

Summary of Recommendations

The Northern Ireland Human Rights Commission (NIHRC):

- 2.9** advises that the UK Government comprehensively consults on whether the new direction set out in the Ministerial Statement meets the needs of victims, survivors and their families and is confident that the proposed way forward is compliant with Articles 2, 3 and 13 ECHR.
- 2.13** recommends that the implementation of the Stormont House Agreement commitment to a comprehensive Mental Trauma Service is realised without any further delay.
- 2.14** recommends that the Mental Trauma Service is adequately resourced and that those funds are ring-fenced to enable this service to meet the needs of victims to give effect to the State obligations to provide rehabilitation, as a form of effective remedy.
- 2.24** recommends that a prompt decision is taken on how to finance the Victims' Payment Scheme effectively and immediate steps are taken thereafter to fully implement the Scheme.
- 2.25** recommends that the Scheme is regularly monitored and evaluated to ensure it is delivered in a human rights compliant manner.
- 2.27** recommends that any specific advocate counsellor or other additional provision to support victims and survivors should be realised without further delay.
- 2.31** recommends that the UK Government provides a clear

statement on how it intends to progress its commitment in the Stormont House Agreement to consider statements of acknowledgement.

3.11 advises that it is deeply concerned that the new legacy body proposed by the UK Government will not be compliant with Article 2 ECHR.

3.16 advises that Article 3 ECHR cases do not necessarily have to be conducted by the new legacy body, but they should not be forgotten and should be appropriately dealt with by an Article 3 ECHR compliant mechanism.

4.5 advises that the UK Government's new proposals are a radical departure from the Stormont House Agreement and the draft Stormont House Agreement Bill. The NIHRC recommends the UK Government set out in detail how the new arrangements will work and meet human rights obligations and then extensively consults with key stakeholders on those arrangements.

5.5 recommends that the new legacy body should have the remit to ensure that all previous investigations into 'Troubles-related' deaths are Article 2 ECHR compliant. This should include the ability to assess the compliance of cases completed by the Historical Enquiries Team, Legacy Investigations Branch and the Police Ombudsman NI and the ability to re-investigate if non-compliance is identified.

5.11 advises that all investigations by the new legacy body must in line with Article 2 ECHR principles that constitute an effective investigation.

6.3 advises that the accelerated release scheme should be extended to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973, including the security forces.

6.8 advises that any steps regarding the investigation or

prosecution of veterans should not amount to an amnesty, including the introduction of a statute of limitations or other undue or insurmountable barriers to prosecution for human rights violations and abuses, such as violations of Articles 2 and 3 ECHR. Arrangements such as those contained in the Sentencing Review Act could be applied after any prosecutorial process.

1.0 Introduction

- 1.1 The Northern Ireland Human Rights Commission (the NIHRC), pursuant to section 69(1) the Northern Ireland Act 1998, reviews the adequacy and effectiveness of law and practice relating to the protection of human rights. In accordance with this function, the following advice is submitted to the Northern Ireland Affairs Committee as evidence to its inquiry on the UK Government's proposals to address the legacy of the Troubles in Northern Ireland.
- 1.2 This submission considers the questions posed by the NI Affairs Committee under representative headings.

2.0 Needs of Victims, Survivors and their Families

Effective remedy

- 2.1 The United Nations (UN) principles and guidelines on the right to a remedy identify a number of different remedies – restitution, compensation, rehabilitation, satisfaction and non-repetition.
- 2.2 Restitution is restoring the victim or survivor to the original situation before a violation occurred.¹

¹ UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law 2005, at para 19.

