

## **Introduction**

On 23 December 2014, an Agreement between the five parties involved in the Stormont House talks was published and there was, for many families, hope that after decades of waiting, there would be agreed mechanisms for an independent process to investigate their concerns.

Hopes had been raised before by the publication of the Eames/Bradley proposals in early 2009 and the Haass/O'Sullivan proposals in late 2013 but now, finally, the political parties had reached an agreed position.

Those Christmas 2014 hopes gradually diminished, however, as more years drifted by with little emerging to implement the Stormont House Agreement (SHA) although civil society groups such as ourselves, the Committee on the Administration of Justice and leading academics lobbied for action and a Draft Model Implementation Bill was drafted.

When the British government did finally begin a consultation process in May 2018, these and other groups began engaging with those who had the most to gain, and lose, from the implementation of the Stormont House Agreement - the bereaved families.

By this time, the hopes raised four years previously had been tarnished by repeated delays.

Nevertheless, the PFC and others engaged in good faith in the consultation process on the final proposals to implement the legacy section of the Stormont House Agreement.

The families for whom we advocate had almost lost hope in the political process in Northern Ireland, but most decided to suspend disbelief and engage in the consultation process.

Putting aside their disillusionment, they genuinely responded to the specific and detailed questions put to them by the Northern Ireland Office.

The PFC assisted many families by taking a neutral position in our discussions with families on the several contentious issues within the process - although we, also, spent many hours working on our own response to the government's proposals.

Having done so, the bereaved families waited to hear the outcome. And waited. And waited. When Brandon Lewis spoke in the House of Commons on 18 March 2020, he effectively ignored the long, arduous and protracted process in which the political parties and the families had engaged - thus endangering further any confidence in the British government's bona fides.

### **Submission to the NIAC inquiry**

On 18 March, the Secretary of State for Northern Ireland, Brandon Lewis MP, outlined the Government's new approach to the addressing the legacy of the past in a written statement to the House of Commons. This statement proposed:

- the formation of a single independent body to oversee information retrieval and investigation;
- a shift in focus to information retrieval as the core service for individuals and families;
- full police investigations in cases with a "realistic prospect" of prosecution due to "new compelling" evidence; and
- the closure of all other cases with a bar on future re-investigation.
- The inquiry will examine the extent to which the UK Government's proposals meet the needs of victims, survivors and their families.

Following the announcement, on 29<sup>th</sup> April 2020, the Northern Ireland Affairs Committee (NIAC) announced an inquiry to examine the UK Government's proposals to deal with the past and invited written submissions. The Term of Reference (TOR) are outlined below:

- 1. Whether the Government's proposed approach will meet the needs of victims, survivors and their families;*
- 2. 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 (GFA) and ECHR commitments;*
- 3. The differences between the Government's new proposals and the draft Stormont House Agreement Bill;*
- 4. Whether and how the Government's proposals will promote reconciliation in Northern Ireland;*

5. *The potential merits of consolidating the bodies envisaged in the Stormont House Agreement into a single organisation;*
6. *The equity of the Government's proposed approach to the re-investigation of cases;*
7. *What legislative steps the Government can take to address what have been described as vexatious claims against veterans*

The Pat Finucane Centre (PFC) and Justice for the Forgotten (JFF) make the following submission in response to this inquiry. In summary we submit that:

- a) The UK Government's proposed approach WILL NOT meet the needs of victims, survivors and their families;
- b) The proposed legacy body WILL NOT meet the UK Government's obligations under ECHR and WILL NOT comply with the commitments under GFA. Further we have no faith that the new legacy body would be independent, balanced and/ or open;
- c) The UK government's proposals would be damaging to reconciliation;
- d) The Stormont House Agreement mechanisms should be established as a matter of urgency, and there is no merit in consolidating them into a single body;
- e) The notion of 'vexatious claims against veterans' is without basis and undermines not only the rule of law.

