armed Forces personnel during the Troubles**

The Royal Ulster Constabulary (RUC) investigated any fatalities involving the Armed Forces at the time and, in some cases, prosecutions were brought against military personnel.

In most cases those fatalities were a direct result of operations and "centred around the key issue of whether the soldier had the right to open fire in the particular circumstances pertaining at the time". This resulted in a number of convictions, although in the majority of cases the Director of Public Prosecutions for Northern Ireland directed that there was no case to answer, or the defendants were acquitted at trial.

### **Good Friday Agreement and “on the runs”**

The 1998 Good Friday Agreement made no provision for the investigation or prosecution of former members of the Armed Forces, focusing instead upon the early release of prisoners affiliated to paramilitary organisations. Nor did that Agreement provide an amnesty for crimes which had not yet been prosecuted.

From 2000 to 2014, the Government operated an administrative scheme by which individuals suspected of terrorism crimes in Northern Ireland could find out whether they were at risk of arrest or prosecution if they returned to the UK. Following the collapse of a trial in 2014, a judge-led review of the process was initiated. The [report of that review](#) criticised the scheme for systematic failings, but emphasised that letters of assurance did not constitute an amnesty or immunity from prosecution.

### **Investigation of deaths related to the Troubles**

In 2006 the Government set up the Historical Enquiries Team (HET) as part of the Police Service of Northern Ireland (PSNI). It was created in response to judgements at the European Court of Human Rights that were related to the investigation of deaths in which State involvement was alleged. Those judgements found shortcomings which amounted to breaches of Article 2 of the European Convention on Human Rights relating to the protection, by law, of the right to life.

The role of the HET was to examine all deaths attributable to the security situation in Northern Ireland between 1968 and the Belfast Agreement in 1998.

The HET looked into cases on a chronological basis, with some exceptions: previously opened investigations, those with humanitarian considerations, investigations involving issues of serious public interest and linked series of murders.

In 2012 the Minister of Justice for Northern Ireland commissioned Her Majesty’s Inspectorate of Constabulary (HMIC) to inspect the role and function of the HET. It focused on the HET’s approach to reviewing cases involving the security forces. Specifically, whether they conformed to current policing standards and policy, if the HET adopted a consistent approach and if its review process met the requirements that would ensure its compliance with Article 2 of the European Convention on Human Rights. The subsequent report of the HMIC was highly critical of the HET and in 2013 the PSNI announced that it would review **all** military cases relating to the period 1968 up until the Good Friday Agreement was signed, in order “to ensure the quality of the review reached the required standard”.

### **The Legacy Investigations Branch**

As a result of budget cuts to the Police Service of Northern Ireland, the HET was disbanded in September 2014. In its place a much smaller Legacy Investigations Branch (LIB) was formed.

The LIB continues to review all murder cases linked to the Troubles. It uses a case sequencing model, which looks at forensic opportunities, available witnesses and other investigative material when deciding which cases to tackle first. The PSNI has stated that it does not prioritise military cases, which account for approximately 30 per cent of its workload.

Any decision by the LIB to prosecute is referred to the Director of Public Prosecutions for Northern Ireland. The process is independent of the MOD and the Government.

There has been significant criticism, on all sides, of the process by which legacy investigations have been, and continue to be, undertaken. Concerns have been expressed over the credibility and reliability of evidence and witness statements that may be over 40 years old and of the re-opening of investigations that had already concluded. Most notable has been the widespread perception that investigations have disproportionately focused on the actions of the armed forces and former police officers: these account for 30 per cent of the LIB's workload but only form 10 per cent of the overall deaths during the Troubles.

### **Recent prosecutions**

The perception that investigators are unfairly targeting cases involving military personnel has been emphasised by recent decisions, by the Director of Public Prosecutions for Northern Ireland, to bring prosecutions against a number of former Army personnel. To date, six military personnel have been charged with offences related to the Troubles, including one former soldier (Soldier F) who is being prosecuted in relation to the events of Bloody Sunday.

However, the PPS for Northern Ireland has also sought to make clear that of the 26 prosecution cases brought by the PPS since 2011, 21 of those cases have also involved republican and loyalist paramilitaries. A number of those cases are still ongoing.

### **Addressing legacy issues**

Addressing legacy issues, including the investigation of deaths, was a key part of the [Stormont House Agreement](#) reached in December 2014.

That Agreement set out various detailed measures, including the establishment of a new independent Historical Investigations Unit (HIU). That unit will take forward investigations into outstanding deaths from the Troubles, including outstanding cases from the HET process and the legacy work of the LIB and the Police Ombudsman for Northern Ireland. Families may also have other, previously completed, cases considered for criminal investigation by the HIU if there is new and credible evidence which was not previously available to the HET/LIB. In respect of its criminal investigations, the HIU will have full policing powers and will work through its case load in chronological order. It must complete its work within five years, and it will be overseen by the Northern Ireland Policing Board. Any decisions to prosecute will be taken by the Director of Public Prosecutions.

### **Public Consultation**

On 11 May 2018 the Northern Ireland Office launched a public consultation: [Addressing the legacy of Northern Ireland's Past](#). The consultation took forward the proposals set out in the Stormont House Agreement in relation to the Historical Investigations Unit (HIU).

Prior to the consultation's publication, there was political and media speculation that it would include a statute of limitations to prevent the prosecution of former soldiers for offences connected to the Troubles in Northern Ireland. This idea was supported by some Conservative MPs, including former Defence Secretary Gavin Williamson, but strongly opposed by Sinn Féin and the Irish Government. The Northern Ireland Human Rights Commission advised the Government that any such statute would amount to an amnesty and could be in breach of international law. The DUP leader, Arlene Foster, also raised concerns that a statute of limitations could lead to a general amnesty for all of those involved in the Troubles, including terrorists.

However, the consultation, as published, did not contain proposals for a Statute of Limitations or any form of amnesty. But it did welcome views on alternatives to the institutions that have been proposed.

The Government's consultation received over 17,000 responses.

### **New decade, new approach**

On 9 January 2020 a [deal to restore devolved government in Northern Ireland](#) was reached. As part of that agreement the Government committed to publish, within 100 days, legislation to implement the Stormont House Agreement and address Northern Ireland legacy issues.

On 18 March the Government published the [Overseas Operations \(Service Personnel and Veterans\) Bill](#). Despite suggestions that it may include Northern Ireland within its provisions, legacy prosecutions in relation to The Troubles were excluded.

In a [Written Ministerial Statement](#) published alongside the Bill, the Secretary of State for Northern Ireland said that the Government wanted to ensure "equal treatment of Northern Ireland veterans and those who served overseas". Having considered the responses to the 2018 consultation, the Government subsequently proposed a change of focus in its approach to legacy issues, with a greater emphasis, going forward, on information recovery. A single, independent, body would be established to oversee and manage that work. Only cases in which there is a realistic prospect of a prosecution, as a result of new compelling evidence, would proceed to a full police investigation and if necessary, prosecution. Cases which do not reach this threshold, or are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible.

It is unclear when legislation relating to Northern Ireland will be introduced. In February 2021 the Leader of the House of Commons, Jacob Rees-Mogg said that legislation would be introduced in the next few months. A number of campaigners have called the Governments

proposal to close the majority of unsolved cases relating to The Troubles, a “betrayal” of the Stormont House agreement.



# 1. Background

The specific focus of this briefing paper is the investigation and prosecution of former British Armed Forces personnel who served in Northern Ireland during The Troubles.

It does not look at the wider issues raised in the 2018 recent consultation on addressing Northern Ireland's past; nor does it discuss the political situation in Northern Ireland or the wider issue of combat immunity.

## Box 1: Suggested reading

- [Parliament and Northern Ireland 1921-2021](#), House of Commons Library, December 2020

## 1.1 Operation Banner (August 1969 – July 2007)

Operation Banner was the longest continuous deployment of Armed Forces personnel in British military history.

The deployment was initially a response to the breakdown in public order which the Royal Ulster Constabulary (RUC) were unable to contain. In 2006 the British Army described Operation Banner as “effectively a large-scale instance of military assistance to the civil power”.<sup>1</sup>

The focus of operations during the early years of the campaign was on maintaining public order.<sup>2</sup> However, by the 1980s the objectives of the campaign had largely shifted to counter terrorist operations to address the threat posed by the Provisional IRA. The three key tenets of Army policy at that time were (a) reassurance, (b) deterrence (or what were referred to as ‘Framework’ Operations)<sup>3</sup> and (c) attrition, which largely focused on the overt arrest and conviction of terrorists.

During the 38-year history of the operation over 250,000 Regular personnel were deployed, in addition to tens of thousands of members of the Ulster Defence Regiment and its successor the Royal Irish Regiment Home Service Force (HSF).<sup>4</sup> At the peak of the campaign in

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<sup>1</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>2</sup> Largely conducted by the British Army, but with essential support from the Royal Navy, Royal Air Force and other Government Agencies.

<sup>3</sup> The term ‘framework operations’ was developed in the 1980s to describe the routine activities of the uniformed Army, including vehicle check points (VCP), routine patrolling, searches and manning observation posts.

<sup>4</sup> The UDR was raised in April 1970 in response to the Hunt Committee report of Autumn 1969, which recommended splitting police and military functions and so disbanding the part-time Ulster Special Constabulary (the B Specials). The UDR was part of the Army, and almost exclusively part-time. Its role was principally that of static security guards, local patrolling and control of vehicle movement. By 1971 it had an establishment of 4,000 personnel and was capable of large scale operations. In 1976 the decision was taken to raise one full-time company per battalion of the UDR. In 1992 the UDR merged with the Regular Royal Irish Rangers to form the General Service (GS) and Home Service (HS) battalions of the Royal Irish Regiment. The HSF was stood down in 2007.

the summer of 1972, 28,000 soldiers were deployed across Northern Ireland.

