



NORTHERN
IRELAND
HUMAN
RIGHTS
COMMISSION

**Update in Respect of UN CAT Committee's
Follow-up Procedure to UK's 2019
Concluding Observations**

May 2020

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1.0 Introduction

1.1 The Northern Ireland Human Rights Commission (the NIHRC) is one of three A-status National Human Rights Institutions in the United Kingdom (UK). Established in 1999, 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. The NIHRC's mandate extends to all matters relating to the protection and promotion of human rights in Northern Ireland (NI), including within the competence of the NI Assembly and the Westminster Parliament. This submission provides the requested update on steps taken since May 2019 to implement the UN Committee against Torture's (UN CAT Committee) recommendations concerning accountability for conflict-related violations in Northern Ireland.

2.0 Government Actions One Year On

- 2.1 The UN CAT Committee requested an update on the following concluding observations, that the UK Government:
- a) in the absence of a functioning devolved government in Northern Ireland since January 2017, [the UK Government] take urgent measures to advance and implement the Stormont House Agreement and the mechanisms it contemplates for investigating conflict-related violations, particularly the Historical Investigations Unit...
 - d) ensure that effective and independent investigations are conducted into outstanding allegations of torture, ill-treatment and conflict related killings to establish the truth and identify, prosecute and punish perpetrators, including with respect to the killing of Patrick Finucane, following a recent decision by the Supreme Court that the State party has not carried out an effective investigation concerning this case.

- e) undertake other initiatives, including expanding the mandate of the HIU, to address allegations of torture, sexual violence, and disappearances committed during the conflict, and ensure that victims of torture and ill-treatment obtain redress, including fair and adequate compensation, and as full as rehabilitation as possible.
- f) refrain from enacting amnesties or statutes of limitations for torture or ill-treatment, which the Committee has found to be inconsistent with States parties' obligations under the Convention.¹

2.2 Updates since May 2019 that are relevant to these recommendations are set out below.

Historical Investigations Unit

2.3 In July 2019, the NI Office published a summary of the 17,000 responses to the legacy consultation. This document will be used to inform the UK Government's next steps, which will be set out "in due course".² The overarching message from the majority of respondents was "the current system needs to be reformed".³ 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".⁴

2.4 On 18 March 2020, the new Secretary of State for Northern Ireland, Brandon Lewis MP, issued a written Ministerial Statement on addressing Northern Ireland Legacy Issues. The text of the statement is set out in full within Annex 1. The statement states "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". It continues that:

¹ CAT/C/GBR/CO/6, 'UN CAT Committee Concluding Observations on the Sixth Periodic Report of the United Kingdom of Great Britain and Northern Ireland', 7 June 2019, at paras 41(a), 41(d), 41(e), 41(f).

² NI Office, 'Press Release: Government Publishes Summary of Responses to Legacy Consultation', 5 July 2019

³ NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses', (NIO, 2019), at 4.

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

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 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.

- 2.5 Without the necessary fine-grained detail it is difficult to draw a definitive conclusion on how the new approach will meet investigatory requirements of the UN Convention against Torture. Nonetheless, the NIHRC is deeply concerned that the new approach to legacy investigations may not readily meet these requirements.
- 2.6 The Ministerial 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. 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 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.

- 2.7 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.

- 2.8 Further, the conflating of 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.
- 2.9 The ability and likelihood of identifying 'compelling new evidence' in a case which has never been significantly investigated in the first place also, seems on the surface, a formidable challenge.
- 2.10 Furthermore, having to investigate a large number of cases simultaneously is not a basis for investigations to be ineffective and subject to excessive delays.⁵
- 2.11 The Ministerial statement does not address the issue of expanding the remit of the Historical Investigations Unit to address allegations of torture, sexual violence, and disappearances committed during the conflict. There are no plans that the NIHRC is aware of to address this using other initiatives.
- 2.12 From the NIHRC's perspective, any failure to achieve the investigation requirements of the UN Convention against Torture is likely to lead to litigation and further delays, an outcome which is not in the 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.

Additional Stormont House Agreement mechanisms

- 2.13 The Stormont House Agreement identifies additional mechanisms for dealing with the past including the Oral History Archive, Independent Commission on Information Retrieval and Implementation and Reconciliation Group.

⁵ *Mahmut Kaya v Turkey* (2000) ECHR 129.

2.14 The Ministerial statement proposes that measures included in the Stormont House Agreement:

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.

2.15 It is unclear, but the implication from the Ministerial statement appears that these additional bodies will be subsumed within the initially proposed Historical Investigations Unit to form a single broad based body. In addition to serious doubts about the impact of such an approach on an effective and thorough investigation, the NIHRC is concerned that the distraction of trying to do too much through one body will lead to an ineffective implementation of the aims and objectives of each individual approach identified in the Stormont House Agreement.

