Preface

In this submission we suggest that the legacy proposals should not go ahead in the form proposed in the Stormont House Agreement ('SHA') or in the draft Bill of May 2018 ('draft Bill'). We believe it is tendentious to purport to offer victims 'truth' together with 'justice', 'accountability' and 'reconciliation'. In our view all these are not attainable without corruption of proper legal process. We should not contemplate this.

We appreciate and regret that our submission may well be distressing for victims of terrorism and other crime who have waited for far too long for something to be done. But the proposed short cuts in justice would cause too much damage to the fair administration of law in Northern Ireland and would perpetrate injustice on individuals.

It is time to tackle this and start anew.

1. Opening Points

1.1 We are two lawyers who have spent our careers in the practice of law in Northern Ireland. Peter Smith CBE QC became a barrister in 1969. He was a member of the Patten Commission on Policing in Northern Ireland and supported its reform proposals. Neil Faris is a Belfast lawyer who has written extensively on the legal defects of the Stormont House legacy proposals.

1.2 Summary:

- The legacy proposals in SHA and the draft Bill falsely purported 'Addressing the Legacy of Northern Ireland's past'. But because their focus was almost exclusively on the deaths, that meant that the depravity of the terror campaigns of injury, bombing, kidnapping, extortion and intimidation which ruined lives in Northern Ireland throughout the decades of sectarian terrorism counted for nothing.
- Furthermore, a true assessment of the 'Legacy of Northern Ireland's Past' would also encompass the constitutional, political and sectarian problems which Northern Ireland faced during those decades of terrorist and sectarian violence.
- Most importantly, we as lawyers, must be vigorous in attack on the canard that the legacy process must be 'victim centred' or 'victim focused'. Our position is that, insofar as the pursuit of criminal justice is to be part of the legacy process, (we and almost all the political parties and commentators are agreed on that) then the criminal justice element must not be 'victim focused', as that would be entirely contrary to the fundamental principle of the administration of criminal justice concerning the presumed innocence of every individual facing a criminal charge.

2. The purpose of this Submission

2.1 It is welcome in our view that the Government is no longer supportive of implementation of SHA through the draft Bill for the following reasons:

- the SHA and the draft Bill contained fundamental legal flaws;
- the focus on victims should not be central insofar as the administration of criminal justice is to be part of the legacy process;
- the SHA and the draft Bill would not have 'solved' the legacy problem;
- the SHA and the draft Bill would have caused further distress to victims' families by the over – promise of the delivery of 'truth and justice' – followed by the inevitable under-delivery;
- the SHA and the draft Bill would have compromised academic freedom in their controlling provisions for an academic report; and
- the SHA and the draft Bill would have created injustice for those who come under scrutiny of the new bodies which were proposed.

2.2 So the purpose of this Submission is to urge that (whatever view may be taken on the new proposals of the Northern Ireland Office in March 2020 'the new proposals') there should be no reversion to the flawed provisions of SHA or the draft Bill.

2.3 As lawyers we are particularly concerned about the potential for the misuse of police powers in the legacy proposals – for purposes other than the strict investigation of crime. To confer police powers on persons who are not police officers for purposes other than the investigation of crime is a perversion of cardinal democratic freedoms.

2.4 Police officers have extensive powers over everyone. All officers must undergo rigorous training, are bound by a Code of Ethics and are subject to stringent police discipline. These are protective measures designed to safeguard the citizen against abuse of police powers by police officers.

2.5 But the draft Bill would have included:

- The conferral of police powers on people who were not police officers; and
- The conferral on these people of the power not only to investigate certain crimes but also to issue reports criticising individuals.

2.6 The Historical Investigations Unit ('HIU') was not to be part of the Police Service of Northern Ireland ('PSNI'). The HIU Director would have had police powers and he/she would also have had the power to appoint HIU officers invested with such powers.

2.7 Where there was sufficient evidence for a prosecution the HIU would have prepared a report for the Public Prosecution Service ('PPS') in which it would have identified anyone whom it believed to be a perpetrator of any criminal act. The HIU would have been able to investigate not only acts of terrorism but also the actions of any member of the police or army whom

the HIU believed had committed any crime: whether directly killing or wounding, or by 'aiding and abetting' the commission of crime, or by covering up a crime in the course of investigation of a troubles related death.

2.8 This would have satisfied the evident widespread political desire (which as lawyers we share) that perpetrators of crime (from wherever they come) should be identified and prosecuted.

