Written evidence submitted by the Malone House Group (MHG), related to the Addressing the Legacy of Northern Ireland's past: The UK Government's New Proposals inquiry (LEG0042)

Introduction

1. The Malone House Group (MHG) was established in Belfast in March 2018 at an open conference. Its proceedings were published in *Legacy: What to do about the past in Northern Ireland?,* Belfast Press 2018. The Group is composed of academics, lawyers, former civil servants, historians, and political activists.

2. MHG is a NGO recognised by the Council of Europe at Strasbourg. It supports the rule of law, including human rights. It accepts that the Belfast Agreement settled Northern Ireland (NI) constitutionally. MHG is an especial critic of lawfare – court cases which perpetuate sectarian rivalry.

3. MHG welcomed the Secretary of State's written ministerial statement of 18 March 2020 (coinciding with the Overseas Operations (Service Personnel and Veterans) Bill), and the direction of travel in the Command Paper of 14 July 2021: *Addressing the Legacy of Northern Ireland's Past*, CP498.

4. It regrets that the government retreated from a clear 'drawing a line' perspective. MHG accepts that the Northern Ireland Troubles (Legacy and Reconciliation) Bill (the Bill) is now before parliament. It is drafting amendments for possible tabling in the House of Commons and House of Lords.

5. The Liverpool University/Institute of Irish Studies opinion poll published in the Irish News on 15 February 2022 indicates the significantly large number of people who support the MHG approach. Overall 40.4% of respondents responded positively to the question on "introducing a general amnesty (statute of limitations) which will end all investigations and prosecutions".

6. MHG accepts the organising concept of reconciliation, but sees the Bill in its latest iteration in terms of continuing communal dispute in a legal context. It will cause more, not less, trouble.

Peace process

7. The end of the NI Troubles was achieved through a 'peace process', which was largely open but also secret. The NIO did not go into the multi-party talks with a plan for amnesty. However, it came out with a secret political agreement, between Tony Blair and Gerry Adams, for the early release of Republican and Loyalist prisoners after one year.[1]

8. Victims obtained recognition for the first time in the 1998 Belfast Agreement, in a section: 'Rights, safeguards and equality of opportunity' (in the multi-party agreement annexed to the legal instrument). Three paragraphs were devoted to 'reconciliation

[1] Tony Blair, *A Journey*, London 2010, pp 172-3.

and victims of violence'. This framed victims, in a way suggesting they would not be involved in the perpetuation of the communal struggle now in its third decade: 'The achievement of a peaceful and just society would be the true memorial to the victims of violence'[2] It gave no promise to consult or assist in terms of criminal investigations or prosecutions.

9. Historically, there have been a number of amnesties in both the Irish Free State and, perhaps surprisingly, under the Stormont government.

(1) The new Irish state legislated three times in 1923-24 for amnesties, dispensing with civil and criminal liability for violence and force used:
- for UK state forces before their evacuation, the Indemnity (British Military) Act 1923 covered the dates 23 April 1916 to 10 February 1923.
- for Free State forces in the subsequent civil war which suppressed enemy Republicans, the Indemnity Act 1923 covered 27 June 1922 to 3 August 1923.
- for Republicans in the war of independence, the Indemnity Act 1924, covered 21 January 1919 to 28 June 1922.

(2) The Unionist government after the IRA's 1956 to 1962 campaign, and after the IRA's order to dump arms, had by 1963 released all prisoners and internees. Stormont even released prisoners during the campaign, including, in 1958, a one-time MP convicted of treason felony.

Justice in NI was circumscribed legislatively and administratively during the making of the 1998 Belfast Agreement and its implementation by a further series of amnesties:

(1) immunities (called an amnesty in law) regarding terrorist weapons, from 1997 to 2010[3];

(2) The Northern Ireland (Sentences) Act 1998 with early release of all terrorist prisoners after two years served;

(3) The requests by Bertie Ahern and Michael McDowell for the UK to discontinue current (and future) extradition proceedings, acceded to by Tony Blair and Peter Mandelson in 1999-2000.

(4) immunities regarding the Saville inquiry, 1998 and 2010[4];

(5) immunities regarding the Hamill, Nelson, Wright and Breen/Buchanan inquiries, to 2013[5];

---

[2] Para 12.

