

Evidence to the Select Committee on Northern Ireland Affairs

Addressing the Legacy of Northern Ireland's Past: The UK Government's New Proposals

Brice Dickson, 28 May 2020

Introduction

1. I am a legal academic, Emeritus Professor of International and Comparative Law at Queen's University Belfast. Since the 1970s my research interests have mainly been the legal system of Northern Ireland, the policing of Northern Ireland and the protection of human rights by law in Northern Ireland and across the world. I was a member of the Equal Opportunities Commission for Northern Ireland from 1990 to 1996 (Deputy Chair from 1993), the first Chief Commissioner of the Northern Ireland Human Rights Commission from 1999 to 2005 and an independent member of the Northern Ireland Policing Board from 2012 to March 2020. I have been a member of the Department of Health's Privacy Advisory Committee since 2009.

Whether the Government's proposed approach will meet the needs of victims, survivors and their families

2. Without knowing more details of what the Government is proposing it is difficult to answer this question. In all probability the proposed approach will meet the needs of some victims, survivors and their families but not the needs of others. Victims and survivors differ widely in their needs and expectations and claims about them should not be made unless they are based on empirically strong evidence: surveys of victims and survivors often focus too much on the views of victims' groups, almost ignoring the views of victims and survivors who do not belong to any such groups. Victims and survivors also differ as to what they understand by 'justice'. It is likely that many of them have been tremendously frustrated by the haggling that has gone on for many years over addressing their needs. The unseemly squabble over whether the UK government or the Northern Ireland government should pay for the compensation scheme that was agreed by the UK Parliament in January 2020¹ is the latest cause of such frustration. One

¹ The Victims' Payments Regulations 2020 (SI 2020/103).

could be forgiven for imagining that the bulk of victims and survivors have very little confidence in the collective determination of politicians in power to deliver on their needs.

What steps the Government can take to ensure that the proposed new legacy body is independent, balanced and open, and complies with the Belfast/Good Friday Agreement and ECHR commitments

3. To meet the independence requirements of the ECHR the proposed new legacy body would need to be institutionally, practically and hierarchically independent of any organisation that was involved in the conflict in Northern Ireland.² The most difficult of these criteria to satisfy is that of practical independence. Thus, on 19 March 2019 the Court of Appeal of Northern Ireland held in the *McQuillan* case that the proposed further investigation by the PSNI's Legacy Investigation Branch into the death of the applicant's sister, Jean Smyth, in 1972 would not satisfy that criterion. The ECHR's requirement for independence relates only to an investigation into a death, but it would obviously also apply to any prior review process intended to identify those cases deemed deserving of further investigation: while such a review process cannot of itself fully satisfy the requirements of Article 2 of the ECHR, it must not operate in a way that breaches that Article (that is why the approach of the Historical Enquiries Team – see para 8 below – was condemned by Her Majesty's Inspectorate of Constabulary in 2013³).

The differences between the Government's new proposals and the draft Stormont House Agreement Bill

4. The differences are considerable, especially in relation to the Historical Investigations Unit proposed by the draft SHA Bill. The Committee should look at why such significant changes are to be made to the Bill notwithstanding the Government's commitment to implement the Stormont House Agreement in paragraph 16 of the *New Decade, New Approach* document of 9 January 2020. Moreover, I do not fully comprehend the Government when it says in its document of 18 March 2020 that 'Only cases in which

² *McKerr v UK* (2002) 34 EHRR 20, para 128.

³ See <https://www.justiceinspectorates.gov.uk/hmicfrs/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf>.

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 subsequently are not referred for prosecution, would be closed and no further investigations or prosecutions would be possible.’ My understanding of the way in which the PSNI’s Legacy Investigations Branch currently works is that it too closes a case if it becomes clear that there is no realistic prospect of a prosecution as a result of new compelling evidence. However, if there is a doubt over whether there is a realistic prospect of a prosecution, as there will inevitably be in many cases, that should ultimately be determined by the Public Prosecution Service, not by any other institution. It is also hard to see how legislation could preclude judicial review of any decision that no further investigations or prosecutions are possible. What if someone were to decide to openly confess to a killing and could provide corroborative evidence of his or her guilt? Should not a prosecution be possible then?

