

Introduction

In 2018 the Secretary of State for Northern Ireland, Karen Bradley MP, opened a public consultation on the legacy institutions put forward as part of the Stormont House Agreement (SHA). The Police Federation for Northern Ireland (PFNI) responded robustly to this consultation, reporting that when analysed through the prism of the principles of justice (as all legal considerations should be), we were unable to support *any* of the proposals.

The issue of the legacy of the Northern Ireland (NI) Troubles is evocative, emotional and fraught with division. As previous attempts to deal with this have shown, it has the ability to re-traumatise and cause great pain to victims, survivors and their families.

Discussions surrounding legacy call into question a range of sensitive issues for victims of terrorist violence. In the case of policing in Northern Ireland, 302 officers were murdered and thousands injured. More than 200 terrorist murders of police officers remain unsolved. Many police survivors were left physically and psychologically scarred – the impact of which remains visible today, twenty two years on from the signing of the Belfast Agreement.

The search for a way forward has previously been blighted by political agendas, however our position has remained the same over time - we do not, and will not, countenance a situation where the actions of men and women who served the community, somehow equate with those who sought to murder them. Such an attempt would be perverse and grossly offensive.

Attempts continue unchecked to demonise the police officers who delivered the very circumstances required to allow peace to develop. They are held up to ridicule, derided and condemned in order to suit a selective narrow narrative; a narrative which is notable for its omissions or references to appalling acts of barbarity by terrorist groupings.

The now commonplace use of the word ‘collusion’, which has no legal standing, is readily quoted by many in order to concoct and reinforce dubious claims of wrong-doing. We do not, and never will, condone law-breaking; the law is there to be upheld and those who break it should be held to account and, where there is evidence, brought to justice. There are no exceptions to this position and if there is substantial evidence of criminality against any section of society, then this should be tested against well rehearsed criminal justice standards.

We have been heartened by the refreshing approach taken by the current the Secretary of State for Northern Ireland, Brandon Lewis MP, with indications that the Government will move away from the deeply flawed proposals contained in the draft Stormont House Agreement, to a process which the PFNI hopes will be more equitable and which seeks to put families first and obtain closure for them, as opposed to tit for tat political narrative which has so far failed to progress the legacy issue.

Whilst we accept that justice and truth should not be limited by financial pressures, we are conscious that many hundreds of millions of pounds have been spent to date and we are still no closer to any closure on many legacy related matters. The PFNI want to ensure that any proposals are achievable and do not result in a bottomless pit whereby the only winners are legal representatives. Furthermore, any attempts to date to deal with legacy have only served to re-open old wounds and divide society further. We would be keen to see an initiative which does not lead to any further division and provides closure as far as possible.

The Northern Ireland Affairs Committee (NIAC) has asked for written submissions from stakeholders on the Secretary of State for Northern Ireland's proposals to deal with legacy issues in Northern Ireland based on the following seven key questions. We will address each of these in order:

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

As we have witnessed many controversial and costly attempts at meeting the needs of families, survivors and victims, the one common denominator has been that generally they have all been divisive. This is reflective of where we sadly still remain as a society and brings into perspective the diverse range of expectations which exist around solving the complex matter of legacy.

It is widely accepted that the first step in addressing what is required for any solution is the definition of what constitutes a victim. There have been well rehearsed political disagreements over what actually defines a victim in Northern Ireland. The Police Federation for Northern Ireland are adamant that this definition should not include terrorists or those who were killed or injured as a result of their own illegal actions.

In meeting "the needs of families, survivors and victims" there needs to be a clear understanding of what closure actually means and that without any agreement around this from across society, the application and success of any initiative may prove difficult to achieve.

Historical investigations have employed ambiguous definitions directed toward police that heavily imply serious criminality, without supporting evidence to support prosecution. This is morally wrong and has the potential to undermine the very principles of justice. For our members and their families, we simply want what every other citizen has – justice, fairness and equal protection under the law. Previous proposals have not given us this. Our experience of legacy has left us fearful that more opportunities to rewrite history, at the expense of the police family, will be created and eagerly seized upon.