From 2004 the MOD began the gradual process of drawing down its presence in Northern Ireland.<sup>5</sup> The Government announced a plan to establish a peacetime garrison comprising no more than 5,000 personnel and to be located in no more than 14 bases by August 2007 following a statement from the IRA in August 2005 that it was ending its armed campaign. The Home Service battalions of the Royal Irish Regiment were also disbanded.<sup>6</sup>

## Casualties

Between August 1969 and July 2007 1,441 military personnel died as a result of operations in Northern Ireland. 722 of those personnel were killed in paramilitary attacks. At the height of the campaign in 1972, 170 British soldiers died or were killed – the largest number in one year since the Cyprus Emergency in 1956.<sup>7</sup> Since then that figure has only been surpassed once, during the Falklands conflict in 1982, when 237 military personnel lost their lives.

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<sup>5</sup> HC Deb 17 June 2004, c50-51WS; Ministry of Defence, *Delivering Security in a Changing World: Future Capabilities*, Cm6269, Session 2003-04;

<sup>6</sup> A structured plan for the phased reduction of troops to peacetime levels was subsequently published in March 2006. A copy of the normalisation plan was placed in the House of Commons Library (ref: DEP06/697)

<sup>7</sup> Ministry of Defence, [UK armed forces operational deaths post World War 2](#), March 2020

## UK Armed Forces deaths in Northern Ireland

Deaths of UK Armed Forces personnel as a result of operations in Northern Ireland, 14 August 1969 to 31 July 2007

	Terrorist action	Other	Total
<b>Army</b>	<b>692</b>	<b>689</b>	<b>1,381</b>
Regular Army	477	337	814
Royal Irish Regiment	7	60	67
General Service	1	3	4
Home Service	6	57	63
Ulster Defence Regiment	197	284	481
Territorial Army	9	8	17
Other non-regular Army	2	0	2
<b>Naval Service</b>	<b>26</b>	<b>8</b>	<b>34</b>
Royal Navy	5	3	8
Royal Marines	21	5	26
<b>Royal Air Force</b>	<b>4</b>	<b>22</b>	<b>26</b>
<b>Total</b>	<b>722</b>	<b>719</b>	<b>1,441</b>

Notes: Figures are for in-service personnel and do not include ex-service personnel who may have been targeted by Terrorists; includes deaths that occurred outside of Northern Ireland but deemed to be the result of Irish Terrorism; 'Other' deaths include accidents, natural causes, assaults, coroner confirmed suicide or open verdicts, and cause not known; Regular Army excludes Royal Irish Regiment; Royal Irish Regiment was formed 1 July 1992 when Ulster Defence Regiment merged with the Royal Irish Rangers; Ulster Defence Regiment formed 1 August 1970 and disbanded 30 June 1992.

Source: MOD, Freedom of Information, Reference: FOI Smyth 02-01-2013-160507-018

300 officers of the Royal Ulster Constabulary were also killed in terrorist attacks during the Troubles. A further 4 were killed by the security forces in "friendly fire" incidents.<sup>8</sup>

During the same period the British military were responsible for the deaths of 301 individuals, of whom 121 were Republican terrorists, 10 were loyalist terrorists and the remainder were civilians.<sup>9</sup>

In total, around 3,520 individuals lost their lives during the Troubles.<sup>10</sup>

## 1.2 Application of military law to serving personnel

Military personnel are, at all times, subject to both Service law<sup>11</sup> and civilian law, wherever they are serving in the world. As such Armed Forces personnel are not immune from prosecution for offences committed whilst serving.

Jurisdiction over offences committed solely against Service law lies with the Service authorities. Concurrent jurisdiction with the civil justice system exists for all other offences, with the exception of certain offences committed in the UK, including treason, murder,

<sup>8</sup> [The Royal Ulster Constabulary George Cross](#)

<sup>9</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>10</sup> *ibid*

<sup>11</sup> As set out in the *Armed Forces Act 2006* and the [Manual of Service Law](#)

manslaughter, treason-felony, rape and war crimes, which lie wholly within the jurisdiction of the civil authorities.

## Rules of Engagement

Armed Forces personnel are issued with a specific set of Rules of Engagement (RoE) for every military operation. These set out the circumstances and limitations under which personnel can use armed force.<sup>12</sup>

RoE are operation, not Service, specific. They have no legal force, but are directives intended to help commanders and soldiers to operate within the law or any political restraints under which they may be operating. They are based upon international legal obligations regarding the use of force such as the *Geneva Conventions 1949* and the *Laws of Armed Conflict*, and embrace the principles of proportionality, distinction, humanity and military necessity. They are subject to constant review.

RoE are not routinely published by the Government for reasons of operational security. During a debate on 1 December 2015 the then Armed Forces Minister, Penny Mordaunt, stated:

Our rules of engagement—as opposed to our static doctrine—are tailored to specific missions and will include policy, legal and operational guidance. They are typically given in a series of permissions and prohibitions that must be followed during a particular operation. We do not put the rules of engagement in the public domain, because it would give our opponents a considerable advantage if they understood that aspect of our operations.<sup>13</sup>

Despite being restricted, copies of RoE often appear in the public domain.

### Northern Ireland

The Rules of Engagement for personnel serving in Northern Ireland were contained in what was commonly referred to as “the Yellow Card”. In line with Government policy, copies of the Yellow Card were marked “restricted”. In answer to a parliamentary question on 15 January 1990 the Government confirmed that “As it is an operational instruction, it would not be appropriate to publish it”.<sup>14</sup>

However, the contents of the Yellow Card became public knowledge, largely as a result of various court cases and were reproduced in publicly available documents.<sup>15</sup> In more recent times copies have been disseminated on the [internet](#).

The Yellow Card was subject to continuous review and scrutiny and was amended on several occasions. Initially the Card “contained 21 distinct rules but was considered to be too detailed and complex to be readily

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<sup>12</sup> A definition of RoE is provided in chapter 5 of the [Joint Service Manual of the Law of Armed Conflict](#)

<sup>13</sup> HC Deb 1 December 2015, c69WH

<sup>14</sup> HC Deb 15 January 1990, c23

<sup>15</sup> For example, Helsinki Watch reproduced a copy of the Yellow Card in its 1991 report *Human Rights in Northern Ireland*. A copy of that report is available in the House of Commons Library (Research Section HA 941.60824)

intelligible and suitable for use by most ordinary soldiers".<sup>16</sup> The document was subsequently revised and the 1980 version only contained 6 rules.

The Standing Advisory Commission on Human Rights outlined what it considered the most significant of these rules in its report for 1992-93:<sup>17</sup>

3.9 The most significant of these rules for present purposes are as follows:

**General Rules**

1. In all situations you are to use the minimum force necessary.  
FIREARMS MUST ONLY BE USED AS A LAST RESORT.

**Challenging**

3. A challenge MUST be given before opening fire unless:
- a. to do so would increase the risk of death or grave injury to you or any other person;
  - b. you or others in the immediate vicinity are being engaged by terrorists.

**Opening Fire**

5. You may only open fire against a person:
- a. if he\* is committing or about to commit an act LIKELY TO ENDANGER LIFE AND THERE IS NO OTHER WAY TO PREVENT THE DANGER. The following are some examples of acts where life could be endangered, dependent always on the circumstances:
    - (1) firing or being about to fire a weapon
    - (2) planting, detonating or throwing an explosive device (including a petrol bomb)
    - (3) deliberately driving a vehicle at a person and there is no other way of stopping him\*
  - b. if you know that he has just killed or injured any person by such means and he does not surrender if challenged and THERE IS NO OTHER WAY TO MAKE AN ARREST.

Rule number 6 also reads:

If you open fire you should:

- a. fire only aimed shots,
- b. fire no more rounds than are necessary,
- c. take all reasonable precautions not to injure anyone other than your target.<sup>18</sup>

In its 2006 assessment of Operation Banner the British Army suggested that:

It was intended that so long as soldiers adhered to the contents of the Yellow Card then they would be acting within the law...

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<sup>16</sup> Eighteenth Report of the Standing Advisory Commission on Human Rights, Report for 1992-1993, HC 739, Session 92/93, Para 3.8

<sup>17</sup> \* denotes he/she, him/her

<sup>18</sup> As re-produced in Helsinki Watch, *Human Rights in Northern Ireland*, 1991, p.155

However, it was widely acknowledged that the Yellow Card had no legal force and in the opinion of the Standing Advisory Commission on Human Rights:

The operational rules for the use of lethal force by soldiers and policemen are considerably more detailed and more restrictive than the test laid down in the Criminal Law Acts. But they have no formal legal force and cannot therefore be taken to override or even to assist in the interpretation of the statutory test.<sup>19</sup>

The Commission concluded that:

It is clear that in case of any conflict between the two sets of rules the legal standard must prevail in any civil or criminal proceedings arising out of a disputed incident.

### 1.3 Prosecutions of Armed forces personnel during the Troubles

Any fatalities involving the Armed Forces were investigated by the Royal Ulster Constabulary (RUC) at the time and, in some cases, prosecutions were brought against military personnel. According to the British Army those cases “were very few – a dozen or so serious cases, over more than 30 years”.<sup>20</sup>

In most cases those fatalities were a direct result of operations<sup>21</sup> and “centred around the key issue of whether the soldier had the right to open fire in the particular circumstances pertaining at the time”.<sup>22</sup>

This resulted in a number of convictions, including:

- R v Thain 1984;
- R v Clegg 1993,<sup>23</sup>
- R v Fisher and Wright 1995

In the majority of cases, however, the Director of Public Prosecutions for Northern Ireland directed that there was no case to answer, or the defendants were acquitted at trial.<sup>24</sup> According to the Army’s 2006 assessment:

The basis on which these directions were given or acquittals made was, broadly, that the soldier had acted reasonably in the

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<sup>19</sup> Eighteenth Report of the Standing Advisory Commission on Human Rights, Report for 1992-1993, HC 739, Session 92/93,

<sup>20</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>21</sup> One case, however, involving the murder of two Catholic farmers in 1972, was not linked to operations and in 1981 those military personnel responsible were convicted of murder.

<sup>22</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>23</sup> Clegg was released on licence in 1995 but subsequently acquitted of murder at a retrial in 1999.