## **Background**

The Pat Finucane Centre (PFC) is a non-party political, anti-sectarian human rights organisation advocating a non-violent resolution of the conflict on the island of Ireland. We provide an advocacy, advice and support service to families bereaved and/ or injured as a result of the conflict, who wish to engage with statutory agencies to establish the facts surrounding the death/s of their loved one/s or injuries sustained. These include the Police Service of Northern Ireland (PSNI), the Office for the Police Ombudsman of Northern Ireland (OPONI), An Garda Síochána in the Republic, and the Coroner's Service. This work is part of our Recovery of Living Memory Archive (ROLMA) project funded by Peace IV and includes a three phased approach to supporting families including advocacy, engagement and story-telling. PFC also works in partnership with Wave Trauma Centre to provide health and well-

being support to victims and survivors. We currently provide this service to approximately 200 plus families across Ireland through four offices in Derry, Armagh, Belfast and Dublin (in partnership with Justice for the Forgotten). Over 1000 bereaved individuals benefit from our advocacy support. PFC supports families who have been bereaved/ injured as a result of state, loyalist and republican violence (including some post-Good Friday Agreement (GFA) cases). We also support families where it is unknown who was responsible for the death. Further, PFC supports victims of state mistreatment and torture including a number of persons who were waterboarded in Belfast in the 1970s<sup>1</sup>, as well as a small number of individuals who are victims of miscarriages of justice.

In October 2018, as part of the NIO's 'Consultation to Deal with the Legacy of Northern Ireland's Past', PFC submitted a considered and comprehensive 47-page response.<sup>2</sup> In this response we outlined how we engaged with victims and survivors and other stakeholders to inform our views and shape our reasoning. This included: *"PFC held a number of private meetings with victims and survivors in Derry, Belfast, Armagh and Dublin where we outlined the (SHA) proposals and listened to the views of families. We did this both at the start of the summer (2018) and nearer to the close of the consultation when people had had time to reflect on what was proposed and to discuss the issues with other family members. We also facilitated individual family meetings providing an opportunity to discuss the proposals in respect of individual cases. Some families requested assistance in preparing their own submissions and we helped them with this. A presentation of the key issues was also distributed to families to ease the dissemination of information. PFC engaged with officials from the Northern Ireland Office (NIO), Department of Foreign Affairs (DFA) in Dublin, the Commissioner for Victims and Survivors, and the Victims and Survivors Service. We also consulted with a number of legal academics and other NGOs providing support to victims and survivors."*<sup>3</sup>

Following the extensive engagement outlined above, we concluded that the proposals envisaged in the Stormont House Agreement could potentially offer a

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<sup>1</sup> <https://www.channel4.com/news/waterboarding-claims-in-northern-ireland>

<sup>2</sup> <https://www.patfinucanecentre.org/sites/default/files/2018-10/PFC%20Submission%20to%20NIO%204.10.18.pdf>

<sup>3</sup> Pg 4 ibid

positive framework to deal with the past that would deliver for victims and survivors and met the UK government's obligation under GFA and ECHR. We did, however, address a number of areas of concerns, and stated that what was required was a genuine commitment from the British and Irish governments and buy-in from state, loyalist and republican actors. We also stated that *“(M)any families have expressed disillusionment and are sceptical that such a commitment exists. Almost all stated that they have no faith in the British government's desire to deal with the past in an honest and open way.”*

In July 2019 the NIO published an analysis of the consultation responses, noting that they had received over 17'000 responses<sup>4</sup>. Within this summary document, the UK government stated, in **BOLD**, that:

***‘The Government remains fully committed to the implementation of the Stormont House Agreement and it is essential that our work continues.’***

This clear commitment, and various other public and private statements of commitment to the Stormont House Agreement by successive UK Prime Ministers, NI Secretaries of State and other MPs and officials over the past five years, has stated and restated the UK government's apparent commitment to SHA.

In fact as recently as the December 2019 Queen's Speech and, again, in the 9th January 2020 document 'New Decade New Approach' , (which restored the NI government) the British government committed to putting in place legislation to enact the SHA. However, on 18<sup>th</sup> March 2020 Brandon Lewis, the new NI Secretary of State, issued an extraordinary written statement essentially dumping the SHA. He said that

*“It is the Government's view that to best meet the needs of all victims and of wider society, we need to shift the focus of our approach to the past. While there must always be a route to justice, experience suggests that the likelihood of justice in most cases may now be small, and continues to decrease as time passes. Our view is that*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/814805/Addressing\\_the\\_Legacy\\_of\\_the\\_Past\\_-\\_Analysis\\_of\\_the\\_consultation\\_responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814805/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses.pdf)

*we should now therefore centre our attention on providing as much information as possible to families about what happened to their loved ones - while this is still possible.*

*Our proposals have therefore evolved to remain true to the principles of the Stormont House Agreement but with a greater emphasis on gathering information for families; moving at a faster pace to retrieve knowledge before it is lost; and doing more to help individuals and society to share and understand the tragic experiences of the past.*