The losses experienced by policing during the Troubles should not be underestimated. Hundreds of officers and their families have experienced personal traumatic incidents including murder and attempted murder, with many thousands more having been subjected to serious psychological illness as a result of their attendance and experiences of policing Northern Ireland. The police were not the “bad guys” in this conflict but were frequently all that stood between society and the terrorists who wanted nothing more than to cause pain and mayhem. There is an obligation on the Government to ensure that the police family do not feel abandoned by the State by ensuring that their sacrifices and treatment are not ignored.

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 and ECHR commitments:

We have previously articulated our concerns and opposition to the setting up of a Historical Investigations Unit (HIU), which in effect would be a parallel police service. There is no logical reason why investigations and recovery of information could not be dealt with by the PSNI.

It is important to remember that all political parties in Northern Ireland are supportive of policing and are active in the governance of policing by holding the Chief Constable to account through the Northern Ireland Policing Board. Such support should be further demonstrated by having confidence in the PSNI to investigate historical matters effectively. Any deviance from this could be construed as hypocritical.

It is important to note that most of the incidents which would be investigated are between 25 and 50 years old. Any police officers involved in the initial investigations will have long since retired or be deceased and the current profile of the PSNI consists of officers and staff who were not employed as police officers during the period in question. In most cases they would not even have been born. To suggest that there is bias is therefore offensive and inaccurate. It would endorse support for policing if PSNI were supported in being the law enforcement agency and investigative authority within Northern Ireland.

A crucial element of any information recovery and / or investigation process is the skill set of any staff involved. Specialised homicide detectives would be required and with a National shortage of people with the prerequisite skills there is no expectation that the many hundreds required for legacy investigations could be recruited. Any dilution of the skill set would weaken the capability of any body to deal with these matters effectively.

Our suggestion would be that historic offences could be investigated under the command of a Deputy Chief Constable with sole responsibility for legacy. They would be ultimately accountable to the Chief Constable and the Northern Ireland Policing Board but an adequate and effective firewall could be set up to keep this strand of investigation separate from mainstream policing. Any officers or staff with a declared conflict could be separated from any investigation at an early stage, which would remove perceived allegations of bias.

PSNI Code of ethics would ensure that the conduct of the investigating body could be scrutinised and not left in the situation we currently have with the Police Ombudsman for Northern Ireland (PONI) where there is no oversight into their actions. The risk of a separate body also having no provision for oversight is also of grave concern.

Unfortunately during the transition of Northern Ireland into a relatively peaceful society, there have been many deviations from EHCR principles. Some of these have been public, such as the early release of terrorist prisoners and the decommissioning of terrorist weaponry. Others such as “letters of comfort” have not been so public and have only fuelled the suspicion that much of the legislation around legacy has been designed as a sop to terrorists. Indeed, it is a fact that prosecutions against terrorists may be harder to achieve as a result of forensic opportunities having been destroyed through the decommissioning process. Other prosecutions will never be progressed due to the “comfort letters” which some suspected terrorists have in their possession.

3. The differences between the Government’s new proposals and the draft Stormont House Agreement Bill:

We believe new proposals being put forward by the Government have the potential to be more realistic in terms of a practical outcome. However, it is difficult to comment on the proposals being suggested, given the lack of any detail in them.

It is widely acknowledged that successful criminal proceedings would be highly unlikely, given the passage of time in many cases and therefore closure for families and victims alike may only ever be achieved through access to the truth. There needs to be an acceptance that in many cases there will not be a prosecution at the end of a legal process and that the truth and detail of people’s loved ones deaths may never be known. This applies equally to

victims across society and not just for the police family. We would welcome any proposals which deal with providing realistic updates and outcomes to victims.

Unsubstantiated complaints seem to generate investigations which do not take into consideration context, and which rely on the inability of investigators to openly divulge national security considerations as somehow being complicit in serious crime. It is perceived by many in policing, that cases are reopened and reinvestigated for reasons which would not meet the threshold for such investigation in any other area of the criminal justice system.

The proposals do not make any mention of Non Criminal Police Misconduct, which we welcome. This was included in the draft Stormont House Agreement Bill and which we vehemently opposed as being biased and unfair. We would like clarification that such proposals have been removed from any future Government plans.

