THE APPARATUS OF IMPUNITY?

Human rights violations and the Northern Ireland conflict:

a narrative of official limitations on post-Agreement investigative mechanisms

Committee on the Administration of Justice

January 2015

CAJ
Committee on the Administration of Justice
Promoting Justice / Protecting Rights

Queen's University Belfast

This publication is available on our website.

CAJ

Committee on the Administration of Justice

2nd Floor, Sturgen Building

9-15 Queen Street

Belfast

BT1 6EA

Tel: 028 9031 6000

Fax: 028 9031 4583

info@caj.org.uk

www.caj.org.uk

ISBN 978 1 873285 94 7

THE APPARATUS OF IMPUNITY?

Human rights violations and the Northern Ireland conflict: a narrative of official limitations on post-Agreement investigative mechanisms

Committee on the Administration of Justice

January 2015

Recent comments from key Council of Europe and UN human rights bodies in relation to existing mechanisms investigating the conflict in Northern Ireland:

The absence of any plausible explanation for the failure to collect key evidence at the time when this was possible, and for attempts to even obstruct this process, should be treated with particular vigilance. In fact the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Articles 2 [right to life] and 3 [prohibition on torture and inhuman/degrading treatment]seem as a matter of principle to make it possible for at least some agents of the State to benefit from virtual impunity as a result of the passage of time.

European Court of Human Rights, Concurring Opinion of Judge Kalaydjieva, in *McCaughey & Others v the UK* and *Hemsworth v the UK, judgments of 16 July 2013*

The Committee...notes however, reports of apparent inconsistencies in the investigation processes where military officials are involved, which delayed or suspended investigations, thus curtailing the ability of competent bodies to provide prompt and impartial investigations of human rights violations and to conduct a thorough examination of the systemic nature or patterns of the violations and abuses that occurred in order to secure accountability and provide effective remedy. In addition, the Committee is concerned about the State party's decision not to hold a public inquiry into the death of Patrick Finucane.

UN Committee Against Torture, Concluding Observations on UK, May 2013

It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'. The UK Government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the Government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK Government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general.

Nils Muižnieks, Commissioner for Human Rights, Council of Europe
Speaking in Belfast, 6 November 2014

1974-2014 - Investigative Bias?

The Attorney General assures me he himself carefully reviews every serious allegation against a soldier and that the final decision whether to prosecute in such a case is made by him only after close and anxious consideration of all of the evidence and the requirements of the public interest. He assured me in plainest terms that not only he himself but also the [Director of Public Prosecutions] and senior members of his staff, having been army officers themselves, having seen active service and knowing at first hand about the difficulties and dangers faced by soldiers, were by no means unsympathetic or lacking in understanding in their in their approach to soldier prosecutions in Northern Ireland. Rather the reverse, since directions not to prosecute have been given in more than a few cases where the evidence, to say the least, had been borderline.

Letter to General Sir Cecil Blacker from Lt General Frank King, 17 January 1974

HET maintains it is not appropriate to compare the review processes in military cases with reviews of murders committed by terrorists. Soldiers were deployed on the streets of Northern Ireland in an official and lawful capacity, bound by the laws of the UK and military Standard Operating Procedures of that time.

PSNI Historical Enquiries Team (HET) Operational Guide 2013

We found that the HET, as a matter of policy, treats deaths where there was state involvement differently from those cases where there is no state involvement. We consider the HET's approach to be entirely wrong in that: 1. it is clear that the HET has adopted a different approach between cases that have state involvement and those that do not; and 2. the approach that the HET has adopted in state involvement cases is susceptible of challenge, as it appears to be based on a misunderstanding of the law.

...practices [,] which would appear to derive from the HET's different approach in state involvement cases, may seriously undermine the capability of the HET's review process to lead to a determination of whether the force used was or was not justified in state involvement cases, and to the identification and punishment of those responsible...Since 2010 it is striking that not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution.