*It is proposed that these measures should be carried out by one independent body to ensure the most efficient and joined-up approach, putting the needs of the individuals most affected at the heart of the process. This body will oversee and manage both the information recovery and investigative aspects of the legacy system and provide every family with a report with information concerning the death of their loved one.<sup>5</sup>*

It is disappointing, but sadly unsurprising that victims and survivors have been let down again by the British government's U-turn over the Stormont House commitments. Many of the families we support have expressed that they feel angry, betrayed, and sadly vindicated in their suspicions. This minimalist statement was made on the same day that the Overseas Operations (Service Personnel and Veterans) Bill was announced<sup>6</sup>, a Bill that would introduce a qualified presumption against prosecution against members of the British armed forces after a five year period. This was clearly opportunistic on behalf of the British government, and we believe was an attempt to appease the 'military wing' of the Conservative Party.

The proposal also appears to have been done without consulting the Irish government given the response of the Tánaiste, Simon Coveney, who stated:

*"The need for agreement by both Governments to any changes of approach applies importantly and specifically to the legislation that would implement the Independent Commission on Information Retrieval (ICIR) on foot of the Treaty between our two*

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<sup>5</sup> <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-03-18/HLWS163/>

<sup>6</sup> <https://services.parliament.uk/bills/2019-21/overseasoperationservicepersonnelandveterans.html>

*Governments signed in 2015. Any approach has to be coherent across both jurisdictions.”<sup>7</sup>*

The unilateral statement not only undermined the public commitments to victims and survivors that the UK government was committed to implementing the SHA proposals, but also the Treaty made between the British and Irish governments to establish a cross border Commission that would facilitate truth-recovery in both jurisdictions, the Independent Commission on Information Retrieval (ICIR).

### **PFC’s submissions**

#### **a) The UK Government’s proposed approach WILL NOT meet the needs of victims, survivors and their families;**

Bereaved families and survivors have a diverse range of needs, as summarised by the Commission for Victims and Survivors. These needs were informed by research conducted in 2012<sup>8</sup> and extensive consultation with victims, survivors and other key stakeholders and culminated in a major conference on Dealing with the Past in 2014<sup>9</sup>

The four key areas of need in relation to victims and survivors that the research identified are:

- Truth;
- Justice;
- Acknowledgement;
- Reparations.

It is the experience of PFC that the above four key areas reflect the needs of victims and survivors, and throughout the various consultations (Eames-Bradley/ Haas O’Sullivan/ Stormont House) our contributions have been based on what is the best way to satisfy these needs. We acknowledge that the conflict has impacted every

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<sup>7</sup>Statement from Tánaiste Simon Coveney to British government’s proposals.

[https://merrionstreet.ie/en/News-](https://merrionstreet.ie/en/News-Room/News/Statement_by_Tanaiste_on_UK_Government_Legacy_Announcement.html)

[Room/News/Statement\\_by\\_Tanaiste\\_on\\_UK\\_Government\\_Legacy\\_Announcement.html](https://merrionstreet.ie/en/News-Room/News/Statement_by_Tanaiste_on_UK_Government_Legacy_Announcement.html)

<sup>8</sup> <https://www.cvsni.org/media/1434/comprehensive-needs-assessment-february-2012.pdf>

<sup>9</sup> These findings were the basis of the Commissioner’s advice to the UK government in 2014 following the ‘Dealing with the Past’ conference, <https://www.cvsni.org/media/1507/cvsni-dwp-conference-report-march-2014.pdf>

victim and survivor in an individual way and therefore what is required is a range of measures that can address different needs highlighted above.

The SHA framework provided for investigations into conflict-related deaths through an independent policing body, the Historical Investigations Unit (HIU); a truth-recovery mechanism to allow families to receive information that could not or may not come to light through a police investigation through engagement with the independent Commission for Information Retrieval (ICIR); an Oral History Archive (OHA) to allow those that wish to record and preserve their individual experiences during the conflict; and a body to collate and analyse the data culminating from these three bodies to product thematic reports examining different issues, the Implementation and Reconciliation Group (IRG).

As outlined above, the Stormont House proposals were drafted following extensive negotiations between the two governments and the main political parties in the north of Ireland. We have also outlined above the steps we undertook when considering the proposals to deal with the past under the SHA. We concluded that the proposed mechanisms offered a framework that could met the needs of most of not all victims and survivors provided certain concerns were addressed<sup>10</sup>.

