



Legacy Issues and Victims/Survivors of Violence: Benchmarks for Legitimacy in the SHA Legislation

Submission to Oireachtas Joint Committee on the
Implementation of the Good Friday Agreement

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Background

My name is Kieran McEvoy. I am Professor of Law and Transitional Justice at the School of Law and the Senator George J. Mitchell Institute for Global Peace, Security & Justice, Queen's University Belfast. I have conducted extensive international comparative work on the relationship between prosecutions, truth recovery and amnesties in processes of conflict transformation in over a dozen post-conflict and transitional societies. For a number of years, I have also been leading a programme of work with colleagues at Ulster University and a local human rights non-governmental organisation in Northern Ireland (the Committee on the Administration of Justice) designed to assist political parties, civil society organisations and the two governments on the technical aspects of the 'dealing with the past' debate in Northern Ireland.¹

Dealing with the past in the aftermath of conflict inevitably involves engaging in sensitive, controversial and legally complex matters. Our role is to provide a useful public service by offering technical and legal information in an accessible fashion on how to deal with the past in a human rights compliant manner. Individuals and groups can thus make decisions based on maximum knowledge and information.

To that end, we have directly briefed the largest political parties in Northern Ireland, all of whom were involved in the Stormont House Agreement negotiations. We also worked closely with the British and Irish governments on many of the technical aspects of this debate. Furthermore, we have delivered extensive briefings to civil society and victims' organisations, former police officers, ex-prisoners and others with an interest in these matters. We have also worked closely with the Commission for Victims and Survivors on a range of legacy matters.

I have also previously given evidence to the US Congress on the implications of the legacy mechanisms in the Stormont House Agreement in 2015 and the UK Defence Select Committee on the viability of introduction a 'state of limitations' (an amnesty) for British Military Personnel in 2017.

The Stormont House Agreement

As members will be aware, the Stormont House Agreement (SHA) was agreed by the then five members of the Northern Ireland Executive and the two governments in 2014. It proposed the establishment of four mechanisms designed to cumulatively address the legacy of the past in Northern Ireland. These are:

- Historical Investigations Unit (HIU)
- Independent Commission on Information Retrieval (ICIR)

¹ For further details of the project, those involved and the various reports and briefing documents see <https://amnesties-prosecution-public-interest.co.uk/>

- Implementation and Reconciliation Group (IRG)
- Oral History Archive (OHA)

After that Agreement was signed, my colleagues and I worked closely with a parliamentary draftsman and drew up our own version of what the SHA legacy mechanisms would look like in legislative form. That *Stormont House Agreement Model Implementation Bill* was launched by at an event in the House of Lords sponsored by Labour Peer and former NIO minister Lord Dubs.² Since that launch we have continued to work on a range of further challenging issues related to the implementation of the legacy aspects of the Stormont House Agreement.

A commitment by the British government to enact legislation to implement the SHA was included in the Queens Speech in 2015. However, political progress to establish these mechanisms has been stalled on a number of fronts, in particular with regard to balancing issues related to *national security* (discussed below) and the disclosure of information to families who have lost loved ones as a result of the conflict. Following the most recent round of failed political negotiations to re-establish devolution, the Northern Ireland Secretary of State has made a commitment to begin a public consultation on the government's proposed SHA legislation 'soon'.

Below I have outlined some of the key legitimacy benchmarks against which the proposed Stormont House Agreement Legacy legislation should be judged. My colleague Dr Anna Bryson will address the role of the Oral History Archive so I shall focus on the other proposed mechanisms as well as the vexed issues of National Security redactions and the question of an amnesty for state actors – two key themes which have permeated legacy debates since the SHA was concluded.

The Independence and Effectiveness of the Historical Investigations Unit

As members will be aware, the SHA proposes that the work previously undertaken by the Historical Enquiries Team (HET) and the legacy unit of the Office of the Police Ombudsman would be taken on by a new Historical Investigations Unit (HIU). Key elements to maximising the independence and effectiveness of this body will be to ensure that it is properly resourced, rigorously independent and sufficiently empowered to access all relevant documents and other material evidence including intelligence information. As members will be aware, the HET was disbanded after a number of highly critical reports about its lack of independence in investigating state killings or cases involving alleged collusion.³

² Stormont House Agreement: Model Implementation Bill (2015). Available at <https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/09/SHA-Model-Implementation-Bill-September-2015-Final.pdf>

See also Stormont House Agreement Model Implementation Bill Explanatory Notes (2015) available at <https://amnesties-prosecution-public-interest.co.uk/themainevent/wp-content/uploads/2015/09/SHA-Model-Implementation-Bill-Explanatory-Notes-Final.pdf>

³ HMIC (2013) Inspection of the Police Service of Northern Ireland Historical Enquiries Team. London: HMIC; P. Lundy (2012) 'Research Brief: Assessment of the Historical Enquiries Team (HET) Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases (Research report available at: <http://eprints.ulster.ac.uk/21809/>).