[3] Northern Ireland Arms Decommissioning Act 1997 (Royal Assent 27 February 1997). Section 4 (amnesty) prohibits the prosecution of offences scheduled to the statute. The parent Act was the basis for the following delegated legislation: Northern Ireland Arms Decommissioning Act 1997 (Amnesty Period) Order: SIs 1998/892; 1999/454; 2000/452; 2000/1409; 2001/1622; 2003/426; 2004/464; 2005/418; 2006/480; 2007/715; 2008/378; and 2009/281.

[4] *Report of the Bloody Sunday Inquiry,* vol. X, appendix 1, para A1.1.16: the attorney general's undertakings of 23 February 1999 and March 2002.

[5] *Robert Hamill Inquiry Report*, 25 February 2011 (not yet published); *Rosemary Nelson Inquiry Report,* HC 947, 23 May 2011; *Billy Wright Inquiry – Report,* HC 431, 14 September 2010; and *Report of the tribunal of*

(6) immunities regarding the recovery of the disappeared, 1999 to present[6];

(7) implied amnesties within the Eames Bradley report and in the Lord Chief Justice's decision on reopened inquests that there should be an end to reinvestigation after five years; and

(8) a secret administrative scheme, regarding so-called 'on the runs' ('OTRs'), which was operated – contrary to the advice of attorneys general – in Whitehall between 2000 and 2014; under it, at least 187 of 228 IRA applicants were granted OTR letters.

10. The fingerprints of the legislative and executive branches of government are all over these measures. And that is before the secret history of the peace process is disinterred. One English high court judge – Sweeney J in the case of John Downey in 2014 – has held that the OTR letters (above) must be honoured: Austen Morgan, *Tony Blair and the IRA: the 'on the runs' scandal,* London 2016, pp 206-11. This issue may yet be tested in an outstanding court case.

11. Amnesty and immunities were inherent to the peace process and are a legitimate instrument of statecraft. It is perfectly logical to call for justice – as many do – and the rolling back of all the above measures in the last 25 years, however unrealistic. But, in order to achieve the peace, government policy to date has been the corruption of criminal justice in NI: the 90 per cent of terrorist killings – all unlawful – have not been pursued; instead, the 10 per cent of state killings – not all unlawful – have predominated in recent years.

Stormont House Agreement

12. MHG opposed the Stormont House Agreement (SHA) of 23 December 2014 (and the Westminster draft Bill of 2018[7]). Not all NI parties signed up to this nor was it ever an international agreement, as is often erroneously stated just because of Irish government involvement.

13. SHA adopted the four Haass bodies from 2013 (an American initiative attempting, unsuccessfully, to take forward the peace process) including a historical investigations unit (HIU) with a parallel police force on the past and the suggested new offence or finding of non-criminal historic police misconduct. The SHA was not however revived within the *Fresh Start Agreement* of 17 November 2015.

14. There was a momentary return to this expansive perspective, in *New Decade, New Approach* on 9 January 2020, contrary to the 2019 Conservative manifesto which

---

inquiry that members of An Garda Siochána or other employees of the state colluded in the fatal shootings of RUC chief superintendent Harry Breen and RUC superintendent Robert Buchanan on the 20th March 1989, 3 December 2013.

[6] Northern Ireland (Location of Victims' Remains) Act 1999 s 3; Criminal Justice (Location of Victims' Remains) Act 1999 s 5. (No immunity was granted if a prosecution could be mounted out with any inquiry, tribunal or victims' remains evidence.)

[7] Northern Ireland (Stormont House Agreement) Bill.

added the interests of veterans to the NI legacy picture. Subsequently, Julian Smith was replaced as Secretary of State in February 2020.

Customary international law

15. Historically, international law imposed duties – with an exception for war crimes – upon states, to promote reconciliation (including amnesties) after civil conflicts and even wars.[8] The book just footnoted was sponsored by the international committee of the Red Cross, which co-published it. Rule 159 of customary international law, according to the editors, reads: "At the end of hostilities, the authorities in power must endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected or accused of or sentenced for war crimes."