It is our view that some families may engage with one of the mechanisms, whereas others may engage with another, depending on which can meet their individual needs. Some may choose to engage with all or none. For some of the families we support there may be not investigative opportunities that could provide answers to their questions, so they may choose to contact the ICIR in the hope that those with information may come forward.

We do not agree that the proposal to consolidate the four mechanisms into one body will be able to meet the needs of victims and survivors. We believe ALL families have a right to truth and to justice, but the processes involved in achieving these may be very different as legal safeguards, such as the proposed limited immunity that would be afforded to those coming forward to the ICIR, are not appropriate or possible in a

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<sup>10</sup> As outlined in our response to the consultation.

criminal justice forum. There are different standards and burden of proof required in each model. By attempting to consolidate both into one body, there is no incentive for those with information to provide it, and a genuine risk that neither would be achieved.

**b) The proposed legacy body WILL NOT meet the UK Government's obligations under ECHR and WILL NOT comply with the commitments under GFA. Further we have no faith that the new legacy body would be independent, balanced and/ or open;**

The UK Government have over a number of years suggested to the Committee of Ministers (CoM) that the mechanisms within the Stormont House Agreement would help to fulfil their obligation in the McKerr set of cases. The CoM commented in its notes for the 5 March 2020 meeting:

*“the Committee, which has repeatedly underlined that, notwithstanding the complexity of the broader political picture, it is imperative that the authorities ensure that effective Convention-compliant investigations can be conducted, particularly in light of the length of time that has already passed since these judgments became final, and since the Stormont House Agreement providing for the HIU and other legacy institutions was concluded in 2014.”<sup>11</sup>*

The CoM went on to say they:

*“noted with satisfaction the authorities' indication that they remain fully committed to the establishment of those institutions and the implementation of the Stormont House Agreement and that the approach must be consistent with the rule of law and international legal obligations.”*

It is our contention therefore that the government are not only failing to live up to their Article 2 obligations under the ECHR but also to obligations made to the CoM. These proposals seem to shift the emphasis from investigations to 'information recovery', while information recovery and truth are very important to families of victims and the injured it should be remembered that this should not be at the

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<sup>11</sup> [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016809c89c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016809c89c0), Accessed 26<sup>th</sup> May 2020

expense of a criminal prosecution if that is still possible. The narrow scope of any table-top review of currently held files will not fit with the UK's international obligations but more importantly will not be accepted by victims, survivors and wider society and neither should it be.

To suggest that only cases where there is 'new compelling' evidence with a 'realistic prospect of prosecution' should be investigated is neither legally appropriate nor morally correct. Who would make this decision and on what information would that decision be made? It is widely accepted that the vast majority of murders during the conflict were not sufficiently investigated and there is also the obvious lack of investigations into killings perpetrated by members of the security forces as outlined below. Where there was an inadequate investigation at the time it is self-evident that the process of information recovery and the production of a family report would be rendered useless. Worse still, in our experience, there is a very real risk of re-traumatisation when families are presented with official reports based on the hopelessly flawed and inadequate information contained in police files. The 'official line' on those murdered on Bloody Sunday for instance stated that the dead were all gunmen and bombers until the Saville Report corrected this. Regardless of the status of the victim it is vital that any information furnished to families is the product of a rigorous investigative process.

Could this process be Article 2 compliant?

- Independence – the initial question has to be, who will conduct these reviews, how is their independence measured, who do they report to? In many recent NI Court judgements, the LIB has been found not to be sufficiently independent to carry out legacy investigations.<sup>1213</sup>
- Effectiveness – will those who conduct these reviews have access to all the appropriate information to complete the PPS files or family reports? How

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<sup>12</sup> Barnard Judgement available at:

[https://judiciaryni.uk/sites/judiciary/files/decisions/Barnard%27s%20%28Edward%29%20Application\\_0.pdf](https://judiciaryni.uk/sites/judiciary/files/decisions/Barnard%27s%20%28Edward%29%20Application_0.pdf),

McQuillan Judgement available at:

[https://judiciaryni.uk/sites/judiciary/files/decisions/McQuillan%27s%20%28Margaret%29%20Application\\_0.p](https://judiciaryni.uk/sites/judiciary/files/decisions/McQuillan%27s%20%28Margaret%29%20Application_0.pdf)

<df> and McGuigan & McKenna, summary available at:

<https://judiciaryni.uk/sites/judiciary/files/decisions/Summary%20of%20judgment%20->

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<sup>13</sup> It should be noted that the Chief Constable has been given leave to appeal a NI Court of Appeal decision in relation to 'practical independence' of the LIB in the McQuillan case to the Supreme Court.

could families be assured all information has been or could be accessed without some form of investigative process having been undertaken?

