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**TO THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE**

**SUBMISSION**

27 May 2020

*Introduction*

I write on behalf of the Malone House Group in relation to the execution of judgments from the European Court of Human Rights in the ‘McKerr Group’ of cases. These are due to be further discussed at the Committee of Ministers meeting on 4 June 2020. They concern the Troubles in Northern Ireland which ended, in large part, in 1998 with the Belfast Agreement and are titled Finucane, Hemsworth, Jordan, Kelly, McCaughey, McKerr, McShane and Shanaghan respectively. We are concerned here with the implementation of the measures set out in the action plan and the continuing issues.

1. I am attaching a legal opinion *In the matter of the European Convention on Human Rights Article 2 Procedural in Northern Ireland* by barrister, Dr Austen Morgan who was asked to advise on the Article 2 substantive right to life and its relationship to the implied procedural right to an effective investigation.

*The Malone House Group*

1. The Malone House Group is a Belfast-based, non-governmental organisation (NGO) dealing with the Legacy issues arising from the Northern Ireland conflict. Its object is to find the best means to address the Past while preventing a re-occurrence of violence between the two communities in Northern Ireland.
2. We came into being after a ‘Legacy Legislation’ conference at that venue in Barnett’s Demesne in south Belfast which was held on 3 March 2018. The proceedings of the conference were published later that year in book form under the title *Legacy: What to do about the Past in Northern Ireland*. It was launched in the House of Commons in July 2018 by Kate Hoey MP.
3. Over the last two years, since the conference, many articles and opinions, both individually and as a group, have been published. In pursuit of our objectives, we have also held regular meetings with government officials, both in Northern Ireland and London, and submitted responses to the consultation of the Northern Ireland Office (NIO) on its 2018 draft Legacy Bill and to the inquiries of the Northern Ireland Affairs Committee at the House of Commons. We have also held discussions with British parliamentarians and the Republic’s Department for Foreign Affairs as well as spoken at consultation meetings on the NIO’s draft Legacy Bill.
4. The Group grew to some extent out of, and because of, the Haass talks on Flags, Parades and the Past of 2013. The unagreed Haass Report became in many ways the source document for the Stormont House Agreement (SHA) of December 2014. It in turn became a foundation for the silently expanded draft Legacy Bill of 2018. It has now been superceded by an, as yet, unspecific revised government policy on legacy legislation which promises to narrow previously proposed arrangements (see 18 March statement by the NIO’s Brandon Lewis). Cost is plainly an issue for the government, one accentuated by the current Covid crisis. Separate but related legislation, the Overseas Operations (Service Personnel and Veterans) Bill, has also been tabled in Parliament but not yet discussed.
5. We share a deep concern over the one-sided broadcast media and academic output around addressing the Past in Northern Ireland. Our views differ considerably from those expressed by other NGOs and our universities’ law departments however they are not as well publicised (nor are they funded).

*The Stormont House Agreement (SHA)*

1. It is important to note that, despite statements to the contrary, SHA was not agreed by all the major parties, any more than the Haass report was. We have assiduously opposed its implementation in the form proposed not least on human rights grounds with its potential for destroying reputations without fair procedures. In particular we are opposed to the creation of a parallel police of the past, the Historical Investigations Unit (HIU), with its suggested powers to investigate non-crimes. The Secretariat in its most recent analysis seems to have taken as read that the HIU is both efficacious and necessary in human rights terms. That view is not widely shared, nor has it cross community support in Northern Ireland.
2. The Group is united in the view that the past should not become our future which it is in danger of doing. This common sense position is reflected in much public opinion and expressed by many senior figures in Northern Ireland from all sides of the community.
3. I instance here the contributions of these prominent individuals who have called into question, in different ways, how government has proposed to address the past and sought to draw a line in some form, whether on prosecutions alone, or on the whole legal and investigative process: John Larkin, the NI Attorney General, Barra McGrory the former DPP, Peter Sheridan a former Deputy Chief Constable of the RUC, Dennis Bradley of the Eames Bradley Report, and the late and highly esteemed civil servant Maurice Hayes. Any informed and fair observer of Northern Ireland affairs will agree that none of these people can be reasonably described as of the unionist community. Those involved in Malone House are also drawn from both communities.
4. The Malone House Group’s participants and contributors range over the academic, legal, journalistic and political worlds as well as representatives of victims and bereaved individuals themselves. Key participants are myself, Jeffrey Dudgeon MBE, a former Ulster Unionist Party Belfast City councillor, author and human rights activist, Belfast solicitor Neil Faris, Ulster University political scientist Professor Arthur Aughey, expert in government administration Bill Smith, and William Matchett a former RUC officer and current writer.
5. The conference speakers were from a range of backgrounds and political outlooks while the titles of their contributions were Neil Faris (solicitor): *Misconceptions on “Truth & Justice” – an Overview*; Dr Cillian McGrattan (Ulster University): *“The possibilities are endless”: Republican strategy and transitional justice;* Dr. Andrew Charles (community and voluntary sector): *The Past Being the Future;* Dr Austen Morgan (barrister and historian): *The Past: Drawing a Line?*; Ken Funston (Advocacy Manager South East Fermanagh Foundation (SEFF)): *The Victim’s Perspective*; Trevor Ringland (solicitor, ‘One Small Step’): *Dealing with the Past – Properly or Not At All*; Danny Kinahan (former Ulster Unionist MP for South Antrim): *Getting the Legislation Right*; and Ben Lowry (Deputy Editor of the Belfast News Letter) *Mishandling of Legacy – One of the Biggest Scandals in the UK since the 2nd World War*. Brian Garrett (solicitor and arbitrator) facilitated the event. I would be happy to forward a number of copies of our Legacy book, if requested, but am also attaching its text and cover should that be of use.