2.9 Of course, the decision as to whether or not to prosecute would not have rested with the HIU but, as in the case with all crime, with the independent PPS. Note that a decision by the PPS not to prosecute would no doubt in cases be disappointing to victims' families (particularly if all possibility of review of the PPS decision was exhausted). But the PPS cannot properly permit the concept of satisfaction of victims' families to be prioritised over the due administration of criminal justice. So in this regard the process cannot properly be 'victim focused'.

2.10 Then there may not be many successful prosecutions where a conviction is obtained. However, in the sense that the due procedures of the criminal law are properly carried out from investigation onwards, then justice is done.

2.11 Apparently, the new proposals will include some form of 'sifting' process to identify cases which might merit the criminal investigation procedures being implemented. But it is not clear if such new criminal investigations will be carried out by the police - either PSNI or another police service – or by an HIU style body whose officers will have police powers, without being police officers of the PSNI or another police service.

2.12 In our view, as lawyers, serious problems will arise if it is proposed to vest police powers in any new form of 'HIU style' body.

2.13 A major problem is that it is intended that the new body will – at least at the end of the process - issue a 'family report' to victims' families.

2.14 In the case, of course, where a prosecution is to be brought, the new body will not be able to issue a family report until the conclusion of any court proceedings because of the danger of prejudice to the trial.

2.15 But in the case where there is not to be a prosecution (or where court proceedings have come to an end) it seems to us to be very worrying and problematic if the new body – if it were to have police powers – would be entitled to issue family reports which might identify anyone who was 'believed' to be a perpetrator (of any category).

2.16 Such a proposal, improperly in our view, would combine in the new body not only police powers but also the power to make adjudications or findings against individuals in its reports which it would issue to victims' families.

2.17 To put it simply, the police have the right and duty of investigation and fact finding in respect of crime - for the purpose of making reports to the PPS. But the draft Bill abused these powers by conferring also on the HIU the power to make adjudications against individuals, whether or not there was any allegation of any criminality.

2.18 It is only in a 'police state' that the police have such a role - designed to exclude the courts!

2.19 A recent, widely reported, judgment in the High Court in London in favour of a Mr Harry Miller is relevant. Mr Miller was interviewed by the police following a complaint that he had engaged in twitter in hate language in tweets on the transgender issue. The police recorded his tweets as constituting a 'non-crime hate incident' and then interviewed him, warning him that if he 'escalated' matters in his tweets they might take criminal action.

2.20 The judge gave careful, detailed consideration to the lawfulness of the police action under their 'Hate Crime Operational Guidance'. He concluded that police had acted lawfully in their investigations, in the sense of intelligence gathering.

2.21 However, the judge then went on to hold that the actual police treatment of Mr Miller was unlawful, as he had not committed any crime and they had no basis for considering him even potentially guilty of any crime.

2.22 There are similarities here with the attempt in the draft Bill to vest the HIU with police powers and then to empower it to make findings against individuals who had not committed any crime and where the HIU had no proper basis (in the absence of a prosecution and conviction in court) for considering such individuals even potentially guilty of any crime.

2.23 Of course, it is legitimate for society to require investigation of matters of public importance - such as legacy and, for instance, the RHI 'problem' in Northern Ireland. But the investigation of such matters is properly carried out by a body such as the RHI Tribunal which demonstrably included not only 'due process' but also transparency between the fact finding and the adjudication.

2.24 Other means of doing this are available - the RHI Tribunal is not the only model - but what is not permissible, under the rule of law in a democratic society, is to vest in the police (or others such as the new body, if it is to be granted police powers) both the role of investigation and also the role of adjudication.

2.25 In essence in the *Miller* case the judge ruled that it was a perversion for the police to involve themselves with imputing blame to citizens who have not committed any crime and where the police have no basis for considering any citizen even potentially guilty of any crime.

2.26 The judge was not prepared to minimise the effect of the police turning up at Mr Miller's place of work, when there was no evidence or grounds for suspecting that he had committed any criminal offence. He commented:

> "The effect of the police turning up at Mr Miller's place of work because of his political opinions must not be underestimated. To do so would be to undervalue a cardinal democratic freedom. In this country we have never had a Cheka, a Gestapo or a Stasi. We have never lived in an Orwellian society."

2.27 While the draft Bill (rightly) contained many protective and supportive provisions for victims and their families, there were no equivalent protective and supportive provisions for anyone who might have been subject to the interrogation and exercise of police powers by the HIU.

2.28 There was no provision for legal advice, for access to documents, or for a right to adduce evidence or test the evidence allegedly supportive of the criticism of that individual. The point of all this is not only fairness for the individual – it provides checks and balances against the abuse of power by any investigator.

2.29 These shortcomings rendered the draft Bill's proposals a gross violation of the maxim *Audi alteram partem* – a fundamental principle of justice requiring that no one may be judged to have done wrong without a fair hearing including a fair opportunity to challenge the evidence against them.

