Terms of Reference

1. This brief submission addresses the committee's terms of reference in two respects; *first*, the equity of the approach to the re-investigation of cases and *second*, whether the proposals will promote reconciliation in Northern Ireland. Specifically, this evidence offers some observations on the following passage of the Written Statement made by the Secretary of State for Northern Ireland;

> *'[O]nly 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 be possible....*[1]

2. Beyond the Written Statement on the 18th of March 2020, there has been no further detail provided. A significant volume of evidence was submitted in response to the NIO consultation in May 2018.[2] To avoid repeating views already (and better) expressed elsewhere, I signal such evidence in the references. Similarly, I make no remarks on any compliance with the Stormont House Agreement (SHA), the Good Friday/Belfast Agreement (GFA) or the European Convention on Human Rights (ECHR).[3]

Executive Summary

- The threshold of 'new compelling evidence' requires further clarity and detail as to its meaning, application and implementation. In any event, transparent criteria or guidelines that would illuminate the exercise of such discretion is required.

- The Rt Hon Secretary's remarks conflate a decision to bring charges, with the initial decision to investigate. In most cases it is not possible to know whether there is a realistic prospect of a prosecution ('conviction') without carrying out an investigation.

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[1] The Rt Hon Secretary of State for Northern Ireland (Brandon Lewis) Written Statement 18 March 2020.
[2] Northern Ireland Office, *Addressing the Legacy of Northern Ireland's Past* (July 2019).
[3] See, indicatively, Committee on the Administration of Justice, *Prosecutions, Imprisonment and the Stormont House Agreement: A Critical Analysis of Proposals on Dealing with the Past in Northern Ireland* (April 2020) <https://caj.org.uk/2020/04/09/prosecutions-imprisonment-and-the-sha/>

- Investigations should adhere to more uniform and strict timescales and any 'final' decisions need to be fully representative of the views of victims. In practice this will require an elevated duty of candour, the provision of reasons and a victim's right to review scheme in respect of decisions not to prosecute. At the same time, it is worth contemplating a mechanism by which a decision *to* prosecute can also be reviewed.

Introduction

3. I am a senior lecturer in law at the University of Northumbria, Newcastle Upon-Tyne, United Kingdom. This evidence is submitted in my personal capacity and arises from research interests in prosecutorial discretion, conflict-affected societies and reconciliation.[4]

I) The Equity of the Approach to the Re-Investigation of Cases

4. The approach outlined by the Rt Hon Secretary of State (*para.2 above*), raises the following concerns.

5. **First,** '[N]ew compelling evidence' now appears to be the benchmark in determining whether there is a realistic prospect of a prosecution. However, many questions remain unanswered; What is the threshold for 'new' and 'compelling'? Does this mean newly discovered evidence or simply existing evidence that has now been re-evaluated? What is 'compelling' (compared to, say, 'sufficient') and who will decide the strength and type of evidence that would qualify? What of the normal public-interest stage considerations that prosecutors are entitled to consider, especially those factors that strongly tend in favour of a prosecution?[5]

6. These questions need to be addressed. Given the decisions are so politically contentious, including among victims, and that the decisions purport to be final, the development of guidelines and/or criteria to illuminate how such discretion is to be exercised is required (at the very least).

7. **Second,** the proposal places the cart before the horse in the following respects. Only upon a police investigation can any such 'new compelling evidence' be discovered and it is not clear what is less than a 'full' police investigation? Furthermore, it may not be possible to know whether there is a realistic prospect of '*conviction*' without a prior investigation to establish the evidence base upon which a decision to prosecute

[4] My specific research interests are in international criminal justice and transitional justice, particularly the work of the International Criminal Court. See https://www.northumbria.ac.uk/about-us/our-staff/k/birju-kotecha/

[5] Public Prosecution Service (PPS), *Code for Prosecutors*, from para 4.10 < https://www.ppsni.gov.uk/sites/ppsni/files/publications/PPS%20Code%20for%20Prosecutors.pdf>

can be made. The reference to 'realistic prospect of prosecution' therefore conflates (or confuses) the end of the investigative process when a decision to charge is made, with the initial determination of whether there is a case to answer, when a decision to investigate is made.[6]

8. More broadly, the proposal amounts to a significant interference with the principle of prosecutorial independence. The extent of prosecutorial discretion would be heavily curtailed. Prosecutors are ministers of justice and communities' faith in their independence is essential. In that light, one needs to acknowledge that the proposals are somewhat contaminated by previous debates about a statute of limitations exclusively protecting British military personnel forces[7] leading to the Overseas Operation (Service Personnel and Veterans Bill).[8] This perception may be further entrenched as the touchstone of 'new compelling evidence' risks privileging protection (or even offers *de facto* amnesty) to former British military personnel, precisely because many of those cases were already investigated (however ineffectively) at the time.[9] Given the challenges of building a case, especially when many of alleged military incidents were several decades ago (e.g. 1969-74), the prospect of discovering compelling evidence is likely to be relatively slim.

9. Ultimately, equity is about fair and even-handed treatment of cases. Like cases ought to be treated alike in light of their various features (fact pattern, culpability etc). Any differential treatment ought to be properly justified in proportion to the differences between cases. The way in which the new body exercises its discretion and subsequently explains it is going to require significant deliberation. Ultimately, disparities in treatment that are not justified are vulnerable to charges of bias and discrimination—precisely the type of public debate that will inhibit the prospect of reconciliation in Northern Ireland.