HM Inspectorate of Constabulary June 2013
Inspection of the Police Service of Northern Ireland Historical Enquiries Team

Legacy is one of the defining issues of our future...We are all proud of our service in the RUC. The PSNI is determined to play our part in the defence of the RUC.

[The] bedrock of what we are trying to do is to protect our people. To protect the reputation of the organisation and to protect people's security.

Comments attributed in official notes to a PSNI Deputy Chief Constable and Senior Legal Advisor, in a 2012 'Legacy Information Evening' for the NI Retired Police Officers Association (cited in Irish News, 2 December 2014,p14).

Key Acronyms

CAJ	**Committee on the Administration of Justice**
CHIS	**Covert Human Intelligence Source**
CJI	**Criminal Justice Inspection (Northern Ireland)**
CMP	**Closed Material Procedure**
DoJ	**(Northern Ireland) Department of Justice**
DPP	**Director of Public Prosecutions**
ECHR	**European Convention on Human Rights**
FoI	**Freedom of Information**
HET	**PSNI Historical Enquiries Team**
HIU	**Historical Investigations Unit**
HMIC	**Her Majesty's Inspectorate of Constabulary**
IRA	**Irish Republican Army**
LIB	**(PSNI) Legacy Investigations Branch**
LSU	**(PSNI) Legacy Support Unit**
MoD	**(UK) Ministry of Defence**
NCND	**Neither Confirm Nor Deny**
NIO	**(UK) Northern Ireland Office**
NIRPOA	**The Northern Ireland Retired Police Officers Association**
OPONI	**Office of the Police Ombudsman for Northern Ireland**
OTR	**'On the Run'**
PFC	**Pat Finucane Centre**
PPS	**Public Prosecution Service**
PRONI	**Public Records Office of Northern Ireland**
PSNI	**Police Service of Northern Ireland**
RFJ	**Relatives for Justice**
RMP	**Royal Military Police**
RUC	**Royal Ulster Constabulary**
SOCPA	**Serious Organised Crime and Police Act 2005**
UDA	**Ulster Defence Association**
UDR	**Ulster Defence Regiment**
UVF	**Ulster Volunteer Force**

What is CAJ?

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organization affiliated to the International Federation of Human Rights. CAJ takes no position on the constitutional status of Northern Ireland and is firmly opposed to the use of violence for political ends. Its membership is drawn from across the community.

The Committee seeks to ensure the highest standards in the administration of justice in Northern Ireland by ensuring that the government complies with its responsibilities in international human rights law. The CAJ works closely with other domestic and international human rights groups such as Amnesty International, Human Rights First (formerly the Lawyers Committee for Human Rights) and Human Rights Watch and makes regular submissions to a number of United Nations and European bodies established to protect human rights.

CAJ's activities include - publishing reports, conducting research, holding conferences, campaigning locally and internationally, individual casework and providing legal advice. Its areas of work are extensive and include policing, emergency laws and the criminal justice system, equality and advocacy for a Bill of Rights for Northern Ireland.

CAJ however would not be in a position to do any of this work without the financial help of its funders, individual donors and charitable trusts (since CAJ does not take government funding). We would like to take this opportunity to thank Atlantic Philanthropies, Barrow Cadbury Trust, Hilda Mullen Foundation, Joseph Rowntree Charitable Trust, Oak Foundation and UNISON. The organization has been awarded several international human rights prizes, including the Reebok Human Rights Award and the Council of Europe Human Rights Prize.

Acknowledgements

This research report is a product of a collaborative Business Alliance Project between CAJ and Queen's University Belfast (QUB) School of Law, led by Professor Kieran McEvoy. The research was conducted by CAJ Deputy Director Daniel Holder in collaboration with CAJ Solicitor Gemma McKeown, with supervision from Director, Brian Gormally. The production of this report was also supported by others in CAJ namely Emma Patterson-Bennett, Donal Lyons and Liz McAleer and Christina Verdirame. Thanks to those who provided information during the research or otherwise gave comments on the content including Louise Mallinder, Patricia Lundy, Niall Murphy, Barry McCaffery, Anne Cadwallader, Alan Brecknell, Paul O'Connor, Sara Duddy and Mary McCallan.