4. Whether and how the Government's proposals will promote reconciliation in Northern Ireland:

Reconciliation is a noble concept. It is borne out of a genuine desire to move society to a better place, free from the barbs of divisiveness and one-upmanship. It requires honesty and earnestness and an end to seeking advantage over 'the other side'. It must be open and candid. The difficulty in Northern Ireland is that the political atmosphere remains polluted with mistrust in abundant supply. Sadly, on too many occasions, words fail to match actions.

For people from opposite sides of the divide, the task of bridge-building is painstakingly slow; one step forward is invariably met with reversals as community tensions mount, and old tribal beliefs reinforced as one side misinterprets an action as a concession.

Realities have to be recognised in the first instance for a meaningful start to be made at building reconciliation. Respect is a pre-requisite to reconciliation. We must show a genuine desire to move the needle to a more positive place and that requires both courage and leadership. The status quo is no longer acceptable. Too often, we see the pretence of understanding the views and aspirations of 'the other side' as genuine progress. In fact, it is a charade and merely a thinly veiled nod at reconciliation.

A maturity so far absent from the scene is required. If only one side embraces and cherishes reconciliation, then it will fail. All sides, all shades of opinion and all persuasions have to move as one in the construction of mutual trust and understanding. A shared space, deeper appreciation of one another's beliefs and views, will open the way to community reconciliation. It will not be achieved overnight.

In Northern Ireland terms, this has to mean the demonstration of transparency and honesty by paramilitaries who were responsible for the vast majority of deaths. Only when that acknowledgement is forthcoming – an essential first step – can society as a whole look seriously at bridging gaps and moving on as one.

Policing is about trust and integrity. It is an integral part of the community and, as such, it can play a central role in building reconciliation. The acceptance of the role of the police in a historically divided community is an essential building block. Throughout the history of policing of the past fifty years, the leaders of both the RUC GC and the PSNI openly and privately encouraged dialogue and understanding. They recognised the need to break the stalemate and publicly recognised the fact that policing, on its way, could not cure all society's ills.

The price the police paid is high. Although progress has been made, the service accepts that there continues to be reluctance to fully accept the positive role that policing exercises. However, delivering continuing advances would be hampered if responsibility for investigating historic murders was taken from the PSNI and handed to a new body. Such a move would merely serve to heighten mistrust and generate suspicion and doubt within certain communities.

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

The PFNI have previously articulated our concerns around an Oral History Archive and difficulties with some of the proposed workings of the Independent Commission on Information Retrieval. We feel that these will become institutions which will focus on story telling and reinforce a biased narrative which will be predominantly and disproportionately critical of the State. We also have concerns that these bodies would fail to reflect the context in which many decisions and actions were taken in order to protect society in very challenging times.

As previously stated in this document, we believe that the setting up of an HIU is unnecessary and could easily be incorporated into the PSNI, with adequate safeguards. They would be in a position to access relevant documents and ensure the human rights of those who protected society through professional policing or by providing information to the police are protected. Information gained by PSNI could then form the basis for family reports which would provide closure for many of the victim's families.

We do not feel that there is a legislative requirement for a body which specifically deals with oral history. This will find its own level in the media and through political parties and pressure groups. Any version of events which does not fit into narrow political narratives

will be challenged by political opponents and as such will not benefit from a statutory body no matter how well intentioned.

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

We feel that the proposed approach by the Government under the new proposals has the potential to be a more equitable process than that envisaged under the Stormont House Agreement. The fact that terrorists had murdered over 300 of our colleagues and had injured and maimed many thousands of others had been largely ignored under previous proposals. Many officers have been subjected to multiple attempts to murder them and found it repulsive that there was little or no focus on bringing the perpetrators to justice.

In the SHA proposals, the proposed "offence" of non criminal police misconduct meant that there was the real potential for serving or retired officers to be investigated for something which wasn't even a crime and for which there is no definition, whilst others were not held to account for some of the most heinous crimes, including murder. We are heartened that under the new proposals this perversion of justice appears to have been removed.

We would continue to maintain that any prosecutions or investigations should be based on criminal justice principles and at its nucleus should be the principles that:

- (a) 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;
- (b) 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.