- 2.3 Compensation is providing economic damages “as appropriate and proportional to the gravity of the violation and the circumstances of each case”.²
- 2.4 Rehabilitation can include medical and psychological care, legal services and social services.³
- 2.5 Satisfaction can include measures “aimed at the cessation of continuing violations”, “verification of the facts and full and public disclosure of the truth”, “judicial and administrative sanctions against persons liable for the violations”, public apology, or commemoration.⁴
- 2.6 Non-repetition can include “ensuring that all civilian and military proceedings abide by international standards of due process, fairness and impartiality”, “strengthening the independence of the judiciary”, providing human rights education to law enforcement officials and security forces, and “promoting the observance of codes of conduct and ethical norms... by public servants”.⁵
- 2.7 The needs of victims, survivors and their families and their desired remedies can differ according to the circumstances, individual or family involved. Some will wish to have one specific remedy while others may want a combination of remedies. A victim, survivor or family (or even individual family members) affected by the same incident may not agree on their desired remedy. However, Article 13 of the European Convention on Human Rights (ECHR) (right to an effective remedy) is clear that any remedy should be effective.
- 2.8 Alongside the needs of victims, survivors and their families, Articles 2 (right to life) and 3 (freedom from torture) ECHR are also clear that independent, timely, effective and thorough investigations with an outcome should be conducted into suspected violations of these rights.⁶ Such investigations should entail keeping families aware of

² Ibid, at para 20.

³ Ibid, at para 21.

⁴ Ibid, at para 22.

⁵ Ibid, at para 23.

⁶ *Jelic v Croatia* (2014) ECHR 809, at para 63; *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325.

progress with investigations while taking into account other individuals own Article 2 rights.

- 2.9 The NIHRC advises that the UK Government comprehensively consults on whether the new direction set out in the Ministerial Statement meets the needs of victims, survivors and their families and is confident that the proposed way forward is compliant with Articles 2, 3 and 13 ECHR.**

Mental Trauma Service

- 2.10 The Stormont House Agreement included a commitment to take steps to ensure access to high quality services for Victims and Survivors including a comprehensive Mental Trauma service, seeking an acceptable way forward on the proposal for a pension for severely physically injured victims and advocate-counsellor assistance.⁷ This service, as recommended by the Commission for Victims and Survivors, is to be implemented and operated within the National Health Service, working closely with the Victims and Survivors Service, and those who work directly with victims and survivors. The criteria to access should be centred on a health-based needs assessment, applied without discrimination. It is unclear if this service is intended solely for victims of the conflict, or any person deemed in need of such therapeutic intervention.
- 2.11 This service, identified in the Stormont House Agreement as a specific need for victims, survivors and their families is not committed to within the UK Government's proposals.
- 2.12 The NIHRC recognises the current provision of services to victims and survivors through the Victims and Survivors Service. The relationship between the existing and the proposed services is not clear. The UK Government needs to ensure that the full range of rehabilitative measures available to victims and survivors is adequate and appropriate.

⁷ Stormont House Agreement, 23 December 2014, at paras 26-29.

2.13 The NIHRC recommends that the implementation of the Stormont House Agreement commitment to a comprehensive Mental Trauma Service is realised without any further delay.

2.14 The NIHRC recommends that the Mental Trauma Service is adequately resourced and that those funds are ring-fenced to enable this service to meet the needs of victims to give effect to the State obligations to provide rehabilitation, as a form of effective remedy.

Victims' Payments Scheme

2.15 The NIHRC welcomes the progress made on introducing a "pension for the severely physically injured victims in Northern Ireland",⁸ through the Victims' Payments Scheme.

2.16 The Secretary of State for NI was required to "establish a scheme under the law of NI which provides for one or more payments to be made to, or in respect of, a person who has sustained an injury as a result of a Troubles-related injury".⁹ Regulations were required to be made before end of January 2020 and to come into force before end of May 2020.

2.17 Following a consultation on the proposed victims' payments scheme in November 2019,¹⁰ the regulations were passed by Parliament on 31 March 2020. The regulations establish a Victims' Payments Board, which must have regard to:

- a) the need to prioritise, and be responsive to, the needs of victims of Troubles-related incidents;
- b) the need to be transparent and to communicate effectively with the public and victims of Troubles-related incidents;

⁸ Ibid, at para 28.