These failings undermined some good work done in the investigation of other cases.

In 2013, following these critical reports on the HET, the then PSNI Chief Constable directed that the military killings which had previously been part of the HET report should be taken on by an internal PSNI investigative team, the Legacy Investigation Branch (LIB).⁴ However, in a number of important high court judgements the judiciary in Northern Ireland held that both the LIB and the HET lacked the required elements of independence to perform an investigation which is compliant with Article 2 of the European Convention on Human Rights in such state-actor related cases.⁵

A central benchmark for judging the legitimacy of the work of the HIU will be the ways in which it addresses this sensitive but entirely manageable issue. The approach by the HET was to have distinct teams with the team working on cases of state violence or collusion excluding former RUC officers while another team (which did include such officers) worked on paramilitary cases. Notwithstanding the difficulties associated with determining which cases involved or did not involve collusion, as became clear, the working relationships with the HET mean that in practice public confidence in the HET was corroded because of the lack of independence within that structure to the extent that it was wound up.

The obvious solution with regard to the HIU is to adopt a similar position to the Office of the Police Ombudsman regarding legacy cases and to disbar former RUC or British Army members (or indeed those with an affiliation to paramilitary organisations or their linked political parties) from employment by the HIU. Given that the courts have repeatedly found that the presence of such individuals undermines the legal requirement for independence in legacy investigations, it would be perverse to suggest legislating for something which has repeatedly been found to be in breach of human rights law. Some Unionist politicians have argued that such a measure would be discriminatory, presumably against protestant males.⁶ However, the Fair Employment and Treatment Order makes clear that a measure may be found to be indirectly discriminatory if *'it cannot be shown to be justifiable.'*⁷ In such a scenario, in particular in light of the judgments mentioned

⁴ Questions to the Chief Constable to the Policing Board Northern Ireland 'Killings during the Troubles by the army', 2 February 2017. <https://www.nipolicingboard.org.uk/sites/nipb/files/media-files/written-response-to-questions-for-2-February-2017-Meeting.pdf>

⁵ *Re Margaret McQuillan in Matter of Review by the HET into the Circumstances of the Death of Mrs Jean Smyth and Other Suspected British Army Military Reaction Force Killings*. 3rd March 2017. REF 15/57619/01. See also Treacy J's judgment in Barnard's (Edward) Application [2017] NIQB 82. 'Article 2 Compliant investigations include a requirement that investigators are independent from those being investigated, prompt, transparent and effective. See further L. Mallinder et al (2015) *Investigations, Prosecutions and Amnesties under Article 2 and 3 of the ECHR*. <https://amnesties-prosecution-public-interest.co.uk/output-type/project-reports/>

⁶ D. Beattie 'HIU Ban On RUC And PSNI Personnel Would Not Be Acceptable.' 20th September 2017. <https://uup.org/news/5172/HIU-ban-on-RUC-and-PSNI-personnel-would-not-be-acceptable-Beattie>

⁷ The Fair Employment and Treatment (Northern Ireland) Order 1998, 2, (ii)

above, the independence requirement of an Article 2 investigation (derived from 'the right to life') would almost certainly trump any risk of an indirect discrimination claim.

In sum, if the HIU is to secure public confidence, it must be legally and structurally independent and it should not include amongst its staff any individual who could potentially be faced with a conflict of interest based on past employment of affiliation.