*Purpose of this Submission*

1. I draw the Committee’s attention to the attached detailed legal submission by London barrister Dr Austen Morgan. A further legal opinion is in the course of preparation in Belfast and will be forwarded as soon as possible, In brief summary, we feel that the Council of Europe in its various formations should review the value and purpose of these unsettled Article 2 investigations and assess what they can still achieve. The opportunity for closure comes with the government’s new proposals, difficult though they may be.
2. These questions need considered:

* Is continuance dividing communities rather than reconciling them?
* Are the cases one-sided, with no non-state actors under investigation?
* Can further investigation be effective given the passage of time?
* Is further investigation hugely disproportionate in costs for minimal outcome or added value?
* Would such process in any way be helpful in every other conflicted European country not least in the Balkans?
* Would a dogmatic, doctrinaire imposition of Article 2 (as contended for in McKerr) lead the Committee into investigation of Soviet-era crimes and policy, or further back?
* Should not regard to cost be reasonably taken into account in any proportionate examination – bearing in mind the entirely disproportionate expenditure envisaged in Northern Ireland with legacy enquiry costs in in the region of £2 billion and rising?
* Is the context of the times, in particular in the 1970s and 1980s, really understood?
* Is Strasbourg’s reputation jeopardised without such a dispassionate assessment.

1. We believe that the decision at the 1369th meeting of the Committee of Ministers calling on the authorities of the United Kingdom “to submit by 31 March 2020, concrete information on how they intend to conduct an Article 2-compliant investigation into Mr Finucane’s death in light of the findings of the Supreme Court judgment of 27 February 2019” takes no account of the full judgement of the court which (as the Secretariat wrote) left it to the government to decide “what form of investigation if indeed any is now feasible, is required to meet [the procedural requirement] under Article 2]”. Past enquiry costings tell us that would need some £200 million which is not now a reasonable or proportionate outcome. Broader political and financial issues, let alone the need for reconciliation must surely enter into the decision making process at this level.
2. Are we now seeing the Past being unwritten without regard to context as happens in too many legal actions, or rewritten to provide equivalence between terrorist and state actions. To many, this can only be discriminatory against the state, given who kept records and who did not. Confidence in the European Convention in the UK is consequently eroded, especially as no end to process is ever seen.
3. In the light of our submission and the accompanying legal opinion, we believe that the UK has taken all reasonable, necessary and proportionate measures within its resources to abide by the judgement in this case in particular and ask that the Committee of Ministers adopts a resolution concluding that its functions under Article 46, paragraph 2, or Article 39 paragraph 4, of the Convention have been exercised.
4. In the other cases, the likely outcome of the NIO’s current intended legislation policy will not only not satisfy many claimants but will see calls for the UK to reverse or revise its position. The Committee has it within its power however to accept that unceasing demands for re-investigation have the potential for unsettling the relative peace between our communities, and the UK’s good faith in its proposals over decades to address legacy matters. Otherwise this will become a political dispute.

*Legacy – Contended in Northern Ireland*

1. Whatever view the Committee takes on these cases, and regardless of any new legacy institutions, it is certain that there will be continued and unremitting activity in our courts, with demands for the re-opening of many more inquests, civil suits for damages, judicial reviews, challenges on convictions, requests for further public inquiries, and indeed further Strasbourg cases.
2. It is worth noting that the leader of Sinn Fein, Mary Lou McDonald, in an interview in Dublin’s *Sunday Independent* (24 May 2020) stated that the IRA campaign which killed over 2,000 innocent people was “justified”. This is evidence that dealing with the past remains a deeply contended matter in Northern Ireland when the second largest party in both parts of Ireland proudly justifies colossal abuse of the Convention’s right to life, itself.

*Article 2’s purpose*

1. Meeting the Strasbourg Court’s judgements on Article 2 may simply be unattainable at this stage. There has to be an end point. It is worth reminding ourselves what Article 2 says, and ask if the jurisprudence on effective investigation of deaths has not overtaken the very purpose of protecting life?

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

Yours sincerely

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