<sup>24</sup> Appendix One of the Standing Advisory Commission on Human Rights report for 1992-1993 has a table of prosecutions and their outcomes, correct to July 1993. The case R v Elkington & Callaghan, which is listed as pending in the table, also resulted in an acquittal.

circumstances pertaining at the time; and this was the case even if the soldier had in fact been mistaken.<sup>25</sup>

Other commentators have suggested that the reason for the high number of cases not brought to trial, and for the acquittal of defendants was that, as the law stood at the time, there was no alternative between a murder charge or no charge at all where force had deliberately been used.<sup>26</sup> The Standing Advisory Commission on Human Rights observed:

there is no satisfactory way of dealing with cases in which the current rules may have been broken. The formal legal rule as laid down in *The Attorney-General for Northern Ireland's Reference No 1 of 1975* (above) is that where unreasonable force is deliberately used when some force would have been justified only a charge of murder is permissible. This makes it very difficult for the prosecuting authorities to justify making a charge in many cases, in that there is no realistic prospect of securing a conviction of murder against a soldier or policeman who has used unreasonable force except in the most flagrant cases. This is borne out by the fact that where such charges have been laid they almost invariably result in an acquittal.<sup>27</sup>

This debate is discussed in greater detail in the Eighteenth Report of the Standing Advisory Commission on Human Rights 1992-1993. A 1991 report, *Human Rights in Northern Ireland*, by Helsinki Watch also discusses the issue of limitations on the charges which could be brought.<sup>28</sup>

## 1.4 The 1998 Good Friday Agreement

The Belfast Agreement, also known as the Good Friday Agreement (GFA), was reached following multi-party negotiations and signed on 10 April 1998. Principally concerned with British-Irish relations and the restoration of devolved institutions to Northern Ireland, the GFA also made allowance for "the reduction of the numbers and role of the Armed Forces deployed in Northern Ireland to levels compatible with a normal peaceful society".

One section covered Republican and Loyalist "Prisoners", compelling the Irish and UK Governments to:

put in place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners). Any such arrangements will protect the rights of individual prisoners under national and international law.<sup>29</sup>

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<sup>25</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>26</sup> The charge of manslaughter was still brought in those cases where a shooting was accidental (for example in *R v Davidson* 1981).

<sup>27</sup> Sixteenth report of the Standing Advisory Commission on Human Rights, Report for 1990-91, HC 488, June 1991

<sup>28</sup> Helsinki Watch, *Human Rights in Northern Ireland*, 1991, p.79

<sup>29</sup> [Agreement reached in the multi-party negotiations](#), p.30

Paramilitary prisoners “affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire” would not benefit from the arrangements, although the intention was to keep that aspect under review.

Furthermore, both Governments were to:

complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community.<sup>30</sup>

Legislation to give effect to these arrangements was enacted by the *Northern Ireland (Sentences) Act 1998*.<sup>31</sup>

Between 1998 and 2012, the Sentence Review Commission received 636 applications from prisoners, of which 506 applications were granted release.<sup>32</sup>

The GFA did not include a mechanism for dealing with unresolved killings – either by terrorists, the police or British Army – during the Troubles, nor did it provide an amnesty for crimes which had not yet been prosecuted.

### **Administrative scheme for “on the runs”**

Between 2000 and 2014, the Government operated an administrative scheme to deal with the issue of those suspected of terrorist crimes in Northern Ireland, but not in custody. As outlined above, the release of prisoners had been a crucial part of the Northern Ireland peace process. Negotiations between Sinn Féin and the UK Government established an administrative scheme for those suspected of terrorism crimes before the Agreement but who could not benefit from the 1998 Act because they were “on the run”.

Under the scheme, Sinn Féin, the Irish Government and the Prison Service of Northern Ireland submitted individuals’ names to the UK Government. The Police Service Northern Ireland reviewed their cases, and the Director of Public Prosecutions for Northern Ireland and the Attorney General decided whether prosecution was justified. Where they decided that this was not justified, the UK Government issued letters of assurance (often referred to as letters of comfort) to those individuals via Sinn Féin.<sup>33</sup> An attempt to put the scheme on a statutory footing failed when the *Northern Ireland (Offences) Bill 2005-06* was withdrawn.<sup>34</sup>

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<sup>30</sup> Ibid

<sup>31</sup> Background is in Library Research Paper 98/65, [Release of Prisoners Under the Northern Ireland \(Sentences\) Bill](#), 15 June 1998

<sup>32</sup> <http://www.sentencereview.org.uk/download/downindex.htm>

<sup>33</sup> [The Report of the Hallett Review: An independent Review into the On the Runs Administrative Scheme](#), HC 380, 2014-1, paragraph 2.21

<sup>34</sup> See Library Research Paper 05/78 [Northern Ireland \(Offences\) Bill \(Bill 81 of 2005-06\)](#), 17 November 2005 and the oral statement by the then Northern Ireland Secretary, Peter Hain, [HC Deb 11 January 2005 c289](#)



Whilst the scheme was not secret, it was not widely publicised. However, the case [\*of R v John Anthony Downey\*](#), which was heard in the Central Criminal Court in February 2014, resulted in much information on the scheme becoming public. John Downey had been told in 2007 that he was not of interest to any police force in the UK when in fact he was wanted by the Metropolitan Police Service on suspicion of involvement in the Hyde Park bombing of 1982. This led to the collapse of his trial, and to the Government asking Lady Justice Hallett to conduct an independent review of the scheme. Her report was published in July 2014.<sup>35</sup>

The Hallett Review Report made it very clear that the letters given to “on the runs” did *not* constitute an amnesty or immunity from prosecution: The Report criticised the scheme and its operation:

2.1 There has been a great deal of misunderstanding and misreporting of the administrative scheme, and confusion about the categories of ‘on the runs’ (OTRs).

(...)

2.3 The administrative scheme did not amount to an amnesty for terrorists. Suspected terrorists were not handed a ‘get out of jail free card’.

2.4 The administrative scheme was treated by the UK Government as sensitive and details were not widely publicised. However, the scheme was not classified as ‘secret’.

2.5 The scheme was allowed to evolve and operate without any proper structure or policy in place. This led to considerable scope for error.

2.6 Failings were for the most part systemic rather than attributable to individuals. Opportunities were missed between and within departments and organisations which could have minimised the risk of errors.<sup>36</sup>

The Northern Ireland Affairs Select Committee published a report on [The administrative scheme for “on the runs”](#) in March 2015.

More recently, former Minister of State for Northern Ireland, John Penrose reiterated that “letters of comfort” issued under the OTR scheme do not provide immunity from prosecution. In a debate on 16 May 2019 he stated:

My right hon. Friend also made a point about the letters of comfort that were issued by a previous Government. I reassure him and other Members that legal reports have been issued on those letters since the cases that he mentioned saying that they are not an amnesty from prosecution. If a case can be made, letters of comfort will not in future be body armour against prosecution. He is right to say that we will have to wait and see how that plays out when or if one of the cases comes to court, but that is the latest and strongest legal situation [...]

I hope the message will go out loud and clear from the Chamber that anyone who thinks they can swan around scot-free as a

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<sup>35</sup> [The Report of the Hallett Review: An independent Review into the On the Runs Administrative Scheme](#), HC 380, 2014-15

<sup>36</sup> [The Report of the Hallett Review: An independent Review into the On the Runs Administrative Scheme](#), HC 380, 2014-15, executive summary, page 7

result of that does not have the legal protection that some people may have thought they did.<sup>37</sup>

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<sup>37</sup> HC Deb 16 May 2019, c371 and c382

## 2. Investigation of deaths related to the 'Troubles'

The investigation of former British soldiers who served in Northern Ireland during "The Troubles", is the result of a process which began over a decade ago.

### 2.1 The Historical Enquiries Team

In 2006 the Historical Enquiries Team (HET) was set up in response to judgements at the European Court of Human Rights. These judgements, in the so-called McKerr cases, related to the investigation of deaths in which state involvement was alleged. They found various shortcomings which amounted to breaches of Article 2 of the European Convention on Human Rights relating to the protection, by law, of the right to life.

The role of the HET was to examine all deaths attributable to the security situation that occurred in Northern Ireland between 1968 and the Belfast Agreement in 1998. There were 3,260 deaths attributable to "The Troubles" within this period, arising from 2,555 separate incidents. From its outset, the HET adopted three main objectives:

- 1 To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to "the troubles" between 1968 and the signing of The Belfast Agreement in April 1998;
- 2 To re-examine all deaths attributable to "the troubles" and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;
- 3 To do so in a way that commands the confidence of the wider community.<sup>38</sup>

There were 3,260 deaths attributable to "The Troubles" within this period, arising from 2,555 separate incidents. The HET looked into cases on a chronological basis, with some exceptions:

- Previously opened investigations: prior to the establishment of the HET in 2005, the PSNI's Serious Crime Review Team (SCRT) had the task of reviewing past cases. The HET subsumed these cases when it took over the responsibility for historical cases and, in the interests of fairness to the families involved, prioritised their reviews;
- Humanitarian considerations: for example, if the relatives of victims are very ill or elderly;
- Involving issues of serious public interest: for example, the cases that are currently being examined by the Committee of Ministers;

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<sup>38</sup> [Inspection of the Police Service of Northern Ireland Historical Enquiries Team](#), HMIC, 2013

- Linked series of murders: the HET will pursue the evidential opportunities presented by each case. If cases appear to be linked, then they will be considered together.<sup>39</sup>

## HMIC inspection of the HET

In 2012, on the request of the Chief Constable of the Police Service of Northern Ireland, the Minister of Justice for Northern Ireland commissioned Her Majesty's Inspectorate of Constabulary (HMIC) to inspect the role and function of the Historical Enquiries Team (HET). The inspection focused on whether the HET's approach to reviewing military cases (a) conformed to current policing standards and policy, (b) adopted a consistent approach to military and paramilitary cases and (c) met the requirements that would ensure it was compliant with Article 2 of the European Convention on Human Rights and Fundamental Freedoms (i.e. independence, effectiveness, promptness, and transparency and accountability).

The [subsequent report of the HMIC](#) was highly critical of the HET and in 2013 the PSNI announced that it would review **all** military cases relating to the period 1968 up until the Good Friday Agreement was signed, in order "to ensure the quality of the review reached the required standard".<sup>40</sup>

## 2.2 The work of the Legacy Investigations Branch

As a result of budget cuts to the Police Service of Northern Ireland, the HET was disbanded in September 2014. In its place the PSNI stated that a much smaller Legacy Investigations Branch (LIB) would be formed. At the time the PSNI acknowledged that "What is clear is that we cannot afford to do all that we currently do and some of what we do will take longer to achieve".