The underlying rationale should be to balance the expectations of the families of victims into ensuring there is a swift, thorough, article 2 ECHR compliant investigation by the PSNI, who would have the overarching power to both collate and collect information together with investigatory and decision-making powers. The decision to prosecute would remain with the PPS upon referral from PSNI regarding cases into which there was a 'reasonable prospect of prosecution' giving rise to a reasonable suspicion of guilt to connect any suspect to the alleged offence.

There are a number of issues that need to be addressed which include:

- (1) The test for 'compelling evidence';

(2) The test for 'realistic prospect of a prosecution'.

(1) The test for compelling evidence

The PPS Code for Prosecutors that applies in the determination of charging a suspect provides for consideration of both the evidential and public interest tests. The former states that the evidence must be admissible and reliable. The latter includes factors to be considered including the seriousness of the offence, passage of time, health of the accused etc. The threshold for prosecution is a 'reasonable prospect of conviction'. It is clear that the 'compelling evidence test' is no more than the test for reliability given that any evidence that passes the threshold for a reasonable prospect of a prosecution will trigger a full investigation. There must be clarity around such a subjective phrase and whether in such circumstances as historical investigations whether corroboration should be required for example, or hearsay evidence should not be permitted to ground the basis of any such investigation. Similarly, there should be some form of built in safe-guards at the outset such as the type of factors grounding admissibility of hearsay and bad character evidence or with a residual 'interests of justice' type discretion that would address prejudice that is or may be caused by the passage of time as set out below.

(2) The test for realistic prospect of a prosecution

In terms this is arguably a lesser standard than is to be applied by the PPS in determining whether there is a sufficient evidential basis to prosecute. Consideration should be given to an express prohibition on;

- (i) any prosecution based principally on hearsay evidence by reason of the inability of the accused to properly challenge the author of the evidence;
- (ii) where there has been a loss of forensic material that may otherwise exculpate the accused; or
- (iii) significant delay which by reason of the health or lack of capacity of the accused; (or)
- (iv) upon a demonstrable degree of prejudice being demonstrated.

There are also risks in attempts to reach the truth through the current arrangements for coronial inquests. Consideration needs to be given to what status any such witness is to be given, if the individual may also face criminal investigation in light of the 'compelling evidence' that may emanate from such inquest proceedings.

The inquest hearing is an inquisitorial not an adversarial forum, designed to elicit the truth regarding, inter alia, the factual circumstances around the cause of death. At present any witness may be referred directly to the Director of the Public Prosecution Service by the coroner, or alternately the PPS can and have been invited in several instances by the Next of Kin to consider bringing criminal proceedings. Whilst the PPS may deem there to be insufficient evidence to prosecute and/or the court may be slow to exercise its discretion to make such a referral, nonetheless, safeguards need to ensure that this time consuming and costly process is fit for purpose in any future legacy processes.

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

As the statutory representative body for police officers in Northern Ireland, we have concerns that standards of evidence which may instigate an investigation appear to be considerably lower than for members of the public. Whilst we do not represent military veterans, we can see parallels in how both police officers and military have been treated in legacy rhetoric over the past decades.

We stand by our view that the law should apply equally to police officers, soldiers, terrorists and members of the public and that the threshold for prosecution should be the same for all groups and have outlined our concerns around the process at point 6.

We would further contend that serving and retired police officers must have access to a funding stream which ensures they are financially capable of mounting a proper defence, should the need arise. Currently police officers are left financially liable for the legal costs of such a defence, whilst those making often spurious and vexatious claims have the legal aid system at their disposal. This is fundamentally and morally wrong. The minimum should be a system of legal representation which replicates that offered to the military via the Ministry of Defence, whereby legal representation is provided at the outset of any investigation into individuals.

Conclusion

We have commented on what is the stated position of Government as outlined by the Secretary of State for Northern Ireland but feel that there is as yet very little detail on the proposals. In acknowledging the new suggestions, we are heartened that Government appears to have accepted that the pathway to dealing with legacy as outlined in the draft Stormont House Agreement Bill was flawed and incapable of providing closure or justice for many victims.

There needs to be an impetus in moving this matter forward in a manner that may not please some but which provides a route map for closure which is not based on any political bias or agenda and which does nothing but perpetuate wasting public finances on legal processes.

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