- Public scrutiny – how could this closed process be seen to be open to public scrutiny and therefore give confidence to those with a vested interest in the process?
- Prompt-families have already waited decades for an Article 2 compliant investigation
- Involvement of next of kin- how would a process that involves closing down cases without proper investigation fulfil this requirement?

According to a recent academic report published in Belfast by leading human rights experts in the field:

*“it is far from clear that this would be an Article 2 compliant process. With too high a threshold for the use of police powers to investigate, and an obligation to close cases forever once the process is completed, the process would not adequately expose human rights violations, and thus would not facilitate guarantees of non-recurrence, justice or truth recovery.”<sup>14</sup>*

The SHA as the name suggests is an agreement reached after many years of false dawns in relation to dealing with legacy issues. While the NIO consultation identified some areas where additional work may be required and some dissenting views there was considerable consensus which the Secretary of State has now ignored. What is being proposed is a complete abandonment of the SHA. It is hard to see where the ‘spirit’ of the SHA still exists.

The new proposal makes no reference to the Oral History Archive or the Implementation and Reconciliation Group but does however claim that one of its main aims is towards reconciliation.

The proposed legacy body is intended to deal with both investigations and information recovery. It has long been acknowledged that the two are different

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<sup>14</sup> McEvoy K, Holder D, Mallinder L, Bryson A, Gormally B & McKeown, G(2020), PROSECUTIONS, IMPRISONMENT AND THE STORMONT HOUSE AGREEMENT, A Critical Analysis Of Proposals On Dealing With The Past In Northern Ireland, p.33

processes with different outcomes and that some form of incentive to encourage the provision of information is required. The HIU and the ICIR were deliberately designed as separate entities in an effort to encourage those with information to come forward.

It is often claimed that in this type of process it would be the state that will be on trial as paramilitary groups did not keep records. It is undoubtedly correct that paramilitary groups did not keep records. It is however also correct that the state ensured that the actions of soldiers and police officers in lethal force cases were not investigated, that records were not kept of collusive behaviour as evidenced in the Da Silva Report into the murder of Pat Finucane and that potentially criminal behaviour by the security and intelligence agencies took place in the shadows. The not inconsiderable apparatus of intelligence gathering was directed at the paramilitary groups, in particular, the republican side, and the vast PSNI, MoD and security service archives will contain millions of documents pertaining to non-state actors.

According to McEvoy et al under the latest proposals the justice reforms implemented as part of the GFA would be dispensed with “in relation to the test for prosecution and the independence of the Public Prosecution Service.”<sup>15</sup> Presumably this refers to a body other than the PPS making decisions as to whether there is sufficient evidence to pursue a prosecution.

Should any changes be made to the Human Rights Act as a result of these proposals this would also be a dilution of the GFA as the British government agreed to the “complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR),”<sup>16</sup>

As the proposals currently stand decisions as to what constitutes new and compelling evidence will not be open to public scrutiny. We believe that the main intention of the proposals is to ensure that no more ex-service personnel will have to

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<sup>15</sup> Ibid, p. 34

<sup>16</sup> Text of the Good Friday Agreement

answer difficult questions about potential criminal behaviour whilst serving during Operation Banner.

**c) The UK government's proposals would be damaging to reconciliation;**

PFC says, with regret, that we believe the current British government's proposals on legacy, far from promoting reconciliation, will set it back significantly, arguably by many years.

The term "reconciliation" can be defined as the restoration of friendly relations and/or making one view or belief compatible with another. In Northern Ireland terms, the PFC believes an achievement of the latter definition to be far more difficult, requiring the passage of much time.

The former, however, is more a more realistic target and possible within this generation, given the right political and social circumstances. This aim will, however, in our view only be feasible if there is a gradual building of mutual respect within each community for the other's alternative position.

The question, then, remains how best to achieve this outcome. Going back to basics, we believe, it is impossible to impose reconciliation on any individual or any community. Experience, and common sense, dictates it cannot be forced, as if in a greenhouse, but will only flourish organically, in the wild, as a by-product of other processes.

Chief amongst those processes must be an honest, dispassionate and evidence-based inquiry into our past where the wishes of individual bereaved persons and families are respected but where society's requirements for equal treatment are also addressed.

This will inevitably be a painful process for many, probably for most, but one that cannot be avoided. We do not believe reconciliation will ever be possible without this truth-seeking process, in which all sides can engage honestly and in which hard evidence will be key.