DESIGN: CREATIVEWORKERSCOOPERATIVE.COM | **PRINT:** ASPECT MEDIA

The Apparatus of Impunity?

CONTENTS **Page**

SUMMARY OF MAIN FINDINGS

To date there has been no overarching legacy commission or transitional justice mechanism to deal with the legacy of the Northern Ireland conflict. Instead a number of criminal justice system mechanisms examine unresolved conflict-related deaths. Such mechanisms were largely prompted by a series of Article 2 ECHR 'right to life' judgments in the European Court of Human Rights against the UK. This led to Government adopting a 'package of measures' it argued would meet its human rights obligations for effective, independent investigations. The package included changes to the inquest and prosecution systems. It also included reference to public inquiries, the PSNI Historical Enquiries Team (HET) and the Police Ombudsman's role in investigating the past. Serious limitations however have become apparent in relation to these mechanisms which have militated against their capacity to provide accountability for human rights violations. Elements of the package have been shown not to have the necessary independence, effectiveness or impartiality to investigate state actors. Even those mechanisms which have been independent have faced limitations on their powers, delay or obstruction in undertaking their work.

Five years on from the 2009 Eames-Bradley proposals the 2013 Haass-O'Sullivan Proposed Agreement envisaged a single investigative mechanism, the Historical Investigations Unit (HIU), to investigate unresolved deaths. The December 2014 Stormont House Agreement committed to setting up the HIU as an independent body as well as other institutions to deal with the past. The proposed HIU has the potential to provide effective redress, yet the efficacy of such a mechanism will lie in the detail of how it operates. It is this which will determine whether it will succeed in conducting human rights compliant investigations and in achieving accountability. This report shines a light on how the current system of past investigation has been officially undermined and limited. In doing so it attempts to highlight which restrictions and practices would need to be addressed in the context of ensuring the proposed HIU and other mechanisms do not suffer similar flaws.

Controlling evidence, personnel and resources

- Many investigations and court proceedings into pre-1998 human rights violations have faced recurrent problems of obstruction and non-cooperation from state agencies and former personnel. This has included concealment, non-cooperation, withholding and delaying the disclosure of records, with repeated examples of material being put beyond the reach of investigators, going 'missing', being destroyed, or being overly redacted.

- Despite the requirements of human rights law for persons and institutions involved in investigations to be independent from those potentially under investigation, there have been recurring questions of conflicts of interest regarding personnel in key positions in the investigative chain. This includes rehired RUC officers in key roles responsible for disclosure to external legacy investigations.

- Resources for legacy investigations are an obligation on the state. The control of resources can significantly determine whether and when legacy investigations can be conducted and completed, and there have been examples where resources have been withheld or withdrawn. Whilst a figure of £30 million per annum has been calculated as the combined costs of current legacy mechanisms, this figure has not been disaggregated between the level of resources which must be allocated to deal with the legacy caseload and costs caused by avoidable delays and costly obstruction by state entities themselves. Such practices are in turn used to argue investigations are too expensive.

Institutionalising impunity?

- Along with many other states the UK does not define the term 'national security' yet has dramatically extended its scope in recent years. In its name significant powers of direction and concealment can and have been deployed in legacy investigations.
- The extension of 'Closed Material Procedures' (i.e. when court hearings can take place in secret on 'national security' grounds) to all civil proceedings in 2013 has already been used in Northern Ireland legacy cases relating to informants. The doctrine of 'Neither Confirm Nor Deny' (NCND) has also been used in informant cases.
- The definitions of 'collusion' and 'miscarriage of justice' have been officially changed in recent years to make findings of either much more difficult.

Beyond the peace process agreements:

- The UK Government abandoned 2005 legislation which would have protected applicants from standard prosecutorial processes in relation to conflict-related charges. The legislation emerged from commitments in the Weston Park Agreement 2001 to resolve 'OTRs' (On The Runs) cases. After some deliberation Government had included state actors in the scope of the Bill.
- There has been speculation assurances have been given to other categories of persons beyond OTRs. No such system is provided for in legislation and any clandestine scheme would involve a complex set of arrangements with the buy in of key persons in a number of institutions. To date we have been able to locate cases of two loyalists, two republicans and no state actors who have been convicted by legacy investigations.