The LIB continues to review all murder cases linked to the Troubles. It examines cases on a [case sequencing model](#), which looks at forensic opportunities, available witnesses and other investigative material when deciding which cases to tackle first. The PSNI has stated that it does not prioritise military cases.<sup>41</sup>

The LIB inherited over 900 cases from the HET, involving nearly 1,200 deaths. PSNI figures provided to the Defence Committee in 2017 showed that investigations into killings by the British Army accounted for about 30 per cent of its outstanding legacy workload. Of the total 923 deaths in its remaining caseload at the time, 379 were attributed to republicans, 230 to loyalists and 283 to the security forces (military and Royal Ulster Constabulary). A further 31 were unknown.<sup>42</sup>

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<sup>39</sup> [Inspection of the Police Service of Northern Ireland Historical Enquiries Team](#), HMIC, 2013, p.109

<sup>40</sup> PSNI statement on [Legacy Investigations](#), 8 December 2016

<sup>41</sup> *ibid*

<sup>42</sup> Police Service of Northern Ireland Legacy investigation Branch, [Submission to the Defence Select Committee, IFB0003](#), 2017

Any decision by the LIB to prosecute is referred to the Director of Public Prosecutions for Northern Ireland. The process is independent of the MOD and the British Government.

There has been significant criticism, on all sides, of the process by which legacy investigations have been, and continue to be, undertaken. Concerns have been expressed over the credibility and reliability of evidence and witness statements that may be over 40 years old and of the re-opening of investigations that had already concluded.

Most notable is the widespread perception that investigations have disproportionately focused on the actions of the armed forces and former police officers, rather than Republican and Loyalist paramilitary forces.

In a 2017 report (see below) the Defence Select Committee observed that of the outstanding caseload of the LIB “investigations into former army personnel account for a minority of LIB cases”, yet “they still amount to a disproportionately high number of investigations (30 per cent of investigations) when compared to the total level of killings attributed to the Army (10 per cent)”.<sup>43</sup>

### **Recent prosecutions of former soldiers**

Over the last few years, the perception that investigators are unfairly targeting cases involving military personnel has been emphasised by decisions by the Director of Public Prosecutions for Northern Ireland to bring prosecutions against a number of former Army personnel. At the time of writing, six former military personnel are facing prosecution for offences committed during the Troubles, in five separate incidents.

The media have suggested that approximately 400 retired British soldiers had been sent letters by the PNSI asking for information to help the police in their remaining investigations.

#### **Cunningham case**

In March 2015 the LIB re-opened the case into the death of John-Pat Cunningham, who was shot dead by an army patrol in 1974, following criticism of the HET process and the decision to review all military cases. Veteran Dennis Hutchings, formerly of the Life Guards Regiment, was charged with attempted murder in April 2015, while the PPS carried out a full review of all the available evidence in the case.

The case had previously been investigated in 1975, and again by the HET in 2011. On both occasions the case was dismissed.

In November 2015 the PPS took the decision to prosecute Mr Hutchings for attempted murder. When the [trial opened](#) in March 2017 the judge at Armagh Magistrates’ Court ruled there was insufficient evidence to return Hutchings for trial for attempted murder, although evidence was sufficient for committal to trial for attempting to cause grievous bodily harm with intent.

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<sup>43</sup> Defence Select Committee, Investigations into fatalities in Northern Ireland involving British military personnel, HC 1064, Session 2016-17, para. 15

In May 2017, however, the Director of Public Prosecutions for Northern Ireland reinstated the charge of attempted murder and directed that the trial would proceed without a jury. An [application](#) to have the trial heard in front of a jury was rejected in December 2017 by Belfast Crown Court, which ruled that the “administration of justice might be impaired if the trial were to be conducted with a jury”.

A further application to halt the prosecution of Mr Hutchings on the grounds of unavailability of evidence, a delay in mounting the prosecution and an alleged breach of promise relating to the original decision not to pursue charges, was rejected by Belfast Crown Court in May 2018. Mr Justice Colton stated that, while he was concerned about mounting a prosecution four decades after the event, he was satisfied the defendant would receive a fair trial and that the defence would have the opportunity to challenge any issues it had with the quality of the prosecution case during trial.<sup>44</sup>

In September 2018 Mr Hutchings was granted leave to appeal to the Supreme Court over the decision to hold a non-jury trial. That case came before the Supreme Court on 14 March 2019. The Court dismissed the appeal on 6 June 2019. The [Judgment](#) stated:

It is important to focus on the need for a fair trial. Trial by jury is, of course, the traditional mode of trial for serious criminal offences in the United Kingdom. It should not be assumed, however, that this is the unique means of achieving fairness in the criminal process. Indeed, as the Court of Appeal’s statements in *Jordan* show, trial by jury can in certain circumstances be antithetical to a fair trial and the only assured means where those circumstances obtain of ensuring that the trial is fair is that it be conducted by a judge sitting without a jury.

35. So-called “Diplock trials” took place in Northern Ireland between 1973 and 2007. No one suggests that this mode of trial failed to deliver fairness of process, by reason of the fact that the trial took place before a judge sitting without a jury.<sup>45</sup>

Following the Supreme Court ruling, a trial date was set for 9 March 2020. Mr Hutchings was formally arraigned on 26 September 2019 during which he pleaded not guilty to the two charges before him.

However, the trial has been repeatedly delayed over concerns for the defendant’s health amid the Covid-19 pandemic. At a review hearing on 13 March 2020 the Presiding Judge suggested that the trial could take place via video-link, with the court sitting for two days a week. That approach was rejected however, with lawyers for Mr Hutchings arguing that he wanted to be present for his trial.

At a review hearing in January 2021 the Presiding Judge, Mr Justice McAlinden, adjourned the case once again.<sup>46</sup> The [Belfast Telegraph](#) reported:

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<sup>44</sup> “Former British soldier to stand trial over John Pat Cunningham killing amid Troubles”, *Irish News*, 10 May 2018

<sup>45</sup> The Supreme Court, Judgment (2019) UKSC 26, para 34-35.

<sup>46</sup> The trial had been expected to begin in February 2021.

Mr Justice McAlinden said that Northern Ireland had the highest infection rate in the UK and the former soldier travelling to Belfast would "place him in a hotbed of Covid infection" [...]

With regard to any trial hearing being held remotely, Mr Justice McAlinden said he had no power to compel the pensioner, who has given firm instruction he wants to attend his trial in person, to do otherwise.

The judge said to have Mr Hutchings come to Belfast for his trial, and to receive other medical treatments while here, was something "this court in all conscience can't countenance".

At the time of writing, it remains unclear when the trial will go ahead.

### **McCann case**

In December 2016 the Public Prosecution Service of Northern Ireland announced that two former Army personnel are to be prosecuted for murdering an IRA Commander, Joe McCann, in 1972.

The RUC conducted an investigation in 1972, and on the basis of available evidence decided not to prosecute anyone.

In 2013 a report by the HET concluded that his killing was unjustified. Following a request for a fresh inquest, in March 2014 the Attorney General for Northern Ireland referred the case to the Director of Public Prosecutions for a formal review. In December 2016 [the decision](#) was subsequently taken to prosecute the two former British soldiers for murder.

A preliminary hearing at Belfast Magistrates Court in March 2018 ruled that the soldiers (referred to as Soldiers A and C) have a case to answer and should stand trial for murder. The trial had been expected to begin in January 2019 but following a decision by the Director of Public Prosecutions for Northern Ireland to hold a trial without a jury, the defendants launched a judicial review in the High Court.

However, the Supreme Court's dismissal of the Cunningham/Hutchings case on the same basis in June 2019 (see above) has brought that legal challenge to an end. A non-jury trial will now go ahead.

Formal arraignment proceedings were due to take place in April 2020, with a provisional trial date set for 2 November 2020. However, due to the Covid-19 pandemic those proceedings have been delayed.

At a review hearing in November 2020, Mr Justice O'Hara fixed a new trial date for 26 April 2021. An anonymity order relating to the defendants currently remains in place, although Mr Justice O'Hara is expected to review that decision in a hearing currently scheduled for 22 March 2021.

Given the ongoing nature of the Covid pandemic, and the [reported backlog of cases at Belfast Crown Court](#), it is currently unclear whether the trial will go ahead in April as expected.

### **McAnespie case**

On 19 June 2018 the Public Prosecution Service for Northern Ireland [announced that charges of gross negligence manslaughter would be](#)

[brought](#) against a former soldier in relation to the death of Aidan McAnespie at a military checkpoint in 1988.

David Holden, a former Grenadier Guardsman, was originally charged with manslaughter, but the charges were subsequently dropped based upon the evidence available at the time.

In 2008 the HET reviewed the case, and questioned the version of events as reported, although no new evidence had been uncovered that warranted the case being referred to the PPS.

In January 2016 the PPS announced its intention to review the decision to drop the charges in the original case following a referral of the case by the Attorney General for Northern Ireland. The McAnespie family had requested a fresh inquest into the circumstances of the shooting.

In a [statement](#) the PPS commented:

The process considered all of the available evidence including a fresh ballistics report and it has been concluded there is sufficient evidence to prosecute the suspect in connection with the shooting of Mr McAnespie.

In January 2020, the Judge presiding over the case at Dungannon Magistrate's Court ruled that there was sufficient evidence for the accused to stand trial; while also dismissing an application that the defendant would not receive a fair trial due to the time that has elapsed.

In February 2020, however, the defence counsel mounted a legal challenge to the case, citing an abuse of process. That challenge is ongoing.

### **Bloody Sunday Prosecutions**

In its [Annual Report and Accounts for 2016-17](#) the PSNI confirmed that 18 prosecution files relating to former soldiers of the Parachute Regiment involved in Bloody Sunday had been submitted to the Public Prosecution Service in December 2016.<sup>47</sup>

On 14 March 2019 the DPP for Northern Ireland announced that one former soldier (referred to as Soldier 'F')<sup>48</sup> would be prosecuted for murder and attempted murder. In the remaining cases the PPS concluded that the Test for Prosecution had not been met.