⁹ Sections 10(1) and 10(2), NI (Executive Formation etc) Act 2019.

¹⁰ Letter from NI Human Rights Commission to NI Office, 26 November 2019.

- c) the need for the Scheme to be straightforward and simple to navigate;
- d) the need for applications to be determined without delay;
- e) the need for personal data to be handled sensitively.¹¹

2.18 A person is entitled to victims' payments in respect of injury caused by a Troubles-related incident if:

- the injury results in permanent disablement;
- the assessed degree of relevant disablement amounts to not less than 14 percent;
- the Troubles-related incident took place in the UK or anywhere in Europe at a time when the applicant was a British citizen, born in Northern Ireland, in service to the Crown, or was a close relative accompanying a person in service to the Crown;
- the Troubles-related incident took place on or after 1 January 1966 and before 12 April 2010.

2.19 A person's injury may only be considered to be caused by a Troubles-related incident if it is suffered by that person when:

- present at a Troubles-related incident;
- present in the immediate aftermath of a Troubles-related incident in which a loved one died or suffered an injury;
- responding, in the course of employment, to a Troubles-related incident, in which the person reasonably believed a loved one had died or suffered significant injury.¹²

2.20 A person is not entitled to victims' payments in relation to a Troubles-related incident where the person has a conviction (whether spent or not), and that conviction was in respect of conduct which caused, wholly or in part, that incident.¹³ It is the

¹¹ Regulation 4(1), The Victims' Payments Regulations 2020.

¹² Regulation 7(1), The Victims' Payments Regulations 2020.

¹³ Regulation 6(1), The Victims' Payments Regulations 2020.

Board's discretion, aided by guidance from the Secretary of State for NI, as to whether issuing a victims' payment to a person with a conviction is inappropriate.¹⁴

- 2.21 Posthumous applications for victims' payments can be made,¹⁵ and, on the death of a person entitled to victims' payments, a nominated person is entitled to such payments for the period of 10 years beginning with the date of the death.¹⁶
- 2.22 The Board has discretion on how it prioritises applications based on evidence available, age of the applicant and health of the applicant.¹⁷
- 2.23 The NIHRC welcomes the Victims' Payments Scheme, but is concerned that the Scheme will not be established as planned at end of May 2020 and could be subject to further delay, if a prompt and workable decision on how the Scheme will be financed is not reached.¹⁸
- 2.24 The NIHRC recommends that a prompt decision is taken on how to finance the Victims' Payment Scheme effectively and immediate steps are taken thereafter to fully implement the Scheme.**
- 2.25 The NIHRC recommends that the Scheme is regularly monitored and evaluated to ensure it is delivered in a human rights compliant manner.**

Advocate-counsellor assistance

- 2.26 The continued commitment to and format of advocate-counsellor assistance set out in the Stormont House Agreement remains unclear and should be further clarified. The role should be informed by human rights obligations, which includes rehabilitation within the victims' right to a remedy that embraces "medical and psychological care as well as legal and social services".¹⁹ To ensure that victims

¹⁴ Regulations 6(2)-6(7), The Victims' Payments Regulations 2020.

¹⁵ Regulation 10, The Victims' Payments Regulations 2020.

¹⁶ Regulation 9, The Victims' Payments Regulations 2020.

¹⁷ Regulation 11, The Victims' Payments Regulations 2020.

¹⁸ Jayne McCormack, 'Troubles' pension: "Disappointment" over delay of scheme', *BBC News*, 21 May 2020.

¹⁹ UN General Assembly, 'Guidance Note of the Secretary-General: UN Approach to Transitional Justice' (UNGA, 2010), at 9.

receive appropriate support the design of measures should include the participation of those victims affected and facilitate participation.²⁰

2.27 The NIHRC recommends that any specific advocate counsellor or other additional provision to support victims and survivors should be realised without further delay.