Inquiries

- The UK had committed to holding a number of public inquiries into 'serious allegations of collusion by the security forces' if they were recommended to do so following collusion inquiry reports by an independent judge, Mr Justice Cory. When the inquiries were in fact recommended the UK rushed through the Inquiries Act 2005, which permitted Government ministers to interfere at practically every stage of the inquiry. The UK subsequently reneged on its commitment to hold an inquiry into the murder of human rights lawyer Pat Finucane, and have declined to open a number of other inquires. Other 'Cory' inquires did take place, with some limitations.
- The earlier established Saville Inquiry into the events of Bloody Sunday reported in 2010. It vindicated families and led to an official apology, yet to date has not been followed by prosecutions or other effective remedies.

The PSNI Historical Enquiries Team:

- The HET was established within the PSNI with a remit of re-examining unresolved conflict related deaths. It ran for around a decade until being stood down in December 2014. Its remit for investigating British Army cases had been suspended following a report from HM Inspectorate of Constabulary in 2013 which held its approach in state involvement cases had afforded such preferential treatment that it was unlawful.
- The role of the HET has been controversial. On the one hand the HET has uncovered considerable and substantive information which would otherwise, in the absence of any other mechanism, not yet have come to light and some victims families have found a measure of resolution from HET reports. At the same time there is evidence of a consistent

pattern of official interventions in the work of the HET with the purpose or effect of limiting its role, impact and independence. This has been facilitated by the lack of any statutory basis for the HET.

- The HET has been replaced in 2015 by a smaller Legacy Investigations Branch (LIB) in the PSNI it is not clear how the LIB will avoid the same problems of a lack of independence in state involvement cases as the HET, including in cases involving collusion.

Police Ombudsman

- The Police Ombudsman's Office is among one of the most powerful and independent police complaints bodies in the world. As such its legislation and structure are a potential starting point for the HIU. During the term of Office of the first Ombudsman, Nuala O'Loan, a number of hard hitting reports were produced leading to significant changes in policing practice, including in the area of covert policing, although there was at times virulent official resistance.

- Under the second Ombudsman, Al Hutchinson however, in a crisis over the handling of conflict related legacy cases which ultimately led to his resignation, the Office had become severely undermined following political and police interference in its work. The resignation of the Chief Executive and critical reports first from CAJ and subsequently from the Criminal Justice Inspection, which among other matters found that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation, led to the suspension of the Office's historic caseload.

- A programme of reform under the third Ombudsman, Michael Maguire, has re-established the credentials of the Office which, following a favourable report from the Criminal Justice Inspection, has been able to resume historic investigations. Following this however the Ombudsman has faced a number of external challenges, namely an attempt to judicially review the Office's powers by the NIRPOA, having to initiate its own judicial challenge against the PSNI over failure to disclose documents and a devastating budget cut from the Department of Justice impacting particularly on the historic cases function. Legislative amendments to address gaps in the powers of the Ombudsman's Office also remain unimplemented.

Inquests

- Inquests can play an important role in ensuring effective investigations. Inquests in Northern Ireland have long been controversial and a significant number of the systemic failings identified in the Strasbourg 'right to life' cases relate to the inquest system.

- There are currently dozens of legacy inquests before the Coroners Court, yet the process has been obstructed by endemic delays, particularly in obtaining disclosure of information from state agencies. There are also significant structural issues which require redress. This has led to further damning rulings in the domestic and European Court in relation to the inquest process. There is now a commitment in the Stormont House Agreement for reform to ensure human rights compliant inquests.

Prosecutorial decisions

- Decisions to prosecute, or not, are a key element of the criminal justice system. There is evidence that at times during the conflict a level of immunity was afforded to soldiers and informants who could otherwise have faced prosecution.