In a [statement](#) the PPS commented:

It has been concluded that there is sufficient available evidence to prosecute one former soldier, Soldier F, for the murder of James Wray and William McKinney; and for the attempted murders of Joseph Friel, Michael Quinn, Joe Mahon and Patrick O'Donnell.

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<sup>47</sup> The [Saville Inquiry](#), which was established in 1998 to re-investigate the incident, was made public in 2010. That Inquiry concluded that the killing of 13 people at a civil rights march by the British Army in 1972 was unjustified. While the findings of the Inquiry are inadmissible in court, it nevertheless opened up the possibility of prosecutions.

<sup>48</sup> The Saville Inquiry granted anonymity to all military witnesses who gave evidence to that inquiry. The PPS concluded that these reporting restrictions should remain in place.



In respect of the other 18 suspects, including 16 former soldiers and two alleged Official IRA members, it has been concluded that the available evidence is insufficient to provide a reasonable prospect of conviction. In these circumstances the evidential Test for Prosecution is not met.

The PPS also released a [summary of the reasons not to prosecute](#) in the majority of the Bloody Sunday cases. It said that the decisions related solely to actions undertaken on Bloody Sunday and that “Consideration will now be given to allegations of perjury in respect of those suspects reported by police”.<sup>49</sup>

#### *Review of the decision*

The solicitors acting on behalf of the families subsequently made a legal submission to the Public Prosecution Service for Northern Ireland, asking for a review of the decision not to prosecute the remaining soldiers. They also contended that Soldier F should be charged with additional offences.

In November 2019 the PPS confirmed that a review of the files would take place, but it was unable to say when that review would conclude.

In September 2020 the PPS for Northern Ireland [announced that the initial prosecution decisions would be upheld](#), concluding that the Test for Prosecution had not been met on evidential grounds. While fresh charges will not be brought against Soldier F, the original prosecution against Soldier F continues.

In December 2020 lawyers for the families [lodged an application](#) with the High Court seeking leave to apply for judicial review of the PPS’ decisions not to prosecute.

#### *Trial of Soldier F*

Preliminary court proceedings were held at Londonderry Magistrates Court in December 2019 and February 2020. A committal hearing, to determine whether there is sufficient evidence to return Soldier F for trial in the Crown Court, had been expected in July 2020 but was adjourned due to the Covid-19 pandemic.

It is unclear when court proceedings related to this case will continue. At a review hearing in June 2020, the presiding Judge was reported to have “adjourned the hearing with ‘the greatest reluctance’”, commenting:

the system is ‘not fit for purpose for even a simple matter’.

The only way to deal with this is when we can get back to court and that isn’t going to happen by July 16 [...]

We still don’t know when we are going to come to anything approaching a normal situation. As soon as we do I want to have this case listed.<sup>50</sup>

### **Hegarty case**

In July 1972 15-year old Daniel Hegarty was shot and killed by a member of an Army patrol on duty in the Creggan area of Londonderry

<sup>49</sup> Public Prosecution Service for Northern Ireland, [News Release](#), 14 March 2019

<sup>50</sup> [“Soldier F case adjourned due to Covid-19 pandemic”](#), Derry Journal, 25 June 2020

during Operation Motorman.<sup>51</sup> The operation sought to re-establish control of a number of sectarian “no-go areas” that had been established in Belfast, Londonderry and other urban centres.

In July 1973, following an initial investigation, the decision was taken by the Director of Public Prosecutions for Northern Ireland not to prosecute the soldier involved. A 2008 review of that case by the Historical Enquiries Team reconfirmed the decision not to prosecute.

In 2011 the Attorney General for Northern Ireland directed that a fresh inquest be held into the death of Daniel Hegarty.<sup>52</sup> At the subsequent hearing the Coroner received testimony from a ballistics expert which suggested that an offence may have been committed and therefore, the Coroner referred the case back to the DPP in December 2011. Again, the decision was taken in March 2016 that the Test for Prosecution had not been met. However, that decision was subsequently quashed by the Divisional Court in May 2018.<sup>53</sup>

On 15 April 2019, following a further review of the case by the DPP, which included fresh evidence presented after the 2018 Court ruling, the PPS for Northern Ireland [announced](#) its intention to prosecute a former soldier (identified as “soldier B”) for the murder of teenager Daniel Hegarty and for wounding with intent with respect to a second youth, Christopher Hegarty, during the same incident.

In a statement the DPP commented:

As with all cases, I have also carefully considered whether the public interest requires prosecution through the courts. Particular consideration was given to Soldier B’s ill health, regarding which an updated medical report was obtained. In line with our Code for Prosecutors, I have concluded, given the seriousness of the charges, that the Public Interest Test for Prosecution is also met.<sup>54</sup>

Soldier B’s legal team sought a Judicial Review of the decision to prosecute at the High Court in Belfast, citing an alleged breach of his right to life under article 2 of the ECHR. His lawyers argued that the decision to charge him had put him at a heightened risk of sudden death due to ill health.

In December 2020 the High Court dismissed that application. Delivering their ruling, Lord Justice Treacy stated:

If the argument of the applicant was accepted it would confer de facto immunity on any suspect with a medical condition capable of similarly increasing risk, consequential upon higher levels of stress resulting from a decision to prosecute [...]

Furthermore, if the applicant’s contention was right, the increase in the risk of death arising from the prosecution could as a matter of principle be deployed more than once [...]

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<sup>51</sup> An overview of Operation Motorman is available in a series of [Cabinet Office papers](#) available at the National Archive.

<sup>52</sup> The original inquest in October 1973 recorded an open verdict.

<sup>53</sup> A summary of the judgement is available [online](#).

<sup>54</sup> Public Prosecution Service Press Release, 15 April 2019

The system of safeguards and protections is sufficient to satisfy the obligations of the State under Article 2 and 3.<sup>55</sup>

### **MOD response**

As noted above, legacy investigations in Northern Ireland, and any subsequent decision by the DPP on whether or not to prosecute, are independent of the British Government and the Ministry of Defence.

In response to recent prosecution decisions the MOD has stated:

This process is entirely independent of Government and so it's inappropriate for us to comment. We understand the strain these proceedings place on our people, both serving and veterans, and will stand by them – funding all their legal costs and providing pastoral support.<sup>56</sup>

The MOD has established an Operational Legacy Support Team (OLST) within the Army Personnel Services Group to provide support and advice to veterans and serving personnel on matters relating to legacy operations in Northern Ireland, Iraq and Afghanistan. In answer to a Parliamentary Question on 14 May 2019 the MOD provided more information on the OLST:

Within the Army's Personnel Services Group (APSG), the Operational Legacy Support Tea, coordinates welfare and pastoral support to Army veterans and serving personnel who are subject to historical investigations. APSG has drawn together all stakeholders (including those in the Ministry of Defence, the appropriate Regimental Headquarters and Associations, the Confederation of Service Charities and ABF-The Soldiers' Charity) to ensure coherent pastoral support to veteran, under the primacy of the MOD's Veterans UK. This is incorporated into the recently announced UK-wide Veterans' Strategy and is supported by £10 million of funding overall. I am confident that this demonstrates that the Department has a clear strategy and is meeting its obligations to veterans subject to historical investigations, whilst also protecting the Army's reputation for future generations of soldiers.<sup>57</sup>

Detailed information on the legal and welfare support that is being made available is online at [Operational legacy investigations and inquests – help for veterans](#).

### **Recent prosecutions against paramilitary personnel**

In response to accusations that military personnel have been unfairly targeted by the PSNI in its legacy investigations, the PPS for Northern Ireland has sought to make clear that cases with respect to alleged offences involving republican and loyalist paramilitaries also remain active.

In a [statement](#) in April 2019 the PPS set out its prosecution decisions relating to paramilitary personnel since 2011:

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<sup>55</sup> [High Court Justice of Northern Ireland, Queen's Bench Division \(Judicial Review\), 2020 NIQB 76](#), 17 December 2020, para. 82 and 94

<sup>56</sup> MOD, Defence in the Media, 22 March 2017

<sup>57</sup> PQ 252560, Northern Ireland, 14 May 2019

- Between 2011 and April 2019 the PPS took prosecutorial decisions in 26 legacy cases. A case can involve more than one individual.
- 13 of those cases related to alleged offences involving republican paramilitaries:
  - There have been prosecutions in eight of those cases.
  - As of April 2019, prosecution proceedings were still active in three of those cases.
  - Of the five cases that had concluded, two resulted in convictions, two cases were discontinued,<sup>58</sup> and one resulted in acquittal.
- Eight of the 26 cases related to alleged offences involving loyalist paramilitaries:
  - The decision to prosecute was taken in four of those eight cases.
  - Two cases resulted in a conviction.
  - As of April 2019, two prosecution cases remained active.
- Five cases involved former military personnel (see above).

### Current LIB/ PPS caseload

In answer to a [Freedom of Information request](#) in January 2021 the PSNI provided updated information on its current caseload. This data only relates, however, to those cases handed over to the LIB since 2014. The PSNI statement of April 2019 (see above) provides information back to 2011, which prevents a direct comparison of information.

- In total the PSNI has a total of 929 cases, involving 1184 victims.
- Of those cases, 33 are currently active. A case can have more than one individual associated with it.
- Nine are LIB case reviews:
  - Five cases relate to alleged offences involving republican paramilitaries.
  - Three cases relate to alleged offences involving loyalist paramilitaries.
  - One review case relates to alleged offences involving the military.
- Five cases are ongoing LIB investigations:
  - One investigation relates to alleged offences involving republican paramilitaries.
  - Two investigations relate to alleged offences involving loyalist paramilitaries.
  - Two investigations relate to alleged offences involving military personnel.

At the time of writing, fifteen prosecution decisions are currently being awaited by the PPS for Northern Ireland.

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<sup>58</sup> One following the death of the defendant.