Central to any process must be mutual respect for the other's narrative but above all the exposure of all the evidence that can be found or established, both oral and written. We have seen repeatedly over many years, in our daily work with victims' families, how the truth, whatever its imperfections, can foster self-confidence, security and self-respect.

The very act of truth-seeking, vindicating as it does the need for truth, reduces the seeker's sense of alienation from the outside world. Being listened to, and heard, engenders a sense of self-worth in those who feel their truth has been disregarded for many decades.

Without the very different processes proposed by the SHA, the truth will be so incomplete that reconciliation, we believe, will be quite impossible. The British government's current proposals will make reconciliation far less likely as they will reinforce a sense of being disregarded by large sections of the community.

The Catholic hierarchy is just one group who have expressed their "deep concern" at the current proposals<sup>17</sup> stating that they are a fundamental move away from previously agreed central tenets. The Bishops reiterated that central to any process must be the prioritising of victims; the principle of equal access to justice for all and that facing the past however painful should be central in work to "achieve authentic reconciliation for a just and stable peace".

Further, they say: "If we trivialise or ignore a history of suffering or call on those who have suffered to forget or overlook their suffering, we are in fact continuing to perpetuate an oppressive situation".

The Catholic Bishops further wrote to the Secretary of State for Northern Ireland on 7 April that: "State and non-state actors must be equally accountable before the law. Otherwise no authentic reconciliation can be achieved".

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<sup>17</sup> <https://www.catholicbishops.ie/2020/04/08/catholic-bishops-in-northern-ireland-criticise-uk-governments-approach-to-legacy-of-the-past/>

"Justice should be pursued, for a just society is a society of peace. For those victims who do not feel justly treated, the wounds of the past will never fully heal. We therefore support the ongoing pursuit of appropriate criminal, legal and civic justice for all victims".

In this, the PFC agrees with the Bishops who are, we believe, accurately expressing the views of a majority of people living in Northern Ireland, not just adherents to their particular faith. Moreover, these basic principles were supported in the consultation process on the SHA in which the families with whom we work, and thousands of others, invested so much time, energy and confidence<sup>18</sup>.

For example, a clear majority of all respondents to the consultation argued that a Statute of Limitations or amnesty would not be appropriate for Troubles-related matters while many were clear that victims, survivors, and families are entitled to pursue criminal justice outcomes.

Any move towards amnesty (such as that currently proposed in the British government's 18 March 2020 statement) the document notes, could seriously risk progress towards reconciliation. There was also a strong sense in responses to the consultation that the new mechanisms must be fair and not favour any particular group (see page 21) and that victims, survivors and their families are entitled to truth - with information recovery essential to reconciliation.

According to the analysis of responses document, "The clear majority of all respondents to the consultation argued that a Statute of Limitations or amnesty would not be appropriate for Troubles-related matters - many were clear that victims, survivors and families are entitled to pursue criminal justice outcomes and such a move could risk progress towards reconciliation. There was a strong sense that the new mechanisms must be fair and not favour any particular group". (P21)

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/814805/Addressing\\_the\\_Legacy\\_of\\_the\\_Past\\_-\\_Analysis\\_of\\_the\\_consultation\\_responses.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/814805/Addressing_the_Legacy_of_the_Past_-_Analysis_of_the_consultation_responses.pdf)

Many respondents noted that victims, survivors and their families are entitled to truth - and that information recovery is essential to reconciliation. (P12)

**d) The Stormont House Agreement mechanisms should be established as a matter of urgency, and there is no merit in consolidating them into a single body;**

We note that Brandon Lewis stated that his new proposal would 'remain true to the principles of the Stormont House Agreement but with a greater emphasis on gathering information for families.'

We submit that there is no merit in consolidating the different mechanisms into one body, in fact the opposite is true. By 'muddying the waters' between the HIU and ICIR, we believe, would result in neither truth or justice being achieved, and families again being let down. For the reasons outlined above we submit that there is a real risk that truth-recovery would be inhibited to the point that the exercise would be worthless.