16. Rule 159 was cited in a Strasbourg case, in 2012 and on appeal in 2014: *Margus v Croatia*.[9]

17. Margus, who had fought to free Croatia from Yugoslavia in 1991, was prosecuted twice in the new state, in 1997 and in 2006. On the former occasion, he availed of Croatian amnesty law. On the latter occasion, he was accused of war crimes against Serbian civilians. He was imprisoned for 15 years in Croatia. He went to Strasbourg on Article 6 and Protocol 7/Article 4 (double jeopardy). He lost in the first section on 13 November 2012, and in the grand chamber on 27 May 2014.

18. The first section cited rule 159, commenting (without citation): 'there has been a growing tendency for international, regional and national courts to overturn general amnesties enacted by Governments.'[10] At Middlesex University in London, Professor William Schabas, a noted international lawyer of Canadian origin, applied on 29 May 2013 to intervene in the ECHR grand chamber. He was joined by a number of academics, including from NI. Their names are available, and are here published for the first time.[11] The Court noted the intervention, but did not amend its position.[12] Prof Schabas's opinion, it is submitted, deserves serious consideration, which it did not receive in Strasbourg: '…we consider that the declaration by the Chamber in the present case goes too far and is not supported by the law. It is also questionable from the standpoint of policy. We urge the Grand Chamber to adopt a more legally sound and nuanced approach that recognizes the uncertain picture presented by custom as well as the weaknesses in the claim that there is any support for the prohibition of amnesty in treaty law. The Grand Chamber should recognize that the state maintains a margin of appreciation in democratically determining how to meet its sometimes conflicting human rights obligations, and the possibility of amnesties should not be presumptively excluded from the deliberation.'

---

[8] J-M. Henckaerts & L. Doswald-Becks, eds., *Customary International Humanitarian Law,* vols. 1 & 2, Cambridge 2005.
[9] (2013) 56 EHRR 32 (first section); (2016) 62 EHRR 17 (grand chamber).
[10] Para 74.
[11] Louise Mallinder; Christine Bell (formerly Belfast); Tom Hadden; Kieran McEvoy.
[12] Paras 9, 108-113 & 139.

19. It is by no means the case that Strasbourg will – much less must – strike down any attempt by the UK to legislate on legacy, with a view to ending investigations, prosecutions, inquests, and civil claims.

Article 2 procedural

20. A great deal of legally incorrect commentary continues to rise from NI, about what the Strasbourg human rights court will, and will not, permit. Article 2 non-compliance is the slogan of choice of many. The same argument over ECHR jurisprudence does not sound in England and Wales.

21. There is of course a difference between: the Human Rights Act (HRA) 1998 in domestic law (where Strasbourg is not binding); and Strasbourg jurisprudence in international law (which does not follow a rule of precedence). The Committee of Ministers which enforces judgments is of course a political body.

22. Two recent Supreme Court cases embody the problems: Re Finucane's Application for Judicial Review [2019] UKSC 7; and Re McQuillan's Application for Judicial Review [2021] UKSC 55.

23. It is significant that the government's helpful (and unusual) 36-page memorandum on compliance with Strasbourg case law does not deal with the latter case, decided on 15 December 2021. MHG strongly submits that the McQuillan judgment presages the beginning of the end of the UK being held to retrospective standards by international judges. The forthcoming UK Bill of Rights should further that process significantly.

24. Putting this submission another way: from 4 May 2001, McKerr v United Kingdom, plus other Strasbourg cases, dominated the discussion of police investigation of Troubles killings in NI; on 15 December 2021, Re McKerr's Application for Judicial Review [2004] UKHL 12 was reaffirmed by the Supreme Court, raising the question of whether victims even have access to Article 2 for killings before 2 October 2000 (the date was pushed back ten years by Strasbourg, and twelve years, and controversially, by Lord Kerr to embrace the Patrick Finucane case). It is unlikely to survive another Supreme Court case relating to NI, and the ten-year pushback is also at risk, domestically at least, from UK judges.

The Bill

25. The Bill has abandoned an amnesty approach (which bites on crimes) in favour of an immunity approach (which protects persons). Thus, the tortuous definition of the NI Troubles in clause 1 (Part 1). Given the opposition of all the NI parties at 2nd reading on 24 May 2022, the government, in return for this important change in policy, has achieved no diminution in hostility.

