

**SUBMISSION TO THE NORTHERN IRELAND AFFAIRS COMMITTEE INQUIRY
"ADDRESSING THE LEGACY OF NORTHERN IRELAND'S PAST: THE UK
GOVERNMENT'S NEW PROPOSALS"**

KRW LAW LLP

"With all due respect to my colleagues, you cannot possibly understand the issues of Northern Ireland from Westminster" (*The House*, 10 September 2018, No. 1624 Volume 41)

Introduction

KRW LAW LLP (KRW) is one of Northern Ireland's leading providers of publicly funded legal representation for relatives of victims and survivors of the Conflict. This work involves public and private law challenges including by way of judicial review, inquests, civil litigation and information rights. KRW works across the community including assisting former members of the British Security Forces. KRW works with civil society organisations and with victims in England and Ireland. KRW is ranked Band 1 for Administrative and Public Law by Chambers.

Summary

The publication of the UK Government's most recent proposal to address the Legacy of the Conflict in Northern came at the start of the current Covid-19 pandemic crisis. We welcome scrutiny by NIAC on this important proposal.

At the outset KRW consider this proposal to be both divisive and dangerous. It is also, in its out-workings (which will be challenged and resisted by many in Northern Ireland), possibly unlawful and illegal.

This proposal is not compliant with the European Convention on Human Rights (ECHR). This proposal does not sit square with the spirit and the letter of the Belfast-Good Friday Agreement 1998 (GFA).

This proposal marks a roll back of the progress made since the Stormont House Agreement 2014 (SHA).

This proposal will undermine the fragile political unity secured earlier this year through the *New Decade New Approach* document which returned elected politicians to Stormont.

In an almost casual but brutal *volte face*, the British government intends to stride away from the hard fought proposals made by SHA under the pall of Covid-19 lockdown and further undermine the fragile Stormont administration and the confidence of the people of Northern Ireland.

The Questions asked by NIAC (as published):

- No. The proposals will not meet the needs of victims, survivors and their families. By introducing a parity between victims and British veterans the proposal creates a hierarchy of victims ('bad terrorist' v 'good soldier') which has been legislated against in the The Victims and Survivors (Northern Ireland) Order 2006. As Relatives for Justice (RFJ) noted: "These measures will further deepen divisions in society and will certainly not aid any measure of reconciliation – they will aggravate existing hurts and wounds."¹
- The proposals under SHA, specifically regarding the Historical Investigations Unit (HIU), should be legislated for. That legislation should be based upon the draft prepared by QUB, CAJ and the University of Ulster.² That legislation would ensure the HIU would be compliant with the ECHR standards of investigation following a violation of Article 2. Specifically this would ensure independence, most importantly in the management of sensitive information and in relations with state agencies.

It would also ensure that the process of disclosure would not be constrained by issues of National Security through the gatekeeper of the government. Disclosure – information recovery and retrieval is, as NIAC should recognise - core to truth and reconciliation process required in a post-Conflict society.³

The search for the truth about the past is particularly significant in 'transitional' societies—those in transition from Conflict to Peace. That truth cannot be denied by reason of National Security as that would

¹ <https://www.relativesforjustice.com/response-from-relatives-for-justice-to-the-statement-by-the-british-secretary-of-state-brandon-lewis-on-legacy/> (last accessed 28 May 2020)

² <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/07/17135210/SHA-Model-Implementation-Bill-September-2015-Final.pdf> and <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2017/07/17135207/SHA-Model-Implementation-Bill-Explanatory-Notes-Final.pdf> (last accessed 28 May 2020)

³ If National Security is relied upon as an element in the Defence of Realm then there is the demand to ask the question that the Realm is the Constitutional Democracy of which are we subjects and that in a Democracy the Rule of Law is paramount in guaranteeing that protection to secure ... openness, transparency and accountability of its servants who cannot hide behind the rhetoric of National Security which those servants will not define?

Further, the principle of up-holding the Rule of Law is both the practice and appearance of not condoning impunity for human rights violations in any form and exposing collusion which lies at the base of the practice and appearance of impunity and undermines the legitimacy of the Rule of Law.

occlude truth and appear to condone with impunity human rights violations.