- The remaining 19 cases are those that have been **submitted** to the PPS for Northern Ireland since the LIB was established in 2014:
  - Ten prosecution cases are military related.
  - Seven prosecution cases are related to republican paramilitaries.
  - Two prosecution cases are related to loyalist paramilitaries.<sup>59</sup>
- Nine prosecutions of individuals have been brought by the PPS since 2014. Six prosecutions are of military personnel (see above), two prosecutions are of republican paramilitaries and one prosecution involves a loyalist paramilitary.
- A further 20 individuals have not faced prosecution, although the FOI response does not provide a breakdown. As of 15 January 2021, 15 prosecution decisions are awaiting a decision. Again, a breakdown is not provided.
- There have been no convictions since the LIB was established in 2014.

The PPS for Northern Ireland hasn't released any further details on specific cases. As such, it is not clear whether one of the active cases involving Republican paramilitaries includes that of John Downey, who was arrested in October 2019 for the murder of two soldiers in Enniskillen in 1972.<sup>60</sup> Mr Downey was initially arrested in the Republic of Ireland in November 2018, under a European Arrest Warrant, and was subject to extradition proceedings. He was granted leave to appeal his extradition, which was dismissed by the Supreme Court in October 2019. Preliminary hearings were expected to begin in February 2021, although could face delays due to the ongoing Covid-19 pandemic.

## 2.3 Coroners inquests

The [Coroners Service for Northern Ireland](#) also has a responsibility for investigating the circumstances surrounding deaths related to The Troubles, where it has been directed to do so.<sup>61</sup> This is a separate process from the work of the LIB.

### Purpose of an inquest

The purpose of a coroner's inquest is to find out who the deceased person was and, how, when and where they died, and to establish the details the Registrar of Deaths needs to register the death.<sup>62</sup> A coroner's inquest is a fact-finding exercise, not a trial. The coroner is not able to

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<sup>59</sup> Ten prosecution cases are military related, seven are related to republican paramilitaries and two cases are related to loyalist paramilitaries. In a statement in April 2019 the PSNI stated that 26 legacy cases had been prosecuted between 2011 and 2019.

<sup>60</sup> Mr Downey had been previously charged with murder for his involvement in the Hyde Park bombing in 1982 that killed four soldiers. His trial collapsed in 2014 after it was revealed he had received written assurances that he was not actively wanted by the authorities (see section 1.3).

<sup>61</sup> Northern Ireland has its own legislation dealing with coroners and inquests, mainly the [Coroners Act \(Northern Ireland\) 1959](#) and the [Coroners \(Practice and Procedure\) Rules \(Northern Ireland\) 1963](#).

<sup>62</sup> The outcome of an inquest in Northern Ireland comes in the form of "findings" which record the essential facts relating to a death.

decide, or appear to decide, any question of criminal or civil liability or to apportion guilt or attribute blame.<sup>63</sup>

### **Application of the ECHR**

Article 2 of the European Convention on Human Rights establishes the right to life and imposes on the State negative obligations not to take life intentionally, and positive obligations to protect life. The positive duty to protect life implies a duty to investigate unnatural deaths, including, but not confined to, deaths in which State agents may be implicated.<sup>64</sup>

In 2003, the European Court of Human Rights established that, in order to meet the requirements of Article 2, any investigation had to satisfy the following five criteria to be effective:

- the inquiry must be on the initiative of the State, and it must be independent;
- it must be capable of leading to a determination of whether any force used was justified, and to the identification and punishment of those responsible for the death;
- it must be prompt and proceed with reasonable expedition;
- it must be open to public scrutiny to a degree sufficient to ensure accountability; and
- the next-of-kin of the deceased must be involved in the inquiry to the extent necessary to safeguard their legitimate interests.<sup>65</sup>

Case law has determined that an inquest satisfies this investigatory obligation.<sup>66</sup>

### **Criminal offences**

Where the coroner's investigation shows that a criminal offence may have been committed the coroner must send a written report to the Public Prosecution Service for Northern Ireland (PPS).<sup>67</sup>

As a result, the PSNI Legacy Investigations Branch could be directed by the PPS to start or re-open an investigation into a Troubles-related incident.<sup>68</sup>

### **Legacy inquests**

Although there is no formal or legislative definition of a legacy inquest case, there is an accepted definition which is used for administrative

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<sup>63</sup> [Coroners \(Practice and Procedure\) Rules \(Northern Ireland\) 1963](#), Rule 16 and Judicial Communications Office Press Release, [Legacy inquest review](#), 7 June 2019 [accessed 12 March 2020]

<sup>64</sup> *McCann v UK* (1996) 21 EHRR 97; *Ergi v Turkey* (2001) 32 EHRR 18; *Yasa v Turkey* (1999) 28 EHRR 408, Joint Committee on Human Rights, [Scrutiny: First Progress Report](#), 24 January 2005, HL Paper 26 HC 224 2004-05, p48

<sup>65</sup> *Jordan v UK* (2003) 37 EHRR 2 as set out in the [Lord Chancellor's Exceptional Funding Guidance \(Inquests\)](#), 15 June 2018

<sup>66</sup> Judicial Communications Office Press Release, [Legacy inquest review](#), 7 June 2019 [accessed 12 March 2020]

<sup>67</sup> [Justice \(Northern Ireland\) Act 2002, section 35](#)

<sup>68</sup> Northern Ireland Consultation Paper, [Addressing the legacy of Northern Ireland's past](#), May 2018, p16

purposes – a legacy case is generally one which involves or is related to deaths arising out of the “Troubles”.<sup>69</sup>

The Northern Ireland Office’s 2018 consultation, [Addressing the legacy of Northern Ireland’s Past](#), included the following information about inquests into deaths that occurred during the Troubles:

The majority of deaths that occurred during the Troubles will have had a Coroner’s inquest soon after the death occurred. Where there were shortcomings in the original inquest, the [Attorney General for Northern Ireland] can order a fresh inquest. There are currently over 50 legacy inquests, relating to almost 100 deaths, proceeding through the Northern Ireland Coroners’ courts on this basis.<sup>70</sup>

### **The Northern Ireland Legacy Inquest Team**

A number of legacy inquests, including the Ballymurphy inquest (see below), are currently underway.

However, in 2019 a dedicated unit was established by the Coroners Service for Northern Ireland to deal with outstanding legacy cases. At the time the team was established, there were 52 outstanding legacy inquests, which the Presiding Coroner has committed to dealing with over the next five years.

In November 2019 the Presiding Coroner issued a [statement](#) setting out the sequence in which those legacy inquests would be heard. Six of those inquests, involving 19 individuals, relate to military operations.

The Covid-19 pandemic has, however, impacted significantly on the schedule of legacy inquests after the Lord Chief Justice of Northern Ireland announced that all non-urgent court business, including legacy inquests, would be adjourned and kept under review.

While some preliminary hearings and administrative reviews have been able to take place, in a [statement issued in June 2020](#) the Presiding Coroner said:

It remains the case that the full impact of the Covid-19 pandemic on legacy inquests is not yet known. What is clear at this stage is that the three inquests that were listed in what was to be quarter 1 of Year 1 of the Lord Chief Justice’s Five Year Plan cannot proceed due to Covid-19. It is also apparent that preparations for all Year 1 inquests have been interrupted by the impact of Covid-19 on Legacy Inquest Unit staff and disclosure providers as well as on elderly witnesses and those who provide support to them during the inquest process. Accordingly, and unavoidably, the hearing of Year 1 inquests has been pushed back with a consequent impact on the start date of the Five Year Plan [...]

I have reviewed the feasibility of sequencing a second tranche of inquests and having done so, I am of the view that we do not yet know enough about the impact of Covid-19 on the planned Year 1 inquests to announce the second tranche. This matter will be kept under review.

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<sup>69</sup> Department of Justice, [DOJ announces legacy inquest reform](#), 28 February 2019 [accessed 11 March 2020]

<sup>70</sup> Northern Ireland Consultation Paper, [Addressing the legacy of Northern Ireland’s past](#), May 2018, p15

The legacy inquests plan could also be impacted by a case that was brought before the High Court in December 2019. The MOD is seeking a judicial review of the [Coroner's findings](#) into the death of Seamus Bradley, who was shot and killed by a soldier in 1972.

The Coroner found that the soldier was not justified in opening fire and that the investigation into Mr Bradley's death was flawed and inadequate. The MOD is [questioning the findings](#) and seeking to have the verdict overturned and a fresh inquest held. Counsel for the MOD has argued that the burden of proof in alleged unlawful killings should be the criminal standard, i.e. beyond reasonable doubt. The Coroner's findings in the case of Seamus Bradley was instead based on the civil standard, i.e. the balance of probabilities.

The outcome of the case is widely expected to impact the whole programme of legacy inquests as it could establish the standard of proof required in all cases going forward. The case had been adjourned until May 2020, although has since been delayed due to the Covid-19 pandemic.

## **Ballymurphy inquest**

One of the more high-profile inquests at present is the [inquest into the death of 10 civilians at Ballymurphy in August 1971](#) at the start of Operation Demetrius. The operation involved the arrest and internment, without trial, of individuals suspected of being involved in the IRA.

Original inquests were held into each of the deaths in 1972 resulting in open verdicts in all cases.

Following a campaign by the families of the victims for the cases to be reviewed, in 2011 the Attorney General directed that new inquests should be held into the deaths of all ten people.

The inquest opened in November 2018 and concluded taking evidence in March 2020. The presiding Coroner is yet to deliver their verdict.<sup>71</sup>

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<sup>71</sup> Commentary on the progress of the inquest has been compiled by [BBC News](#).



## 3. Addressing legacy issues

### 3.1 Implementing the Stormont House Agreement

Addressing legacy issues was a key part of the [Stormont House Agreement](#) reached in December 2014. Participants in the negotiations on that agreement stated that any approach to the past should respect the following overarching principles:

- promoting reconciliation;
- upholding the rule of law;
- acknowledging and addressing the suffering of victims and survivors;
- facilitating the pursuit of justice and information recovery;
- be human rights compliant; and
- be balanced, proportionate, transparent, fair and equitable.<sup>72</sup>

To this end, the agreement set out various detailed measures. Among them was the establishment of a new independent Historical Investigations Unit (HIU)<sup>73</sup> to take forward investigations into outstanding deaths from the Troubles. That would include outstanding cases from the HET process and the legacy work of the LIB and the Police Ombudsman for Northern Ireland.<sup>74</sup> Families may also have other, previously completed, cases considered for criminal investigation by the HIU if there is new and credible evidence which was not previously available to the HET/LIB. In respect of its criminal investigations, the HIU will have full policing powers and will work through its case load in chronological order. It must complete its work within five years and it will be overseen by the Northern Ireland Policing Board. Any decisions to prosecute will be taken by the Director of Public Prosecutions.