26. Indeed, parliamentary counsel has had to do more in order to provide for less legal change. Part 2 – on the Independent Commission for Reconciliation and Information Recovery (ICRIR) – adds a new quango. Much turns on: the chief commissioner (a serving or retired judge); the commissioner for investigations (a police officer?); and the one, two or three other commissioners. They will employ the ICRIR officers –

including those seconded from UK constabularies (and we assume those previously employed in investigation or seconded from the PSNI's Legacy Investigation Branch (LIB).

27. The ICRIR is victim focussed, which is not entirely a good thing when it comes to criminal justice: 'A close family member of the deceased may request a review of a death that was caused directly by conduct forming part of the Troubles.' (clause 9(1)) This presents no obstacle at all to legacy practitioners making many hundreds – more likely several thousand – review requests in relation at least to every security force and loyalist killing.

28. The NI veterans (including MI5 personnel) appear sanguine about the Bill working for them. But how will it play when former soldiers seek immunity (with presumed Ministry of Defence help) – making for equivalence with terrorists? The IRA – responsible for 60% of the killings – is likely to maintain military discipline and boycott the ICRIR. The opprobrium heaped on informers cannot be legislated away to attract them to tell all. The loyalists (30%) may follow the veterans or the Republicans – who knows?

29. Sir Hugh Orde's Historical Enquiries Team (HET) – the only successful legacy body we have had, and one sanctioned as within Article 2 by Strasbourg's Committee of Ministers – is clearly one inspiration for the Bill. However with inevitable maximisation, we are likely to have hundreds of mini-Savilles commenced in the five years allowed for applications. The hurdles before a review is permitted will therefore have to be heightened to limit a process that will otherwise they will run for decades.

30. Part 3 on discontinuing investigations and civil (including inquests) and criminal proceedings is true to the original policy, though now playing second fiddle to immunity.

31. Clause 3 and Schedule 11 fix the problem in the Northern Ireland (Sentences) Act 1998, whereby pre-1973 offenders could not avail of early release after two years. Some MPs have spotted that two years will be reduced to one day, removing any incentive an aging terrorist might have to apply for immunity.

32. Part 4 (Memorialising the Troubles) suffers from the defect that academia in NI is heavily skewed towards an international radical view. The current profound imbalance in the public sphere of memory work appears at least to be recognised with mention in the Bill of balance between communities. Greater oversight and transparency in relation to the UKRI's Councils, and appointments to the proposed advisory forum is required. The government needs also to promote anti-sectarianism, and ensure the exclusion of exculpation or any direct or indirect glorification of Republican and Loyalist terrorism in the Bill. There is a wealth of evidence that historical commissions actually work despite much carping in Belfast.

Conclusion

33. First, the Stormont House Agreement is gone, archived with a great deal of NIO legacy policy.

34. Second, the five-party coalition at Stormont is discounted, not least as it agrees on no alternative. Several parties have client victims, and victims' groups. Others have particular memories of colleagues and comrades. Not one victim is supported by every party while the majority of the 3,750 families are silent.

35. Third, the UK successfully excluded the Irish government (and the roof didn't fall in).

36. Fourth, the victims – who are more diverse than their representatives – are being misled by some political intermediaries. The criminal justice system cannot produce a solution, certainly generally, and no longer even in particular cases. That is well recognised, not least by Jon Boutcher of Kenova.

37. Fifth, the government needs to reconsider the legal advice which led to its change of policy and also take stronger account of domestic judgments.

38. Sixth, the ICRIR – with its capacity to be ignored or overloaded – needs to be more realistically restricted in relation to requests for review, and as regards the avoidance of duplication. It is worth noting such re-investigation into murders would never occur or be paid for in England unless credible and 'compelling new evidence' was available, as required in the Overseas Operations Act 2021. This law reform was to meet 'the public interest in finality'.

39. And seventh, Conservative MPs seem willing to get behind any Legacy Bill, and deal with any difficulties created by the informal lawyers and judges' party in the House of Lords. The Labour Party remains conflicted, given its Ministers up to 2010, were instrumental in constructing and agreeing amnesties.

Jeffrey Dudgeon (Convenor), Arthur Aughey, Neil Faris, Kate Hoey, Cillian McGrattan, William Matchett, Austen Morgan, and Bill Smith

June 2022