Statement of acknowledgments

2.28 Another commitment from the Stormont House Agreement is that “in the context of the work of the Implementation and Reconciliation Group, the UK and Irish Governments will consider statements of acknowledgement and would expect others to do the same”.²¹

2.29 Under human rights law, public apologies form an important part of satisfaction within the right to a remedy.²² Providing a remedy to victims of human rights violations and abuses by state and non-state actors can be assisted through processes of acknowledging and apologising. Apologies are an important element contained within victims’ rights, but alone are not enough to satisfy human rights obligations. Acknowledgements could also take the form of truth-telling, meeting a human rights-based approach as part of measures to fulfil the right to the truth and the historical truth. The ECtHR has recognised that “it is an integral part of freedom of expression to seek historical truth”²³ and has highlighted the “efforts that every country must make to debate its own history openly and dispassionately”.²⁴

²⁰ E/C.12/2000/4, ‘UN Committee on Economic, Social and Cultural Rights General Comment 14: The Right to the Highest Attainable Standard of Health’, 11 August 2000, at paras 11, 17, and 54.

²¹ Stormont House Agreement, 23 December 2014, at para 53.

²² E/CN.4/2005/102/Add.1, ‘Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher’, 8 February 2005, at para 48.

²³ *Chauvy and Others v. France* (2004) ECHR 295, at para 69; *Fatullayev v. Azerbaijan* (2010) ECHR 623, at para 87; *Dzhugashvili v. Russia* (2014) ECHR 1448, at para 33.

²⁴ *Monnat v. Switzerland* (2006) ECHR 1206, at para 64; *Chauvy and Others v. France* (2004) ECHR 295, at para 69; *Dzhugashvili v. Russia* (2014) ECHR 1448, at para 33.

2.30 It does not appear that the Implementation and Reconciliation Group will now be established or how statements of acknowledgement will be considered within any other body.

2.31 The NIHRC recommends that the UK Government provides a clear statement on how it intends to progress its commitment in the Stormont House Agreement to consider statements of acknowledgement.

3.0 Human Rights Compliance of New Proposed Legacy Body

3.1 The Belfast (Good Friday) Agreement 1998 placed an emphasis on the need for laws and practices relevant to Northern Ireland to be human rights compliant, particularly concerning the ECHR.²⁵ This approach was incorporated into domestic law across the United Kingdom (UK) via the Human Rights Act 1998, which came into effect on 2 October 2000.

3.2 On 23 December 2014, the Stormont House Agreement outlined agreed measures aimed at dealing with the legacy of the past.²⁶ This included a structure for the effective investigation of conflict related deaths, including a Historical Inquiries Unit.²⁷ The UK Government had committed within the financial annex of the Stormont House Agreement to provide up to £150 million over 5 years to help fund the bodies to deal with the past.²⁸

3.3 In May 2018, the NI Office launched a consultation entitled Addressing the Legacy of NI's Past, seeking views on draft legislation to establish the various legacy bodies proposed within the Stormont House Agreement.²⁹ The NIHRC broadly welcomed the draft legislation, but raised that the provisions contained within the

²⁵ Belfast (Good Friday) Agreement 1998, at Strand One, para 5.

²⁶ Stormont House Agreement, 23 December 2014.

²⁷ Ibid, at para 30.

²⁸ NI Office, 'Stormont House Agreement: Financial Annex' (NIO, 2014), at 1. The Stormont House Agreement includes a further broad financial commitment to all sections covered within the Agreement. It is stated within the Financial Annex that 'the total value of the Government's package is additional spending power of almost £2 billion'.