### 3.2 Debate in the House

Since 2017 there have been a number of debates in the House on the investigation of legacy cases, in Northern Ireland and elsewhere.

Those debates raised concerns over:

- the perceived unfairness of investigations into former Armed Forces personnel in Northern Ireland
- the credibility and reliability of evidence and witness statements that may be over 40 years old
- the re-opening of investigations that had already concluded
- the pros and cons of introducing a Statute of Limitations on alleged offences.

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<sup>72</sup> *Stormont House Agreement*, para 21

<sup>73</sup> Examined in paragraphs 30-40 of the [Stormont House Agreement](#)

<sup>74</sup> This was re-confirmed in the [PSNI statement on legacy investigations](#). 16 December 2016

## Box 2: Parliamentary debates

- [DUP Opposition Day debate](#), 23 February 2017
- [House of Commons Adjournment Debate, Ballydugan Four](#), 19 April 2017
- [Westminster Hall Debate, Fatalities in Northern Ireland and British military personnel](#), 25 January 2018
- [Westminster Hall Debate, Historic allegations against veterans](#), 15 May 2018
- [House of Commons debate, Veterans and soldiers: statute of limitations](#), 25 June 2018
- [House of Lords debate](#), 5 September 2018:
- [House of Commons debate, Investigation of Veterans](#), 16 May 2019
- [House of Lords debate, Veterans: Investigations](#), 16 May 2019
- [Westminster Hall Debate, Immunity for Soldiers](#), 20 May 2019
- [House of Commons debate, Northern Ireland executive formation](#), 16 January 2020

## 2017 Defence Select Committee Report

In April 2017 the Defence Select Committee published its report into [Investigations into fatalities in Northern Ireland involving British military personnel](#).<sup>75</sup> While describing the overall process of investigations into fatalities in Northern Ireland as “deeply unsatisfactory” and “morally indefensible” for “former service personnel to be caught in limbo”, the Committee also concluded that former soldiers should be protected by a Statute of Limitations preventing further investigation and prosecution of incidents which occurred between almost 20 and 50 years ago.<sup>76</sup> In order to remain within the provisions of international law, the Committee also recommended that a Statute of Limitations be accompanied by a truth recovery mechanism:<sup>77</sup>

5. Accordingly, we recommend the adoption of Option One—the enactment of 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. This should be coupled with the continuation and development of a truth recovery mechanism which would provide the best possible prospect of bereaved families finding out the facts, once no-one needed to fear being prosecuted. (Paragraph 52)

6. Although it is beyond the strict remit of the Defence Committee, we would encourage the next Government to extend this provision to include former members of the Royal Ulster Constabulary and other former security personnel. It will also be a matter for the next Government to decide, after appropriate consultations, whether the statute of limitations should also cover all Troubles-related incidents. (Paragraph 53) [...]

8. We believe that to subject former Service personnel to legal pursuit under the current arrangements is wholly oppressive and a denial of natural justice. It can be ended only by a statute of

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<sup>75</sup> HC 1064, Session 2016-17

<sup>76</sup> Other options presented by the Committee included implementing the Stormont House Agreement; implementing the Agreement and reviewing the Northern Ireland Sentences Act 1988 or ceasing investigations. All were examined in detail in [Section 4 of the Committee's report](#).

<sup>77</sup> The Chairman of the Defence Committee, Julian Lewis, discussed this idea of a ‘truth recovery process’, akin to the Truth and Reconciliation process in South Africa, in the House again in May 2018 (HC Deb 3 May 2018 c500-501)

limitations. Our expert witnesses agreed that the UK Parliament has it entirely within its power to enact such a statute and we call upon the Government in the next Parliament to do so as a matter of urgency. (Paragraph 55)

The Government's initial [response](#) to the report was published on 26 April 2017:

The Government recognises the significant difficulties with the status quo.

For example, the closure of the Police Service of Northern Ireland's Historical Enquiries Team left hundreds of cases outstanding. Many of these cases still require investigation but there is general agreement that the current mechanisms in place to address outstanding cases need to be more balanced, proportionate, transparent, fair and equitable, and deliver outcomes more quickly. In addition, the Office of the Police Ombudsman for Northern Ireland (OPONI) has a remit to investigate alleged misconduct or criminal action by police in Northern Ireland, including in respect of Troubles-related incidents. The OPONI Historical Investigations Directorate's caseload currently sits at around 400 cases and continues to grow, with some 167 complaints in respect of historical investigations received in the past two years.

The Stormont House Agreement in December 2014 reached broad political consensus to establish four institutions to address the past after eleven weeks of intensive talks between the UK Government, the five largest parties in the Northern Ireland Assembly, and, where appropriate, the Irish Government. The institutions proposed by the Stormont House Agreement are designed to address different aspects of the legacy of the Troubles. The Government believes that these institutions provide the best way to address the legacy of Northern Ireland's past [...]

The institutions proposed by the Stormont House Agreement include the Historical Investigations Unit (HIU)—an independent body to take forward outstanding investigations into Troubles-related deaths. The HIU would take on the outstanding work of the Police Service of Northern Ireland's Historical Enquiries Team and the outstanding legacy work of the Police Ombudsman for Northern Ireland. The initial caseload is estimated at around 1,800 deaths. The HIU would aim to complete its work within five years of its establishment and would be required to act in a way which is balanced, proportionate, transparent, fair and equitable.

A further response was published by the present Government as the [Third Special Report of 2017-19](#), HC 549, 13 November 2017. This gave the following response to the recommendation of a statute of limitations:

While the Government believes that the most effective option to address Northern Ireland's past is to implement the proposals set out in the Stormont House Agreement, the Government acknowledges that others have different views on the best way forward, including approaches such as that proposed by the Committee which do not involve recourse to the criminal justice system.

As such, the Government intends to include within its forthcoming consultation on the draft Northern Ireland (Stormont House Agreement) Bill a section entitled '*Alternative approaches to addressing the past*'. This section of the consultation will

discuss alternative ways forward and include a description of the Committee's recommendation. The consultation will invite respondents to give their views on 'the potential effectiveness and appropriateness of alternative approaches such as amnesties and a statute of limitations to address the legacy of Northern Ireland's past'. Following the consultation's conclusion, the Government will consider all views carefully to inform next steps.<sup>78</sup>

In January 2018 the House [debated](#) the Defence Committee's report and raised many of the same arguments. The then Minister for the Armed Forces, Mark Lancaster, re-stated the Government's concerns with maintaining the status quo and its support for implementation of the Stormont House Agreement as "the best way to address Northern Ireland's past in a way that is fair, balanced and proportionate".<sup>79</sup> He also reiterated the commitment to discussing "alternative approaches":

As there are a range of views, and recognising the view of the Committee, the Government have decided to include within the legacy consultation a question on alternative ways of addressing the legacy of the past, such as a statute of limitations or amnesty. While the Government are clear that in their view the best way forward is to proceed with the Stormont House agreement institutions, in the spirit of meaningful consultation, all views will be considered carefully to inform the next steps.<sup>80</sup>

### 3.3 The 2018 public consultation paper

On 11 May 2018 the Northern Ireland Office launched a public consultation: [Addressing the legacy of Northern Ireland's Past](#). The consultation takes forward the proposals set out in the Stormont House Agreement in relation to the Historical Investigations Unit (HIU) (see above).

#### A statute of limitations?

Prior to the consultation's publication, there was political and media speculation that it would include a statute of limitations to prevent the prosecution of former soldiers for offences connected to the Troubles in Northern Ireland. This idea was supported by some Conservative MPs, including former Defence Secretary Gavin Williamson, but strongly opposed by Sinn Féin and the Irish Government.<sup>81</sup> The Northern Ireland Human Rights Commission advised the Government that any such statute [would amount to an amnesty and could be in breach of international law](#). The DUP leader, Arlene Foster, also [raised concerns](#) that a statute of limitations could lead to a general amnesty for all those involved in the Troubles, including terrorists.

However, the consultation did not contain a Statute of Limitations or any form of amnesty. In the Foreword, the Northern Ireland Secretary states:

Conservatives in government have consistently said that we will not introduce amnesties or immunities from prosecution." This

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<sup>78</sup> Para 5, p3

<sup>79</sup> HC Deb 25 January 2018, c222WH

<sup>80</sup> *ibid*

<sup>81</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-44042438>

Government has always shared the view that amnesties are not the right approach and believes that justice should be pursued.<sup>82</sup>

The consultation did, however, welcome “views from those who might have other ideas, either about how the institutions should work, or about alternatives to the institutions themselves”.<sup>83</sup> The Defence Committee was critical of the consultation’s failure to include a comprehensive section on alternative approaches, including the options outlined by the Committee in its 2017 report.<sup>84</sup>

Support for some form of statute of limitations has been widespread and formed much of the substance of the debate on [historical allegations against veterans](#) in Westminster Hall on 25 May 2018. In an [interview on Radio 5 Live](#) on 3 June 2018, then Minister for Defence People and Veterans, Tobias Ellwood,<sup>85</sup> expressed his support:

There's a consultation, I personally would like to see this considered - but it's not for me to make that judgement.... It does make sense to draw a line at some point to say that investigations have taken place to their conclusion and unless there's compelling evidence put forward to a very high court...we then close the books on that particular matter...

However, there is a consultation taking place, these arguments I think will be put into that consultation and I hope common sense will then prevail.