2.30 We trust that the new proposals will not include any provision for the new body to include criticism of individuals in family reports without adequate defence rights, as that also would constitute a breach of the European Convention on Human Rights. The European Court of Human Rights has held that where publication compromises the integrity of the reputation of the person concerned there is a breach of Article 8 of the Convention. In the case of Pfeifer v Austria (15 Nov. 2007) the Court declared that "a person's right to protection of his or her reputation is encompassed by Article 8 as being part of the right to respect for private life." See also Axel Springer AG v Germany (7 Feb. 2012).

2.31 This right was ignored in the draft Bill and it is of vital importance that that this gross error should not be repeated in the new proposals.

2.32 We submit that the detail of the new proposals should, at least in important parts, be quite different from the draft Bill with such serious legal problems.

3. Critical Overview Summary of SHA, the May 2018 Consultation Paper and draft Bill

1. The controlling ‘General Principles’ failed to acknowledge the ‘context’ of the decades of the terrorist and sectarian conflict to which the UK government and its security forces had to respond – in an endeavour to prevent the outbreak of a sectarian civil war in Northern Ireland. The failure to include this ‘context’ sets the tone for the implementation of the legacy project – in skewed and distorted manner.

2. Furthermore, the Consultation Paper was misleading in failing to recognise that the SHA legacy proposals were opposed by a significant proportion of unionists.

3. The Consultation Paper was titled ‘Addressing the Legacy of Northern Ireland’s Past’ . But this was quite misleading as the proposals were selectively focused on deaths during the years of terrorist and sectarian conflict in Northern Ireland. There was no investigative or adjudicative commitment to anything else.

4. Para 31 of SHA asserted that ‘Processes dealing with the past should be victim centred’. But it is impermissible to put the needs and interests of victims above those of the accused persons made subject to the criminal justice system. So to do would cause serious damage to the over-arching principle that in the criminal justice system the focus must be on the accused to ensure, so far as possible, that no innocent person is found guilty.

5. There was to be a sifting process allowing the HIU Director to pick and choose the cases which the HIU will (re)investigate. This choice also of course controls the outcome.

6. The HIU was specifically to investigate ‘collusion’ in accordance with (complex) provisions in paragraph 7 of Schedule 3.Notionally, the PSNI Chief Constable was to control the selection of collusion cases. That of course would have compromised the role of the Chief Constable in re-involving the PSNI in the legacy process.

7. The draft Bill wrongly combined in the HIU the investigative and the adjudicative power.

8. The draft Bill wrongly conferred on HIU officers police powers, when there was no requirement that all HIU officers must be police officers.

9. The draft Bill wrongly proposed that the HIU in issuing family reports to victims’ families might, with the exercise of their police powers, make

adverse comments on the actions (or failure to act) of any individuals when there was insufficient evidence to take a prosecution against such person

10. The HIU investigatory and reporting procedures were unfair to the point of being legally defective.

11. There was to have been provision – at the report writing stage of HIU's work - for the involvement of any person likely to be subject to 'significant criticism' in any family report. But the provision was limited and did not confer adequate due process protection.

12. There was not to have been any provision for due process involvement of any person in the HIU's investigative stage, where such person might be subjected to criticism in the HIU's family report.

13. There was no provision for support and protection for individuals who might have been suspected as 'perpetrators' or who were witnesses to deeply traumatic events in the course of the decades of terrorist and sectarian conflict. Such persons may now be frail or vulnerable by reason of age or infirmity and re-investigation by the HIU might cause mental distress.

14. The ICIR was to be given power to make findings against individuals but with immunity from suit and legal process. This is contrary to the rule of law, in particular in its failure to afford natural justice in its processes, and to bar individuals access to Courts

15. Academic experts were to prepare an independent report but permitted to examine only the documentation listed in the draft Bill, so controlling the outcome and subverting the principle of academic freedom.

16. The provisions for 'non-criminal police misconduct' were discriminatory and contrary to the rule of law in their retrospective application to retired police officers.

4. Response to Questions – in the Terms of Reference

1. The draft Bill has certainly failed to meet the needs of victims, survivors and their families. We need more detail of the new proposals before we can comment further.

2. The members of the new body must be selected independently and entirely free of political influence.

3. The new proposals are truer to the principles of the Stormont House Agreement than the legally defective draft Bill.

4. The new proposals do not confuse legacy with reconciliation.

5. We trust that the draft Bill bodies will not be established.

6. There will be more equity in the new proposals than in the defective draft Bill.

7 Vexatious prosecutions against veterans can be determined according to law.

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