Inquests

2.15 Funding for legacy inquests had been delayed for a number of years.⁶ On 28 February 2019, following a legal challenge,⁷ the Department of Justice NI announced that a new Legacy Inquest Unit will be established within the Coroner's Service under the remit of the Lord Chief Justice. The Permanent Secretary of the Department of Justice NI identified the estimated cost would be £55 million over six years.⁸

2.16 In June 2019, there was a legacy caseload of 54 cases relating to 95 deaths, including three cases relating to three deaths referred to the coroner by the Attorney General for NI since December 2018. A schedule has been set to hear preliminary hearings into all the outstanding cases starting September 2019, with the exception of

⁶ 'Legacy inquests in NI "can be dealt with in five years"', *BBC News*, 12 February 2016.

⁷ *In the Matter of an Application by Brigid Hughes for Judicial Review* [2018] NIQB 30, at para 12.

⁸ Department of Justice, 'Press Release: DOJ announces legacy inquest reform', 28 February 2019.

the nine Stalker and Sampson cases into an alleged Royal Ulster Constabulary shoot-to-kill policy in the 1980s. Mr Justice O’Hara and Mr Justice McAlinden have now been allocated these nine cases, but they will not be able to progress due to COVID-19 restrictions.⁹

2.17 In September 2019, the Lord Chief Justice, Sir Declan Morgan, confirmed that “representatives for the families and the relevant agencies have been asked to provide an update on each case in advance of these hearings”.¹⁰ The Lord Chief Justice also emphasised that “it is important that all those involved work together to ensure that legacy inquest cases are prepared for hearing expeditiously and that disclosure issues are identified early and, through collaboration and dialogue, that reasonable and proportionate solutions are found”.¹¹

2.18 The first full hearings were to start in April 2020 and a thematic approach to the hearing schedule was being considered to avoid the potential of missing the bigger picture.¹² These initial hearings have been allocated to a Coroner or judge.¹³ However, due to COVID-19 all non-urgent court business, including legacy inquests, have been adjourned since 20 March 2020. This is subject to ongoing review, but there is no doubt that it will impact the legacy inquests.¹⁴ To mitigate the impact, the Presiding Coroner, Mrs Justice Keegan, who was due to leave this post is continuing in this role and consideration is being given to dealing with directions by way of written submissions and remote working. However, Mrs Justice Keegan stated that “the task of case management will undoubtedly be difficult and take an appreciable period of time”.¹⁵

⁹ Judiciary NI, ‘Press Release: Statement from the Presiding Coroner Mrs Justice Keegan – Legacy Inquests’, 4 May 2020.

¹⁰ ‘The Lord Chief Justice, Declan Morgan’s, Opening of Term Address 2019’, Royal Courts of Justice, 5 September 2019.

¹¹ ‘The Lord Chief Justice, Declan Morgan’s, Opening of Term Address 2019’, Royal Courts of Justice, 5 September 2019.

¹² ‘Families assured over timeframe for legacy inquests’, *Belfast Telegraph*, 7 June 2019.

¹³ Judiciary NI, ‘Press Release: Statement from the Presiding Coroner Mrs Justice Keegan – Legacy Inquests’, 4 May 2020.

¹⁴ Judiciary NI, ‘Press Release: Statement from the Presiding Coroner Mrs Justice Keegan – Legacy Inquests’, 4 May 2020.

¹⁵ Judiciary NI, ‘Press Release: Statement from the Presiding Coroner Mrs Justice Keegan – Legacy Inquests’, 4 May 2020.

Finucane

2.19 The UK Government still has not provided a formal response to the UK Supreme Court's decision that there had not been an Article 2 ECHR compliant inquiry into the death of Pat Finucane.¹⁶ In January 2020, the Finucane family were granted leave by the High Court to judicially review the UK Government's delay in implementing the UK Supreme Court's decision.¹⁷

2.20 In February 2020, the UK Government stated that it would provide a formal response to the UK Supreme Court's decision "within a matter of weeks".¹⁸ The formal response continues to be awaited and the Finucane family's current legal challenge continues.

Victims' payments

2.21 The Secretary of State for NI was required to make regulations before end of January 2020 to come into force before end of May 2020, which "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".¹⁹

2.22 Following a consultation on the proposed victims' payments scheme in November 2019,²⁰ the regulations were passed by the UK 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;

¹⁶ *In the Matter of an Application by Geraldine Finucane for Judicial Review (NI)* [2019] UKSC 7, at para 153; *In the matter of an application by Geraldine Finucane for Judicial Review (NI)* [2017] UKSC58.

¹⁷ Cate McCurry, 'Government to respond to Supreme Court ruling over Pat Finucane death "in weeks"', *Belfast Telegraph*, 21 February 2020.

¹⁸ Cate McCurry, 'Government to respond to Supreme Court ruling over Pat Finucane death "in weeks"', *Belfast Telegraph*, 21 February 2020.