²⁹ NI Office, 'Addressing the Legacy of NI's Past: Consultation Paper' (NIO, 2018).

draft Bill were not fully human rights compliant in law and practice. In particular, the NIHRC raised concerns about the remit, resourcing, independence and use of closed material proceedings regarding the Historical Investigations Unit. The NIHRC recommended further consideration of the remits and operations of the Independent Commission of Information Retrieval, Oral History Archive and Implementation and Reconciliation Group. The NIHRC welcomed the proposals in the draft Bill to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973 and confirmation that the accelerated release scheme extends to the security force personnel.³⁰

3.4 In July 2019, the NI Office published a summary of the 17,000 responses to the legacy consultation. The document stated it would be used to inform the UK Government's next steps, which were to be set out "in due course".³¹ The overarching message from the majority of respondents was "the current system needs to be reformed".³² The NI Office accepted it has "an obligation to seek to address the legacy of the past in a way that builds for the future... [and confirmed that the UK] Government remains fully committed to the implementation of the Stormont House Agreement".³³

3.5 On 18 March 2020, the Secretary of State for Northern Ireland, Brandon Lewis MP, issued a written Ministerial Statement on addressing Northern Ireland Legacy Issues. The statement outlined "it is clear that, while the principles underpinning the draft Bill as consulted on in 2018 remain, significant changes will be needed to obtain a broad consensus for the implementation of any legislation".

3.6 It continues that:

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

³⁰ NI Human Rights Commission, 'Submission to NIO's Consultation on Addressing the Legacy of NI's Past' (NIHRC, 2018).

³¹ NI Office, 'Press Release: Government Publishes Summary of Responses to Legacy Consultation', 5 July 2019

³² NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses', (NIO, 2019), at 4.

³³ Ibid.

view is that 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.

3.7 The statement also sets out that:

the Government will ensure that the investigations which are necessary are effective and thorough, but quick, so we are able to move beyond the cycle of investigations that has, to date, undermined attempts to come to terms with the past.

3.8 Without the necessary fine-grained detail, it is difficult to draw a definitive conclusion on how the new approach will meet the non-derogable Article 2 ECHR (right to life) investigatory requirements. Nonetheless, the NIHRC is deeply concerned that the new approach to legacy investigations may not readily meet the requirements of Article 2 ECHR.

3.9 In practice, an Article 2 investigation must be effective.³⁴ Moreover, an investigation's conclusions must be based on thorough, objective and impartial analysis of all the relevant elements.³⁵ How an investigative process can be 'effective and thorough, but quick' as outlined in the statement appears to be counter-intuitive particularly so, in cases which have not yet been subject to a previous investigation.

3.10 Any failure to achieve an Article 2 compliant process is likely to lead to litigation and further delays, an outcome which is not in the

³⁴ *Jelic v Croatia* (2014) ECHR 809, at para 63.

³⁵ *Kolevi v Bulgaria* (2009) ECHR 1838, at para 201; *Armani da Silva v UK* (2016) ECHR 314, at para 234.

interests of anyone who has been adversely impacted by the conflict in Northern Ireland. The longer the delay, the greater the frustration, pain and anger among those affected whether they seek justice, truth, reparations or other closure. Not for the first time, the NIHRC has highlighted the unacceptable nature of this protracted delay. These views have been supported by the Council of Europe's Committee of Ministers, which is due to meet again in June 2020 to discuss the *McKerr* group judgments by the ECtHR.³⁶

3.11 The NIHRC advises that it is deeply concerned that the new legacy body proposed by the UK Government will not be compliant with Article 2 ECHR.

3.12 Acknowledging outstanding human rights violations and abuses beyond Article 2 ECHR, the Stormont House Agreement provided that:

the UK and Irish governments recognise that there are outstanding investigations and allegations into Troubles-related incidents, including a number of cross-border incidents. They commit to co-operation with all bodies involved to enable their effective operation, recognising their distinctive functions, and to bring forward legislation where necessary.³⁷

3.13 There are 'Troubles-related' incidents that caused mental and physical injuries that may engage Article 3 ECHR (freedom from torture or to inhuman or degrading treatment or punishment). Whether Article 3 is engaged or not depends on the circumstances of the case. To determine this a number of factors should be considered the treatment on an individual, and the victim's sex, age and state of health.³⁸ Once the minimum threshold is achieved, the level of severity will determine whether the treatment is torture, inhuman or degrading treatment.³⁹

³⁶ CM/Notes/1340/H46-30, 'Council of Europe Committee of Ministers: *McKerr Group v the UK – Supervision of the Execution of the European Court's Judgments*', 14 March 2019; CoE Committee of Ministers, '*McKerr Group v UK (Application No 28883/95) – Supervision of the Execution of the Court's Judgments*', 1259th Meeting, 7-8 June 2016.