We note that the proposed ICIR was to be modelled on the Independent Commission for the Location of Victims Remains (ICLVR). The reason that body has been so successful in locating thirteen of the sixteen victims that were 'disappeared' by republican paramilitaries during the conflict was that certain statutory safeguards were enacted in Ireland and the UK. These included making information provided to the ICLVR inadmissible in criminal proceedings and restricting the disclosure of information provided to the Commission. It is acknowledged that for the ICLVR to work effectively, and locate the bodies of victims that had been missing for decades, it was essential that these safeguards were in place. Although this framework was difficult for the families impacted, as it meant the information provided could not be used to secure a conviction for the murder or other offences connected with the death of their loved ones, it was the only way the process could work. Again, we stress that we believe families have a right to both truth AND justice, and support families in their pursuit of both, but we acknowledge the sad reality that for many families justice is not possible for various reasons and their desire is to know as

much information as possible about the circumstances of the death even if a prosecution won't be secured.

PFC has highlighted our concerns regarding how the proposed ICIR could work as effectively, and ensure families are provided as much information or 'truth' as possible in our response to the 2018 consultation. We highlight the need to ensure the HIU and ICIR work independently, with robust safeguards to ensure those with vital information can come forward, and families can receive answers. We fundamentally disagree with the UK government's proposal that one body 'will oversee and manage both the information recovery and investigative aspects of the legacy system and provide every family with a report with information concerning the death of their loved one. We cannot see how this is possible.

If the ICIR were to be amalgamated with the other mechanisms of the Stormont House Agreement, this would exclude families and survivors in the Republic of Ireland from the entire process. Under the Stormont House Agreement, it was not envisaged that a Historical Investigations Unit (HIU) would be established in the Republic and, therefore, the ICIR was the only mechanism by which any truth/information could be obtained.

As pointed out above the Tánaiste has argued for agreement and coherence regarding the ICIR: We agree absolutely with the Tánaiste's position and believe that the UK Government's attitude to an international treaty to be cavalier in the extreme.

**e) The notion of 'vexatious claims against veterans' is without basis and undermines the rule of law.**

There has been ongoing misrepresentation by a group of MP's and peers that there is some kind of 'witch hunt' against former soldiers involved in killings during the conflict in Ireland. And indeed the Office of the Speaker has conceded that some Members have abused parliamentary privilege in comments made about the prosecution of a former soldier that is continuing before the courts.<sup>19</sup>

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<sup>19</sup> Email to Pat Finucane Centre from the Office of the Speaker of the House of Commons, 2<sup>nd</sup> March 2017

This deeply troubling abuse of power and unfounded narrative is further compounded by *the new approach* being proposed by the current British government as outlined by SoS Brandon Lewis on March 18<sup>th</sup>.

Revealingly, he says *“While there must always be a route to justice, experience suggest that the likelihood of justice in most cases may be small, and continues to diminish as time passes.”*

Lewis is right, but not in the way in which he intended.

*“There must always be a route to justice...”* We agree, there must always be a route to justice. That is a minimum legal expectation of citizens in any democratic society, in peace time and especially in the aftermath of conflict, and a minimum legal obligation and protection that states must provide.

In the absence of the Stormont House Agreement, or any Article 2 compliant mechanism the Police Service of Northern Ireland (PSNI) is investigating a small number of cases, including military killings. Indeed, a large number of killings by British soldiers were never subject to any thorough Article 2 compliant investigation as is legally required, as detailed elsewhere in this submission. These PSNI investigations are not ‘re-investigations’, as suggested by some parties, in fact in many cases an Article 2 compliant police investigation has yet to happen.

We know this because in the early 1970’s an illegal agreement existed between senior army and police officer’s which meant that soldiers involved in fatal incidents were rarely interviewed by police officers. They were interviewed by Royal Military Police - army police - investigating their own forces.

The family of Kathleen Thompson, a mother of six who was shot in her own back yard, had to take a judicial review of the Prosecution Service’s failure to prosecute the soldier who killed their mother.<sup>20</sup> The judge in this case slammed the lack of investigation and ruled that the Chief Constable had no authority to delegate

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<sup>20</sup> [https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2004/2004%20NIQB%2062/j\\_j\\_GIRC5085.htm](https://www.courtsni.gov.uk/en-GB/Judicial%20Decisions/PublishedByYear/Documents/2004/2004%20NIQB%2062/j_j_GIRC5085.htm)

responsibility to the Royal Military Police, yet this is what happened in hundreds of cases in relation to British Army killings.

Similarly, declassified official documents show that a second illegal agreement was reached in the early 1970's whereby the Attorney General would consult with the Ministry of Defence *before* prosecuting a soldier, inviting a submission from the MoD on why a prosecution should not proceed. This was an egregious violation, both of the independence of the Attorney General and the Prosecution Service.<sup>21</sup>

A further report from Her Majesty's Inspectorate of Constabulary<sup>22</sup> and judgements from the European Court of Human Rights all confirm that military killings were not investigated as legally required between 1970 and 1973.