Information Redaction for Reasons of National Security

When the leaked version of the SHA legislation entered the public domain in 2015, it contained significant provisions enabling the Secretary of State for Northern Ireland to redact information being disclosed to families 'on the grounds of national security.' No national security redaction provisions were contained in the SHA. Sinn Féin, the SDLP, the Irish government and the Alliance Party all criticised the British government for attempting to use a 'national security veto' to undermine the truth recovery functions of the HIU.⁸ No-one seriously disputes the responsibility of governments to redact information that might put individual lives at risk. However, there are serious concerns with regard to the proposed decision making process for assessing legitimate national security concerns (decisions to be made by a government department) and the narrow grounds for challenging such a decision – a judicial review on the grounds that the decision was '*so unreasonable that no reasonable secretary of state could have made such decision.*'

In April 2017, having worked closely with a number of NGOs who work directly with victims of state violence including Relatives for Justice, the Pat Finucane Centre and the Committee on the Administration of Justice, my colleagues and I proposed a mechanism which could potentially help break the log-jam on the national security issue.⁹

In essence that model proposed:

- That the final decision as to whether or not to redact sensitive information for families should be made by an independent judge or judges – exploring

⁸ Sinn Féin Criticise Leaked Draft Westminster Bill Dealing With Legacy of The Troubles' BBC NI News (Belfast, 6 October 2015); 'Stormont House Agreement: SDLP State Opposition to Victims Bill' Derry Journal (Derry, 14 October 2015); 'Republic's Foreign Minister Charlie Flanagan Critical of National Security Smothering Blanket' (Irish News, Belfast, 27 November 2015). The Alliance Party leader and then Justice Minister David Ford is quoted as 'sharing the concerns of nationalist and the Irish government' over the national security clauses in the leaked bill. He told the Irish News, 'Clearly every government has national security issues but the concerns we expressed on seeing the draft bill was that there seemed to be about four layers of that – which gave an indication of an unwillingness to be opened. If I thought there was an overlaying of national security it's not surprising other people rejected it completely' in 'David Ford Upbeat for Alliance Ahead of Stormont Election' Irish News (Belfast, 4 March 2016).

⁹ K. McEvoy et al (2017) Breaking the Log-Jam on National Security Available at <https://amnesties-prosecution-public-interest.co.uk/queens-led-team-endeavours-break-log-jam-national-security/>

the granular detail of the information to be redacted and not simply whether such a decision *was 'so unreasonable that no reasonable Secretary of State could take it.'*

- Such decisions should be taken against specified legal criteria which balance the state's legitimate national security concern with the families' right to truth.
- That criteria should explicitly rule out the redaction of information relating to activities which are illegal or historical counter-terrorist techniques which are now obsolete.
- The decisions should be made following a hearing where the views of all of relevant actors including the families are properly legally represented.

It is possible to resolve the issue of national security and the legacy of the conflict with a combination of legal imagination and political will. However, if the forthcoming legislation simply restates the British government position as expressed in the 2015 leaked legislation, it is very difficult to see how this will secure confidence and trust in the legacy process.

The Independence and Effectiveness of the ICIR

A key vehicle of truth recovery envisaged in the SHA is the Independent Commission on Information Retrieval (ICIR). This latter body is modelled on the Independent Commission for the Location of Victims Remains (ICLVR), the body established to assist in the recovery of those murdered and disappeared during the conflict. It enables victims who wish to come forward to the ICIR to seek information from those state or non-state groups who were involved in the deaths of their loved ones – in the knowledge that any such information gleaned through that process cannot be used for prosecutorial purposes. Central to the success of the ICLVR, which has seen the recovery of 13 of the 16 bodies listed as disappeared, has been (a) the independence of the Commission (b) the robustness of the guarantees that no information gleaned from the process can be used for prosecutions (none has) and (c) the development of relationship of trust between the Commission staff and interlocutors with armed groups – in this case the IRA and the INLA. These are all good benchmarks for building legitimacy and confidence in the design of the ICIR.

In addition however, another key concern has emerged about the potential working of the ICIR. In the leaked version of the British government legislation which entered the public domain in 2015, it contained provisions that required the ICIR to pass copies of the reports (which were due to go families) first to the British and Irish governments to review for 'national security' reasons. The difficulties associated with broad national security caveats discussed above with regard to the HIU are equally applicable to the ICIR in terms of the risk of undermining the credibility of this institution.