³⁷ Stormont House Agreement, 23 December 2014, at para 55.

³⁸ *Ireland v UK* (1980) 2 EHRR 25, at para 162.

³⁹ *Ibid*, at point 4 of reasoning.

- 3.14 Where Article 3 ECHR is engaged, an investigation is required that follows the same principles as an Article 2 investigation.⁴⁰ This includes in relation to its purpose and public scrutiny, that the investigation is independent, thorough and conducted with reasonable expedition.⁴¹
- 3.15 The NIHRC notes that there are instances when a serious violation or abuse of human rights may engage a number of rights, including the right to life and as a result may fall within the new legacy body's remit. However, for the serious violations and abuses that do not fall within the new legacy body's remit, there is no apparent mechanism that fulfils the UK Government's human rights obligations to investigate such serious violations and abuses, in particular those engaging the right to freedom from torture, cruel, inhuman or degrading treatment or punishment.
- 3.16 The NIHRC advises that Article 3 ECHR cases do not necessarily have to be conducted by the new legacy body, but they should not be forgotten and should be appropriately dealt with by an Article 3 ECHR compliant mechanism.**

4.0 Difference with Draft Stormont House Agreement Bill and Merits of Consolidating the Bodies Envisaged into a Single Organisation

- 4.1 The Ministerial statement on 18 March 2020 proposes 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.

⁴⁰ *Assenov and Others v Bulgaria* (1998) ECHR 98, at para 102.

⁴¹ *Mocanu and Others v Romania* (2014) ECHR 958, at paras 319-325.

- 4.2 In addition to serious doubts about the impact of such an approach on an effective and thorough investigation, the NIHRC is concerned that consolidating the bodies will lead to a loss of focus on specific areas. This in turn will lead to an ineffective implementation of the aims and objectives of each individual approach identified in the Stormont House Agreement.
- 4.3 Notably, there is no longer mention of the various other mechanisms identified in the Stormont House Agreement and subsequent draft Stormont House Agreement Bill that were aimed at broader learning and societal reconciliation, such as the Oral History Archive and Implementation and Reconciliation Group.
- 4.4 Furthermore, unlike the draft Stormont House Bill, which underwent a public consultation process, the UK Government's radical new direction has been developed without consulting stakeholders.
- 4.5 The NIHRC advises that the UK Government's new proposals are a radical departure from the Stormont House Agreement and the draft Stormont House Agreement Bill. The NIHRC recommends the UK Government set out in detail how the new arrangements will work and meet human rights obligations and then extensively consults with key stakeholders on those arrangements.**

5.0 Proposed Approach to Re-investigating Cases

- 5.1 To date, investigations into 'Troubles-related' deaths have been conducted by the former Historical Enquiries Team, the Police Ombudsman NI and the Police Service NI's Legacy Investigations Branch. Some investigations conducted were Article 2 compliant while others were not. In addition, some cases have not been subject to any form of investigation.
- 5.2 It is clear that cases that have not had any form of investigation should be subject to an Article 2 compliant investigation. It also follows that all 'Troubles-related' investigations conducted should be assessed for whether they were human rights compliant, for more straight forward cases this can be a desktop exercise. Cases that

are identified as not being subject to an Article 2 compliant investigation, should be added to the new legacy body's caseload to remedy this.

5.3 The ability and likelihood of identifying 'compelling new evidence' in a case never significantly investigated in the first place also, seems on the surface, a formidable challenge.