II) <u>Reconciliation in Northern Ireland</u>

10. Reconciliation is a contested notion. It can take decades. Leaving academic debate aside—at its core—reconciliation involves the repair and restoration of people's relationships, and the rebuilding of trust. Such trust, critically, needs to be rebuilt

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[6] The current PPS evidential test in Northern Ireland refers to a reasonable prospect of conviction. The equivalent Crown Prosecution Service evidential test in England and Wales refers to a 'realistic' prospect of conviction.

[7] See the work of the House of Commons Defence Committee *Drawing a line: Protecting Veterans by a Statute of Limitations* Seventeeth Report of Session 2017-19 (22 July 2019)*; Investigation into fatalities in Northern Ireland involving British military personnel* Seventh Report of Session 2016-17 (24 April 2017).

[8] Overseas Operations (Service Personnel and Veterans) Bill (HC Bill 117) Part and Part 2 <https://publications.parliament.uk/pa/bills/cbill/58-01/0117/cbill_2019-20210117_en_2.htm#pt2-pb1-l1g8>

[9] Of course, the extent to which those investigation are Art. 2 ECHR compliant is a separate question. For a discussion on this see House of Commons Library Briefing Paper, *Investigation of former armed forces personnel who served in Northern Ireland* (1 April 2020) at 1.3 and a lengthy discussion in Northern Ireland Affairs Committee 'Oral Evidence: Consultation on implementation of the Stormont House Agreement, HC 1095.

between different affected communities (including victims). To that degree, reconciliation is a behavioural and psychological phenomenon that requires changes in attitudes towards those deemed to belong to an 'opposing side'.

11. Perceptions and reactions to prosecutions decisions are likely to be 'zero-sum'. In societies like Northern Ireland— marked by divisions along political and religious lines— a decision may well attract support in one affected community, but simultaneously trigger antipathy in the other(s). Research conducted in other conflict-affected societies that were once marked by identity-based violence suggest the same dilemma. [10]

12. In the short to medium term, any given decision may be deemed unfair by one community or another. The solution is not to seek mathematically equal numbers of prosecutions, as if to say equity is achieved by dolling out equal blame i.e. a balance in numbers of prosecutions across former military, loyalist, republican cases. This would be flawed, and risk collapsed trials to name only one problem. In any event, it is clear that simply citing numbers may only have a limited effect in influencing public perceptions.[11]

13. Much remains to be decided including the composition, processes and structure of any new body. However, any new body must acquire, build and earn a stable degree of community support, irrespective of whether its key decisions are deemed directly favourable or in their own interests.[12] Indeed, the more unfavourable the decision, the more important the perception that its decision-making procedure is, in fact, fair. [13] Developing a fair decision-making procedure that is consistent, impartial and duly representative can slowly help any new body establish its legitimacy. The following two suggestions may be areas to concentrate attention in respect of the decision to prosecute.

14. **First**, in respect of boosting consistency, ensure that there is a uniformity of times and lengths of investigations. This does not necessitate a cut-off or finite time-limit but, rather, a sense of pragmatism. It is quite clear that protracted and open-ended periods of investigation are both prejudicial to building a case *and* publicly damaging— as the aphorism goes: 'Justice delayed is justice denied'—and this applies whether one is the

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[10] See, indicatively, D F. Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia* (Oxford University Press 2018); M. Milanović, 'The Impact of the ICTY on the Former Yugoslavia: An Anticipatory Post-Mortem' (2016) 110 *American Journal of International Law* 233.

[11] The data does not support claims of bias or imbalance. Since 2011, the PPS has taken decisions in 26 legacy cases, 13 of which involve alleged offence conducted by republican paramilitaries, eight of which involve loyalist alleged offence and five involve former British military persons. See HoC Library Briefing Paper, *Investigation of former armed forces personnel who served in Northern Ireland* (1 April 2020) at 2.2. For an overview, see n(4) at 9-11.

[12] V.A. Baird, 'Building Institutional Legitimacy: The Role of Procedural Justice' (2001) 54 *Political Research Quarterly* 333–354.

[13] E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

victim or, indeed, the person who is the subject of the investigation. Developing proper timescales for differing sets of cases may well provide the requisite clarity and consistency. This is particularly important as delays invite antipathy from those who view them as a means to avoid contentious decisions, making it more difficult for people to accept those decisions once they are eventually made.

15. **Second,** ensure that decisions are fully representative of the views of victims. Any such 'final' decision should not prevent the prospect of a subsequent judicial review of the decision.[14] In that regard, the body, despite offering a final settlement of issues, should still accommodate a victim right to review scheme. [15] Such a scheme has an intrinsic value in ensuring that the procedure permits participation and dialogue with those most affected. It is also known to encourage better decision-making. Similarly, such a review scheme would fulfil a heightened duty of candour and ensure the full provision of reasons for decisions. In light of the finality of the decision, it is worth contemplating how decisions *to* prosecute might also be subject to a review mechanism (without necessarily enabling outside persons to trigger the mechanism).[16] For reasons of brevity, I omit any exploration of how such a scheme may operate.

Conclusion

16. The intention of this brief submission was to concentrate the committee's line of enquiry on how the critical decision, *when to prosecute, or, when to close a case*, is made. In doing so, it has offered some observations, and raised questions, about something that is integral to reconciliation in Northern Ireland.

1 June 2020

[14] For a Crown Prosecution Service Summary of Judicial Review see the *Appeals: Judicial Review of CPS Prosecuting Decision* (27 September 2019) available at < <https://www.cps.gov.uk/legal-guidance/appeals-judicial-review-cps-prosecuting-decisions>

[15] PPS, *Requesting a Review* available at <https://www.ppsni.gov.uk/requesting-review> See also PPS Code at para 4.69. See also the CPS version 'Victims' Right to Review Scheme' available at <https://www.cps.gov.uk/legal-guidance/victims-right-review-scheme>