The Implementation and Reconciliation Group and the Themes and Patterns of the Conflict

The other mechanism agreed to in the Stormont House Agreement was the Implementation and Reconciliation Group (IRG). After five years of the operation of the other legacy mechanisms, a report on such themes should be commissioned by the IRG written by academic experts. The SHA states that the IRG will consist of political appointees (DUP 3, Sinn Fein 2, one each from SDLP, UUP, Alliance, UK and Irish government). The SHA stipulates that the work of the IRG 'should be conducted with sensitivity and rigorous intellectual integrity, devoid of any political interference.'¹⁰

Given the fact that this body is made of political appointees, the key issue for its political credibility will be to ensure that robust governance structures are put in place to ensure that the work of the academic experts is indeed independent and free from political interference. There are analogous research governance frameworks – developed for example by the Research Councils in the UK and Ireland – which could be used to inform that process. However, it will be crucial to ensure that such independence is on a firm statutory footing i.e. placing a responsibility on the academics to act in a way which is independent but also placing a responsibility on the IRG and its individual members not to interfere with the work of those academics.

In addition, while the wording of the SHA suggests that '*any potential evidence base for patterns and themes should be referred to the IRG from any of the legacy mechanisms ...*', it would seem strange that the academics working for the IRG or IRG members should be required to exclude other sources of information or knowledge in reaching their conclusions. By way of illustration, it would seem quite perverse that in producing the elements of a report that related to the theme of collusion, the IRG would be required to ignore the previous work of the De Silva Review, Smithwick report, other reports from other public inquiries or other authoritative sources. Discerning the reliability or otherwise of original or secondary sources is a key task for all academics but not one which is best served by limiting the sources of what one should or should not read.

A Statute of Limitations (Amnesty) for State Actors

In 2017 the UK Defence Select Committee recommended that the government should introduce a statute of limitations for UK security forces who served in Northern Ireland. As I argued in my evidence before that Committee,¹¹ there is no precedent in UK law of a statute of limitations for serious criminal offences. However described, any measure which sought to bar criminal prosecutions and or civil liability with regard to the Northern Ireland Troubles against individuals or categories of individuals by reference to the time passed since the offence was committed (or to whether an original investigation was completed), would be an amnesty by another name. In 2018, despite the fact that there were no provisions

¹⁰ Stormont House Agreement (2014)

¹¹ K. McEvoy (2017) Amnesties, Prosecutions & the Rule of Law in Northern Ireland: Briefing Paper. Available at <https://amnesties-prosecution-public-interest.co.uk>

for such an amnesty in the Stormont House Agreement, the British government announced that it intended to solicit views on such a measure in the pending public consultation on the proposed SHA legacy mechanisms. That proposal has been strongly resisted by the Irish government and a range of political parties in Northern Ireland as well as victims from across the community.

It is possible to design an amnesty which is compatible with international law. However:

1. Such an amnesty could not include certain of the most serious crimes (in particular torture, which may be the most relevant in the Northern Ireland context).
2. It would have to be part of a genuine effort to deal with the legacy of the past. In particular, as the Defence Select Committee acknowledged, it could not be done at the cost of negating the rights of victims to truth recovery through an investigation (discussed further below re Article 2 and 3 of the ECHR) and to possible reparations.
3. Even if the conditions on ensuring the rights of victims were met, it would be difficult to apply such an amnesty to state actors alone while meeting the state's obligations in international law to prevent impunity. A statute of limitations for security forces only is what the United Nations has referred to as a "self-amnesty", wherein an amnesty *"is adopted by those responsible for human rights violations to shield themselves from accountability"*. Other jurisdictions which introduced such self-amnesties have included the former military dictatorships in Argentina, Chile and Brazil and the Robert Mugabe regime in Zimbabwe. For the UK to join such a list would be quite extraordinary.
4. In effect, as I have argued in detail elsewhere,¹² the practical consequences of such an amnesty for state actors would be to render the chances of prosecutions of paramilitary actors extremely difficult. That reality was acknowledged by the Defence Committee Chairman who suggested that victims might have to be "big hearted" and accept that sacrificing the possibility of paramilitary prosecutions might be the price for protecting ex-military personnel from prosecution.
5. Given that the proposed amnesty for state actors was not included in the SHA, that it would most likely result in a de facto amnesty for all conflict related deaths, and that it would be in clear contravention of the desire by many victims to have those responsible prosecuted for such offences (notwithstanding the fact that that individuals convicted for pre 1998 offences will serve a maximum of two years), it is my strong view that this proposal should not form part of the SHA public consultation.

¹² K. McEvoy 'Is the Price Of An Amnesty For The Security Forces Just Too High To Contemplate?' Belfast Telegraph June 2017.