5.4 There is no doubt that the window for obtaining new evidence is closing. Nonetheless, the European Court of Human Rights (ECtHR) is clear that the sheer number of cases pending an effective investigation does not pardon the State from its investigatory obligations. For example, Turkey attempted to argue that it could not be expected to deal with in excess of 500 investigations at any one time. The ECtHR, while expressing it was mindful of obstacles presented, confirmed that it remained incumbent on a contracting State to meet the Article 2 ECHR investigatory requirements. As a result, having to investigate a large number of cases simultaneously was not a basis for investigations to be ineffective and subject to excessive delays.⁴²

5.5 The NIHRC recommends that the new legacy body should have the remit to ensure that all previous investigations into 'Troubles-related' deaths are Article 2 ECHR compliant. This should include the ability to assess the compliance of cases completed by the Historical Enquiries Team, Legacy Investigations Branch and the Police Ombudsman NI and the ability to re-investigate if non-compliance is identified.

5.6 The Ministerial Statement proposes that:

only cases in which 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

⁴² *Mahmut Kaya v Turkey* (2000) ECHR 129.

be possible - though family reports would still be provided to the victims' loved ones. Such an approach would give all participants the confidence and certainty to fully engage with the information recovery process.

5.7 Conflating the investigation process with a prosecutorial analysis goes against the grain of keeping investigations and the assessment of the evidence against a prosecutorial standard separate. How these two procedures can be readily combined in a single process is not manifestly apparent. It also indicates a misunderstanding of how Article 2 compliant investigations are effectively implemented.

5.8 The ECtHR confirms that:

it cannot be the case that any assertion or allegation can trigger a fresh investigative obligation under Article 2 of the Convention. Nonetheless, given the fundamental importance of this provision, the State authorities must be sensitive to any information or material which has the potential either to undermine the conclusions of an earlier investigation or to allow an earlier inconclusive investigation to be pursued further.⁴³

5.9 The ECtHR further provides that:

where there is a plausible, or credible allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures.⁴⁴

5.10 Thus, achieving prosecution can be the purpose of a human rights compliant investigation. However, the likelihood of prosecution is not the sole or determinative factor as to whether an investigation should be instigated. The critical factor should be whether or not a death has been subject to a human rights compliant investigation – i.e. has an investigation taken place that is prompt, reasonably expedited, independent, impartial, subject to effective public

⁴³ *Brecknell v UK* (2007) ECHR 989, at para 70.

⁴⁴ *Ibid*, at para 71.

scrutiny and follows all plausible or credible lines of inquiry. If not, the UK Government has an obligation to ensure one is conducted.

5.11 The NIHRC advises that all investigations by the new legacy body must in line with Article 2 ECHR principles that constitute an effective investigation.

6.0 Legislative Steps Regarding Veterans

Accelerated release scheme

- 6.1 The NIHRC welcomed the proposals in the draft Stormont House Agreement Bill to extend the accelerated release scheme to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973 and confirmation that the accelerated release scheme extends to the security forces personnel.⁴⁵ It is unclear if the UK Government intends to continue with this proposal.
- 6.2 Researchers at Queen’s University Belfast and the Committee of the Administration of Justice have considered such proposals in detail, including from a human rights perspective.⁴⁶
- 6.3 The NIHRC advises that the accelerated release scheme should be extended to those serving sentences for related offences committed on or after 1 January 1968 and before 8 August 1973, including the security forces.**

Statute of Limitations

- 6.4 The UN Committee against Torture (UN CAT Committee) recommended the UK Government “refrain from enacting amnesties or statutes of limitations for torture or ill-treatment”, which are inconsistent with UN Convention against Torture.⁴⁷
- 6.5 The UN CAT Committee’s recommendations are supported by the UN Human Rights Committee,⁴⁸ and Pablo de Greiff, the then UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and guarantees of non-repetition.⁴⁹

⁴⁵ NI Human Rights Commission, ‘Submission to NIO’s Consultation on Addressing the Legacy of NI’s Past’ (NIHRC, 2018).