¹⁹ Sections 10(1) and 10(2), NI (Executive Formation etc) Act 2019.

²⁰ 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.²¹

2.23 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.

2.24 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.²²

2.25 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.²³ It is the

²¹ Regulation 4(1), The Victims' Payments Regulations 2020.

²² Regulation 7(1), The Victims' Payments Regulations 2020.

²³ 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.²⁴

- 2.26 Posthumous applications for victims' payments can be made,²⁵ 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.²⁶
- 2.27 The Board has discretion on how it prioritises applications based on evidence available, age of the applicant and health of the applicant.²⁷
- 2.28 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.²⁸
- 2.29 Once established, the Victims' Payments Scheme will require close monitoring to ensure the scheme is effectively implemented.

Statute of limitations

- 2.30 The Ministerial statement references the Overseas Operations (Service Personnel and Veterans) Bill, which seeks to impose a six-year statutory limitation on taking cases against UK service personnel and veterans involved in overseas operations.²⁹ This Bill applies to overseas operations and does extend to 'Troubles-related' operations involving UK service personnel and veterans on UK territory, such as in Northern Ireland.
- 2.31 As reported in the NIHRC's shadow report to the UN CAT Committee, there have been numerous calls for the introduction of a statute of limitations to protect from prosecution members of the

²⁴ Regulations 6(2)-6(7), The Victims' Payments Regulations 2020.

²⁵ Regulation 10, The Victims' Payments Regulations 2020.

²⁶ Regulation 9, The Victims' Payments Regulations 2020.

²⁷ Regulation 11, The Victims' Payments Regulations 2020.

²⁸ Jayne McCormack, 'Troubles' pension: "Disappointment" over delay of scheme', *BBC News*, 21 May 2020.

²⁹ Schedules 2-4, Overseas Operations (Service Personnel and Veterans) Bill.

Armed Forces who served in NI.³⁰ The most recent of these have come from the current Prime Minister, Boris Johnson.³¹ The Queen's Speech in December 2019 also referenced bringing "forward proposals to tackle vexatious claims that undermine our Armed Forces".³²

2.32 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.³³

³⁰ 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.

³¹ Conservatives, 'Press Release: Conservatives in general election manifesto pledge to end 'unfair trials' for Northern Ireland veterans', 13 November 2019.

³² 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.

³³ NI Office, 'Addressing the Legacy of NI's Past: Analysis of the Consultation Responses', (NIO, 2019), at 4.

Annex 1 – Written Ministerial Statement

Brandon Lewis MP, Secretary of State for Northern Ireland
18 March 2020

Today the Government announced the introduction of legislation to provide greater certainty for service personnel and veterans who serve in armed conflicts overseas. Alongside this, we are setting out how we propose to address the legacy of the past in Northern Ireland in a way that focuses on reconciliation, delivers for victims, and ends the cycle of reinvestigations into the Troubles in Northern Ireland that has failed victims and veterans alike - ensuring equal treatment of Northern Ireland veterans and those who served overseas.

We have heard from many across Northern Ireland and the rest of the United Kingdom that the current approach is not working well for anyone, and that it erodes confidence in public institutions that exist to support society as a whole. Discussions about how to change this have been ongoing for many years. The Stormont House Agreement in 2014 was an important milestone, but it did not stop the debate continuing.

Many families have waited too long to find out what happened to their loved ones, while those who defended the rule of law deserve certainty that there will be an end to repeated questions about what happened during their service. A better way to deal with the past is necessary, if we are to help the whole of society to effectively heal the wounds of the Troubles and become better reconciled with our difficult history.

In 2018, the Government carried out a public consultation on 'Addressing the Legacy of Northern Ireland's Past', inviting views on proposals based on the Stormont House Agreement. The consultation attracted over 17,000 responses - summarised in the Government's 'Analysis of the consultation responses', published in July 2019. We have carefully considered each and every one of these, and sought to identify a way forward that will deliver for all those affected by the legacy of the Troubles and enable all sides of the community to reconcile and prosper.

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. We believe that the proposals set out below provide a framework for doing this.

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 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.

The Government wants information recovery and reconciliation to be at the heart of a revised legacy system that puts victims first. The Government is committed to the rule of law but given the considerable time that has elapsed since many of these incidents took place it is vital that we swiftly implement an effective information recovery mechanism before this information is lost forever.

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. 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 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. The Government believes that this approach would deliver a fair, balanced, and proportionate system that is consistent with the principles of the Stormont House Agreement and deliver for all those who have been affected by the events of the past; striking a balance in enabling criminal investigations to proceed where necessary, while facilitating a swift transition to an effective information recovery mechanism before this information is lost forever.

The Government is committed to introducing legislation in line with our commitments in 'New Decade, New Approach', to move forward and deliver for all communities in Northern Ireland and beyond.

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