At the moment you are hearing of the historic allegations team, this Northern Ireland operation, knocking on doors of people who are now in their eighties asking for questions...That cannot be how we should look after our veterans.<sup>86</sup>

Former Minister for the Armed Forces, Sir Mike Penning, who served in Northern Ireland, also stated his support for a Statute of Limitations in an interview with *The Express* in June 2018. He suggested that it was “fundamentally wrong that cases which had already been investigated all those years ago were being reopened” and that “the statute of limitations would be a good example of how we do it”.<sup>87</sup>

In response to that media story, a Government spokesperson commented:

It is only due to the courageous efforts of our security forces that we have the relative peace and stability that Northern Ireland enjoys today. We are now consulting on new legacy institutions to replace the current flawed processes and ensure that there is no unfair and disproportionate focus on former members of the Armed Forces and police officers. The welfare of our personnel

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<sup>82</sup> This is a view which the Government has also shared in relation to giving immunity to Armed Forces personnel for any offence alleged to have taken place more than 20 years ago whilst engaged in military operations overseas. See [House of Lords Grand Committee of the Armed Forces Bill](#), 3 March 2016, cGC152

<sup>83</sup> Northern Ireland Office, *Addressing the Legacy of Northern Ireland’s Past*, May 2018, Foreword

<sup>84</sup> [Defence Committee submission to NIO consultation](#), 12 June 2018

<sup>85</sup> Elected as Chair of the Defence Select Committee in January 2020.

<sup>86</sup> Pienaar’s Politics, 3 June 2018

<sup>87</sup> [“End ‘sick’ witch-hunt against Army, says MP accused over his own time in Ulster”](#), *The Sunday Express*, 17 June 2018

and veterans is of the utmost importance and we provide legal and pastoral support to any veteran who requires it.<sup>88</sup>

In a commentary piece for *The Daily Telegraph* on 3 August 2018 the former Northern Ireland Secretary, Karen Bradley, once again defended the Government's approach stating that it could not support a mechanism that would also offer an amnesty to terrorists.<sup>89</sup>

The Defence Committee [continued to express concern](#) over the Northern Ireland Office's "closed minded" approach to this issue.

In a further [report on the protection of veterans](#) in July 2019 the Committee reiterated its support for a statute of limitations in relation to all theatres of conflict, including Northern Ireland:

At the heart of this inquiry and our Report is a determination to ensure that justice prevails for veterans and Service personnel. This does not mean that those who serve our country are above the law: far from it. We are unequivocal in our belief that wrongdoing must be investigated and punished. However, we also believe that there is something fundamentally wrong when veterans and Service personnel who have been investigated, and exonerated, become subject to what can often seem an unending cycle of investigation and re-investigation. That is neither a just nor a sustainable state of affairs and it risks undermining morale within the Armed Forces and trust in the rule of law.

With respect to Northern Ireland, the Committee expressed concern that separate [Government proposals for legal protections for Service personnel and veterans](#), would not extend to Northern Ireland:

However, we are extremely concerned that these proposals will not cover soldiers who served in Northern Ireland during The Troubles. We appreciate that legacy investigations in Northern Ireland are the subject of a cross-party process and form an important strand of the talks aimed at restoring devolution. Nonetheless, the treatment of UK Armed Forces should not be inferior in Northern Ireland to that which applies to legacy issues from conflicts overseas. Indeed, the protection of Service personnel and veterans everywhere should be a subject of the utmost importance to the UK Parliament and Her Majesty's Government.

The lives of those who served in defence of the United Kingdom deserve an equal protection from 'lawfare' and vexatious claims, regardless of where they served or where they now live, as the Defence Secretary herself acknowledged in her Written Statement on 21 May. We intend to do all we can to secure this self-evident outcome.

We remind the Government that, in the context of Northern Ireland, our predecessor Committee expressly recommended not only a Qualified Statute of Limitations for Service personnel and veterans, but one which was coupled with a truth recovery

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<sup>88</sup> Ministry of Defence, *Defence in the Media*, 17 June 2018

<sup>89</sup> "We should never forget that 90 per cent of killings during The Troubles were carried out by terrorists: commentary", *The Daily Telegraph*, 3 August 2018

mechanism aimed at providing the families of victims that best possible hope of uncovering the truth. We continue to believe that this offers the best route forward.<sup>90</sup>

The public consultation on addressing Northern Ireland's past closed on 5 October 2018.

In July 2019 the Government published an [analysis of the responses](#) that it had received.

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<sup>90</sup> Defence Select Committee, *Drawing a line: protecting veterans by a Statute of Limitations*, HC1224, Session 2017-19, Conclusions and recommendations, para.10

## 4. New decade, new approach

On 9 January 2020 the [Northern Ireland Office](#) published the text of a [deal to restore devolved government in Northern Ireland](#). There had been neither a fully functioning Assembly nor Executive in Northern Ireland for more than three years. On Saturday 11 January 2020 the Assembly met at Stormont and an Executive was formed.<sup>91</sup>

Annex A to the [New Decade, New Approach](#) agreement sets out specific UK Government commitments to Northern Ireland. It states that:

As part of the Government's wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the [Northern Ireland] Assembly.<sup>92</sup>

The UK Government also committed to "provide funding to support the implementation of the Stormont House Agreement proposals on legacy". Separately, the Irish Government affirmed its:

commitment to working with the UK Government to support the establishment of the Stormont House Agreement legacy institutions as a matter of urgency, including by introducing necessary implementing legislation in the Oireachtas, to deal with the legacy of the Troubles and support reconciliation, meeting the legitimate needs and expectations of victims and survivors.<sup>93</sup>

The agreement did not include a specific date by which legislation was to be introduced. Asked in a [Written Question on 12 February 2020](#) "on what date the 100-day period to introduce legislation to implement the Stormont House Agreement expires", Brandon Lewis, the Secretary of State for Northern Ireland, replied that:

The Government is committed to reforming the current legacy system in Northern Ireland in a way which provides reconciliation for victims and greater certainty for veterans. We are working across government and in the context of consultation responses to develop the Stormont House Agreement proposals, and will provide further details about this legislation as soon as we are able to.

In a [Tweet on 24 February 2020](#), the defence minister Johnny Mercer stated that by 18 March 2020 the Government would introduce legislation "to see the end of repeated and vexatious prosecutions of our service men, including in Northern Ireland".

This suggested that a single piece of legislation might cover prosecutions in Great Britain and Northern Ireland. However the

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<sup>91</sup> See BBC News online, "[Stormont deal: Arlene Foster and Michelle O'Neill new top NI ministers](#)", 12 January 2020.

<sup>92</sup> Northern Ireland Office, [New Decade, New Approach](#), January 2020, p48.

<sup>93</sup> *Ibid.*, p62.



[\*Overseas Operations \(Service Personnel and Veterans\) Bill\*](#), which was introduced to the Commons on 18 March 2020, excluded Northern Ireland. In a [Written Ministerial Statement](#) published the same day, the Secretary of State for Northern Ireland said that “alongside” that Bill, the Government wanted to ensure “equal treatment of Northern Ireland veterans and those who served overseas”.

Brandon Lewis said the Government had “carefully considered” responses to its 2018 public consultation, [\*Addressing the Legacy of Northern Ireland’s Past\*](#), and 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”. The Secretary of State said it was:

the Government’s view that to best meet the needs of all victims and of wider society, we need to shift the focus of our approach to the past. While there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small, and continues to decrease as time passes. Our view is that we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones – while this is still possible.

Mr Lewis said it was proposed that these measures would be carried out by one independent body, overseeing and managing “both the information recovery and investigative aspects of the legacy system, and provide every family with a report with information concerning the death of their loved one”. He said it was “vital” to “swiftly implement an effective information recovery mechanism before this information is lost forever”.

Only cases in which there is “a realistic prospect of a prosecution as a result of new compelling evidence would proceed to a full police investigation and if necessary, prosecution”, Mr Lewis said. Cases which did not reach this threshold, “or subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible – though family reports would still be provided to the victims’ loved ones”.<sup>94</sup>

The decision to separate legal protections for Northern Ireland veterans from the [\*Overseas Operations \(Service Personnel and Veterans\) Bill\*](#), has been met with dismay from a number of campaign groups. Others have called the Government’s proposal to close the majority of unsolved cases relating to The Troubles, a “betrayal” of the Stormont House agreement.<sup>95</sup>

In a [recent report](#) on the Government’s new proposals, the Northern Ireland Affairs Select Committee said that “the permanent closure of a case in which a serious crime has been committed raises profound legal, ethical and human rights issues” and that there was “considerable

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<sup>94</sup> Northern Ireland Office, [Addressing Northern Ireland Legacy Issues: Written statement – HCWS168](#), 18 March 2020.

<sup>95</sup> [“Dismay over UK plan to close unsolved Troubles cases”](#), The Guardian, 18 March 2020

doubt whether such closures are the right approach”.<sup>96</sup> In evidence to the Committee, the Northern Ireland Human Rights Commission expressed concern that the new approach to legacy investigations “may not readily meet the requirements of Article 2 ECHR”.<sup>97</sup>

## 4.1 When will legislation be published?

On 16 March 2020 Baroness Goldie, Minister of State at the MOD, suggested that “a Stormont Bill” is “likely to come before Parliament imminently”.<sup>98</sup>

That legislation is, however, yet to be published. At the Second Reading of the [Armed Forces Bill](#) on 8 February 2021, Johnny Mercer, the Minister for Defence People and Veterans, stated that legislation “will be coming in due course from the Northern Ireland Office”.<sup>99</sup> The Leader of the House, Jacob Rees-Mogg, said at business questions on 11 February 2021:

I can assure my right hon. Friend that the Government will introduce separate legislation to address the legacy of the past in Northern Ireland in the coming months in a way that focuses on reconciliation, delivers for victims and ends the cycle of reinvestigations into the troubles in Northern Ireland, delivering on our commitments to Northern Ireland veterans. My right hon. Friend is right to raise this point. The Government take the issue of veterans closely to their heart. We have a Veterans Minister who is always on the side of veterans. This is a serious issue, and the commitment is to introduce the legislation in the coming months.<sup>100</sup>

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<sup>96</sup> Northern Ireland Affairs Committee, [Addressing the legacy of Northern Ireland’s past: the Government’s new proposals](#), HC329, Session 2019-21, para.38

<sup>97</sup> Ibid, [written evidence submitted by the Northern Ireland Human Rights Commission. LEG0034](#)

<sup>98</sup> HL Deb 16 March 2020, c459GC

<sup>99</sup> [HC Debs 8 February 2021 Vol 689 c50](#)

<sup>100</sup> HC Deb 11 February 2021, c496-7

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