Even after this period, killings of unarmed civilians by the British army were not subjected to rigorous and thorough investigations as required by law. A recent inquest into a man shot dead by soldiers in 1971 shows a complete failure to investigate the disinformation that was put in the public domain at the time. It took over 40 years for his family to finally have the truth told.<sup>23</sup>

These are only some examples of extensive evidence revealing at that time there was clearly no '*route to justice*' for these families, and it is *only now* that they are finding and negotiating effective routes to justice. The *new approach* statement proposes that there will only be full police investigations where 'new and compelling evidence' exists resulting in the closure of all other cases with a bar on future re-investigation. As evidenced above, in many cases proper investigations were never undertaken in the first place. Under the Stormont House Agreement the Historical Investigations Unit (HIU) was intended to investigate all cases which are currently with the PSNI's Legacy Investigations Branch and the Office of the Police Ombudsman for Northern Ireland. These investigations were to be Article 2 compliant and a report was to be given to the family. Under the government's current

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<sup>21</sup> <http://www.thedetail.tv/articles/declassified-documents-reveal-army-lobbied-attorney-general-not-to-prosecute-soldiers>

<sup>22</sup> <https://www.justiceinspectors.gov.uk/hmic/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.pdf>

<sup>23</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-39707105>

proposals, any investigations would be limited in scope to a mere desktop review unless new and compelling evidence can be found.

We are strongly of the opinion that all routes to justice should in fact be opened up even further, which is what the victims and survivors hoped the SHA mechanisms would do.

We would also like to address the dangerous disinformation which is central to the 'witch hunt' narrative; that prosecutions of former soldiers have resulted from a form of 'lawfare' being pursued by lawyers in Northern Ireland seeking financial benefit. In the initial stages of the investigative and prosecutorial process the only lawyers who are those involved are those representing the Public Prosecution Service.

Where investigations and/or prosecutions take place into deaths, including those caused by the British Army/RUC, the family of the victim has no right to legal representation and legal aid is *not* available.

If a prosecution proceeds against a serving or former soldier, the defendant will have all of his legal costs covered by the Ministry of Defence who engage private law firms usually based in London.

In a March 2019 letter to former soldiers then Defence Secretary Gavin Williamson MP guaranteed that soldiers will be entitled to retain their own lawyers "*without limit of time or cap on expenditure.*" The soldiers will not be means tested nor required to contribute to their own legal costs.<sup>24</sup>

Contrary to the disinformation disseminated by some Tory MPs and sections of the tabloid press none of those firms involved in 'legacy' cases representing the next of kin of the deceased in the North receive any remuneration whatsoever when former soldiers are prosecuted.

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<sup>24</sup> <https://www.irishtimes.com/news/crime-and-law/bloody-sunday-case-british-ministry-of-defence-to-pay-for-soldiers-legal-fees-1.3824850>

If the allegation is that the Director of Public Prosecutions and/or his staff have initiated prosecutions that do not pass the dual test for prosecution and are, in some ill-defined way, 'vexatious' then those making the allegation should make a criminal complaint to the police.

## **Conclusions**

For the reasons outlined above, PFC submit that the proposals outlined by the Secretary of State on 18th March 2020 will, once again, fail to meet the needs of victims and survivors and their families. The UK government continue to demonstrate a complete lack of commitment to respecting the rights enshrined under ECHR and GFA, and shows contempt for the domestic, national and international courts who clearly state that families have a right to an effective, independent investigation into the death of their loved one(s). Their only real concern, it is clear, is protecting their armed forces from scrutiny and the rule of law.

Those victims and survivors who choose to contribute to the 2018 consultation did so in good faith. They shared their thoughts and experiences arising from one the darkest periods of our history and gave personal testimony about the most painful moment in their lives, the violent death of their mother, father, son, daughter, brother or sister. This was not an easy thing to do, and it is insulting that their informed opinions are callously disregarded and ignored.

Successive Chief Constables have intimated that policing the past has the potential to undermine public confidence and trust in the PSNI. What the British government is proposing will not only undermine confidence and trust in policing, but all justice institutions. By abandoning SHA, the British government abandons victims and survivors, and any hope of genuine reconciliation.

**We submit that this Committee recommends that the proposals should be scrapped and the SHA mechanisms established without delay.**

*1 June 2020*