As RFJ noted: "Throughout the statement the British government abuses terms and phraseology associated with our transitional process of building peace and reconciliation to cloak its evident malign intent."⁴

- The proposal is: "A new independent body will conduct swift, final examinations of all the unresolved deaths. Only those cases where there is new compelling evidence and a realistic prospect of a prosecution will be investigated. Once cases have been considered there will be a legal bar on any future investigation occurring. This will end the cycle of reinvestigations for the families of victims and veterans alike."

The HIU, subject to the modifications proposed by way of the Model Implementation Bill, would satisfy the demands of both the ECHR and the GFA in terms of human rights compliance.

The GFA is clear on the need for commitment to human rights:

"2. The tragedies of the past have left a deep and profoundly regrettable legacy of suffering. We must never forget those who have died or been injured, and their families. But we can best honour them through a fresh start, in which we firmly dedicate ourselves to the achievement of reconciliation, tolerance, and mutual trust, and to the protection and *vindication of the human rights of all*"⁵

The most recent 'modest proposal' (following years of extensive consultation of the people of Northern Ireland) severs the link with a Draconian stroke between investigations and human rights.

It is criminal justice (retribution and reparation) driven as opposed human rights driven – including the right to truth including the exposure of impunity toward human rights violations.

It also offers both a statute of limitation and an amnesty to veterans.

These veterans are members of the British Security Forces – will this modest proposal therefore extend to former members of the RUC, the Security Services and their agents and informers (Loyalist and Republican).

Will this statute of limitation extend to all acts of collusion which resulted in criminality including murder?

⁴ RFC *op cit*.

⁵

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agree (last accessed 28 May 2020)

- The proposal is, as noted, a dangerous and divisive departure from the Stormont House Agreement Bill (which of itself is flawed which is why we argue for the implementation of Model Implementation Bill).

Its intent is to establish a limited criminal justice focused mechanism of investigation the details of which are not further articulated save beyond the obvious intent to foreclose on all Conflict-related deaths as swiftly as possible given the evidential threshold proposed.

It abandons the truth and reconciliation proposals of the SHA which are necessary for a transition from Conflict to Peace and in establishing a narrative of historical truth. In fact, the proposal feeds into the rhetoric of the pernicious counter-narrative which makes the state sanctioned narrative the only narrative of truth about the Conflict in Northern Ireland silencing more complex and competing narratives.

For Northern Ireland, Truth and Reconciliation is not about Retribution and Reparation. It is not about hard (law) and soft (justice) options. It is not about Prosecution and Punishment. It is about a commitment to Human Rights and to the Rule of Law, both of which are core to a democratic society – a complex democratic society in transition from violence to peace which need to reconcile its past with its present and future through truth recovery and attribution of accountability or admission of responsibility.

- No
- After 22 years of initiatives to establish a process of investigation into all Conflict-related deaths and injuries (without a hierarchy of victims) that is human rights compliant and sympathetic and calibrated to needs required in truth and reconciliation processes (Healing through Remembering, Eames-Bradley, Haass-O'Sullivan, the SHA, Amnesty International, even the Northern Ireland Office *Addressing the Legacy of Northern Ireland's Past* and others) following extensive public consultations, there was agreement that at least two primary and two secondary mechanisms were required *each having a discreet purpose*. These are HIU and Information Retrieval (primary) and Historical Archive and Implementation Group (secondary).

The proposal abandons that structure which was arrived at through consultation and consensus.

- The focus of the proposal is a criminal justice mechanism of investigation. That focus necessarily distorts what might be described as the 'rights of victims' whose expectations or wants may not fulfilled by due process.

Those rights must be balanced between societal needs and the administration of justice and upholding the Rule of Law which equates to facing full on impunity toward collusion during the Conflict. The intent of the proposal is clear – to create a hierarchy of victims, of which those who have primacy are the state agents and actors ('veterans').

- There is no need to take legislative steps to address what has been described as vexatious 'claims' against veterans. In terms of criminal justice the decisions to prosecute Northern Ireland veterans (of which the numbers are minimal, if this is what the proposal means) have been taken by public prosecutors, independent law officers whose decisions should be respected or contested by way of judicial review.

The out-workings of the Legacy of the Conflict in Northern Ireland cannot be elided with other claims made against veterans for short-term populist political gain. To do so is to dangerously conflate for short-term political gain and in opposition to international law, overseas counter-insurgency military incursions/operations/adventures (Iraq and Afghanistan), with what happened in Northern Ireland over the course of over 30 years.

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