5. I wholeheartedly agree with the Government’s statement that ‘it is vital that we swiftly implement an effective information recovery mechanism before this information is lost forever’, but I am very sceptical as to how likely it is that former combatants will volunteer information to any institution, regardless of what guarantees of immunity from prosecution or civil suit may be provided to them. In any event, there will always be severe restrictions on what an information recovery mechanism will be able to say in a report to a family, given the duty to protect the anonymity of individuals who are thought to have been involved in, or who know more details about, a killing. It is true that the guarantees of immunity have so far been relatively effective in relation to information provided for the decommissioning of weapons or the location of victims’ remains, but former combatants will rightly or wrongly be suspicious of the cast-iron nature of such guarantees in relation to murders, given what has occurred in relation to the Boston College tapes of interviews given by Brendan Hughes and Dolours Price.⁴

Whether and how the Government’s proposals will promote reconciliation in Northern Ireland

⁴ See the account given of the use made of those tapes in Patrick Radden Keefe, *Say Nothing: A True Story of Murder and Memory in Northern Ireland* (William Collins, 2018), Chap 27.

6. The Government's own statement of 18 March 2020, perhaps unwittingly, recognizes two variants of reconciliation in this context – the whole of society's reconciliation with its difficult history and the two sides of the community's reconciliation with each other. The proposals are more likely to achieve the former than the latter. Much more will still need to be done to promote inter-community reconciliation. For example, political parties could be asked to sign a Declaration for Reconciliation whereby they each pledge to speak and act in a way that promotes parity of esteem, harmony and collaboration. This would not prevent parties from referring to the past, but it should deter them from contaminating the present or the future. Of course, most victims and survivors and their families would probably welcome a statement of acknowledgement that violence perpetrated against people by paramilitary groups was never justified during the troubles, but that is probably a pipedream. Victims of paramilitary violence would doubtless welcome a paramilitary version of David Cameron's statement that the violence inflicted on Bloody Sunday was both unjustified and unjustifiable.

The potential merits of consolidating the bodies envisaged in the Stormont House Agreement into a single organisation

7. I do see some merit in consolidating the bodies envisaged in the SHA – at least the Historical Investigations Unit and the Independent Commission on Information Retrieval – but the way in which the united body would operate has not yet been spelled out. And will the Oral History Archive and the Implementation and Reconciliation Group still be set up? In so far as the proposed new body would operate in a similar way to the Historical Enquiries Team of the PSNI, which functioned between 2005 and 2014 before being terminated because it was treating members of the British army differently from other individuals suspected of involvement in killings, there is much to be said for it.
8. The PSNI's Legacy Investigations Branch, which replaced the HET, does not appear to be operating efficiently at present: its productivity in terms of processing and closing cases is very low indeed. In a written answer to a question posed by the Policing Board in May 2019, the Head of the Legacy and Legal Department at the PSNI said that between 1 January 2015 and 15 May 2019 (nearly four-and-a-half years) the Legacy Investigations Branch completed just 13 single victim reviews, resulting in the issue of 5 family reports, with 4 more family reports being prepared for imminent release. Of those 13 victims, 8

were civilians, 4 were police officers and was 1 was a soldier. As of November 2019, the Policing Board understood that the LIB's remaining caseload consisted of 1,130 incidents resulting in 1,421 deaths. The LIB's low productivity rate may be due to poor management or resourcing, but it must also be due in part to the excessively detailed way in which the LIB is approaching its investigative work, when everyone involved must know that the chances of turning up evidence at this time which is strong enough to put before a court for a criminal prosecution are minimal. If the LIB – or its successor body – were to operate more like the HET did (but this time with all suspects or persons of interest being treated alike) then cases could be closed much more quickly and families could be given whatever additional information may have been unearthed. I understand that the rate of satisfaction amongst families who received HET reports before the HET was wound up was high. I am not aware of how many of those families have since asked for the review of their loved-one's death to be further investigated in light of the discrediting of the HET. Perhaps the Select Committee would like to put that question to the PSNI?