⁴⁶ Kieran McEvoy et al, ‘Prosecutions, Imprisonment and the Stormont House Agreement and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland’ (QUB and CAJ, 2020).

⁴⁷ NI Human Rights Commission, ‘Submission to NIO’s Consultation on Addressing the Legacy of NI’s Past’ (NIHRC, 2018), at para 41(f).

⁴⁸ CCPR/C/GBR/CO/7, ‘UN Human Rights Committee Concluding Observations on the Seventh Periodic Report of the UK of Great Britain and NI’, 17 August 2015, at para 11(b).

⁴⁹ A/HRC/34/62/Add.1, ‘Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence, Pablo de Greiff on his Mission to the UK of Great Britain and NI’, 17 November 2016, at para 39.

- 6.6 There have been a number of calls for the introduction of a statute of limitations to protect from prosecution members of the Armed Forces who served in NI.⁵⁰ These calls have been supported by a previous Secretary of State for NI, Karen Bradley,⁵¹ and the current Prime Minister.⁵² The Queen’s Speech in December 2019 also referenced bringing “forward proposals to tackle vexatious claims that undermine our Armed Forces”.⁵³
- 6.7 The issue of a statute of limitations was not included in the draft NI (Stormont House Agreement) Bill consultation. However, it was raised by a number of respondents, the majority of whom agreed that a statute of limitations would be inappropriate for ‘Troubles-related’ matters.⁵⁴
- 6.8 The NIHRC advises that any steps regarding the investigation or prosecution of veterans should not amount to an amnesty, including the introduction of a statute of limitations or other undue or insurmountable barriers to prosecution for human rights violations and abuses, such as violations of Articles 2 and 3 ECHR. Arrangements such as those contained in the Sentencing Review Act could be applied after any prosecutorial process.**
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⁵⁰ In April 2017, the Defence Select Committee recommended the enactment of a statute of limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces. In November 2017, Richard Benyon MP introduced a Private Members’ Bill, the Armed Forces (Statute of Limitations) Bill, which would create statutory limitations on court proceedings against current and former members of the Armed Forces for certain alleged offences committed during military operations or similar circumstances. However, this Bill failed to complete its legislative passage in the parliamentary session 2017-19 and therefore cannot progress further. In July 2018, the Secretary of State for Defence announced that a dedicated team within the Ministry of Defence had been established to consider whether serving and former personnel are receiving adequate legal protection and certainty. In May 2019, the Secretary of State for Defence stated that her Department would share with the Secretary of State for NI its considerable experience of the practical difficulties of investigating historical allegations from Iraq and Afghanistan and the unintended consequences that resulted from it, and the impact this has had on Armed Forces personnel. Veterans’ voices need to continue to be heard and the lessons of Iraq Historical Allegations Team need to be learned. See House of Commons Defence Select Committee, ‘Investigations into Fatalities in NI involving British Military Personnel: Seventh Report of Session 2016–17 – HC 1064’, 26 April 2017; Hansard, ‘Armed Forces Veterans: Historic Allegations Oral Answers to Questions – Defence – in the House of Commons’, 9 July 2018; ‘Legal Protections and Support for Armed Forces Personnel and Veterans: Written Statement – HCWS1575: Penny Mordaunt’, 21 May 2019.

⁵¹ Hansard, ‘The Secretary of State for Northern Ireland (Karen Bradley) Point of Order – Volume 655, Col 946’, 6 March 2019.

⁵² Conservatives, ‘Press Release: Conservatives in general election manifesto pledge to end ‘unfair trials’ for Northern Ireland veterans’, 13 November 2019.

⁵³ The speech continued that the UK Government committed to continuing “to seek better ways of dealing with legacy issues that provide better outcomes for victims and survivors”, though no further detail was provided. See Gov.UK, ‘Press Release: Queen’s Speech December 2019’, 19 December 2019.

⁵⁴ NI Office, ‘Addressing the Legacy of NI’s Past: Analysis of the Consultation Responses’, (NIO, 2019), at 4.

1 June 2020