The equity of the Government's proposed approach to the re-investigation of cases

9. See the answer to the previous question. I would add that the Government's document overstates the position when it says that 'the cycle of reinvestigations into the Troubles in Northern Ireland... has failed victims and veterans alike'. Many reinvestigations have brought more information to light which has been of great comfort to victims and veterans. In particular, the use of inquests – which are clearly one type of investigation – has been of substantial help to families of victims. Nor is there any significant evidence that the current investigatory approach 'erodes confidence in public institutions that exist to support society as a whole'. The only such institution that has suffered to some extent in that regard is the PSNI which, despite having made tremendous advances on the human rights front since its formation in 2001, has been damaged from time to time by its apparent inability to deal effectively with allegations relating to the past. Confidence in present-day policing would doubtless be enhanced if the responsibility for dealing with troubles-related cases were hived off to a wholly separate body. The same probably applies to cases involving alleged misconduct by RUC officers: the public's confidence in the Office of the Police Ombudsman, and that Office's efficiency, may be

diminished if it were to remain responsible for such legacy inquiries. The Government's proposals of 18 March do not address that issue.

What legislative steps the Government can take to address what have been described as vexatious claims against veterans

10. It is very regrettable that the Government chose to announce its legacy proposals for Northern Ireland alongside its plan to legislate 'to provide greater certainty for service personnel and veterans who serve in armed conflicts overseas'. The behaviour of veterans when operating outside of Northern Ireland should be looked at separately from the behaviour of veterans who operated within Northern Ireland. The latter should be processed in exactly the same way as other people involved in the troubles – no more favourably and no less favourably. Any special treatment for veterans who served in Northern Ireland would be very likely to violate the ECHR and would reflect very badly indeed on the UK's reputation for adherence to the rule of law. The UK Supreme Court would very probably declare any legislation authorising such special treatment to be incompatible with the ECHR and the European Court of Human Rights is extremely likely to endorse such a view.
11. One way forward, provided it was applied across the board, would be to pass an Act of Parliament specifying that no prosecutions can be commenced into killings related to the troubles that occurred before (say) 10 April 1998. Some lawyers and NGOs will argue that such an Act would violate the ECHR,⁵ because the European Court of Human Rights has said that States are under a duty to investigate all suspicious deaths occurring from 10 years prior to the ECHR coming into force for that State, which would be 1943 for the UK.⁶ But it should be remembered that the European Court has also said in a case involving the Balkan conflict that it may be that 'amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims'.⁷ Similarly, in the wake of the peace settlement in South

⁵ See, e.g., the recent report by Kieran McEvoy, Daniel Holder, Louise Mallinder, Anna Bryson, Brian Gormally and Gemma McKeown, *Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland* (April 2020): available at <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2020/04/09093700/Prosecutions-Imprisonment-the-SHA-LOW-RES.pdf>.

⁶ *Šilih v Slovenia* (2009) 49 EHRR 37, judgment of 9 April 2009. The ECHR came into force for the UK on 3 September 1953.

Africa in the early 1990s, where there was a Truth and Reconciliation Commission, the Constitutional Court of South Africa ruled that justice for the family of a prominent victim of State violence (Steve Biko) could be set aside because of the greater societal interest in reconciliation (*ubuntu*) within the country as a whole.⁸

12. Besides, many countries around the world, including in Europe, have legislation which imposes a time limit on when prosecutions can be initiated following the commission of an offence, even a serious offence such as murder. One example is Poland.⁹ The European Court of Human Rights has never ruled that any such law is incompatible with the ECHR. In a context such as the conflict in Northern Ireland the European Court is even more likely to lean in favour of legislation which has at its core the promotion of reconciliation, even if the legislation also provides for some kind of time limit for prosecutions (but only, again, if the time limit applies in all instances of the offence, regardless of the alleged perpetrator).

⁷ *Marguš v Croatia* (2016) 62 EHRR 17, judgment of 27 May 2014.

⁸ *AZAPO v President of the Republic of South Africa* 1996 (4) SALR 671 (CC). See too Kaley L Martin, 'Tackling the Question of Legitimacy in Transitional Justice: Steve Biko and the Post-Apartheid Reconciliation Process in South Africa' (2015), available at:

<https://repository.upenn.edu/cgi/viewcontent.cgi?article=1225&context=curej>.

⁹ Art 101§1(1) of Poland's Penal Code prevents the crime of murder from being punishable after 30 years.