- Reforms to the system were prompted by the European Court of Human Rights judgments. At present none of the mechanisms dealing with the legacy of the conflict has the remit to scrutinise and remedy past-prosecutorial decisions.

Conclusions

This report brings together relevant evidence about deficiencies in the current mechanisms tasked with uncovering the truth about human rights violations in Northern Ireland. An assessment of this evidence does not support a conclusion that a 'package of measures' is being deployed in good faith by the UK Government, only held back by the complexity of the issues, cost and lack of consensus among Northern Ireland politicians. Rather, the evidence points to a common purpose between the UK Government and elements within the security establishment to prevent access to the truth and maintain a cover of impunity for state agents. Examining each mechanism or phenomenon on its own may create an impression that obstructionist activities are institution specific or aberrational. Yet the emergence of patterns across a number of mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses coming to light and those who were responsible for such abuses (or for covering them up) being held accountable.

There are those who believe security force actions outside the law were justified and helped resolve the conflict. CAJ takes the opposite view and is concerned such actions fuelled conflict. Unless a state is held to account for human rights violations, there is a risk of recurrence. Whilst official and media discourses often point to the state 'only' being responsible for 10% of the deaths during the conflict, this figure does not include deaths attributable to 'collusion'. Only a proper truth recovery process is likely to provide a more accurate figure. What has become apparent is that whole areas of security policy were run outside of the law, yet very few of the tens of thousands of those imprisoned during the conflict were state actors. The UK Government has strongly opposed any amnesty, yet raises concerns that the current legacy mechanisms are too focused on the state. However, in this context, we have been unable to locate one single state actor who has to date been tried and convicted as a result of legacy investigations. The examples in this report show that often every piece of information about past misconduct by state agents has to be hard won.

The existing package of measures has not been able, or has not been permitted, to deliver accountability for human rights violations. The obligations of international human rights law require the dismantling of the various elements of the 'apparatus of impunity' detailed in this report. Remedies are required to ensure existing mechanisms and new institutions alike have the power, resources and structure they need to conduct human rights compliant investigations into the past without their independence being fettered. The state needs to address non-compliance with disclosure and cooperation obligations, conflicts of interest of personnel and to rescind doctrines of 'national security' that afford the opportunity to conceal human rights violations. The process of establishing new institutions needs to redress, rather than replicate and entrench, existing problems and gaps in powers. It is only full implementation of such requirements which will ensure accountability for the past and ensure non-recurrence in the future.

INTRODUCTION

Eames-Bradley to the Stormont House Agreement via Haass-O'Sullivan

In January 2009 the Consultative Group on the Past ('Eames-Bradley') proposals on how to 'deal with the past' were published and subsequently shelved. Almost five years on, the Haass-O'Sullivan '*Proposed Agreement between the Parties of the Northern Ireland Executive*' was completed on New Year's Eve 2013. The Proposed Agreement was the result of crisis talks chaired by Richard Haass and Meghan O'Sullivan which were to focus on flags, parades and the past. [1] Towards the end of 2014, following 11 weeks of talks involving the five Executive parties and the British and Irish Governments, the UK Government published the Stormont House Agreement on the 23 December 2014. The UK described this as an agreement reached with Northern Ireland's political leaders, which provided a "new approach to some of the most difficult issues left over from Northern Ireland's past."[2]

To date there has been no overarching legacy commission or transitional justice mechanism to deal with the legacy of the Northern Ireland conflict. Rather this task is largely left to a collection of criminal justice-system mechanisms to examine unresolved conflict-related deaths from 1968-1998. CAJ and others have put forward position papers advocating a single overarching mechanism to deal with all unresolved conflict-related cases in a manner involving independence from all protagonists.[3]

Haass-O'Sullivan Proposed Agreement

Notwithstanding attempts from London to pre-emptively restrict the scope of any investigative mechanisms proposed,[4] the Haass-O'Sullivan Proposed Agreement did come up with a blueprint and framework for 'contending with the past' which CAJ regarded as a:

> careful, sensitive and sensible contribution to the debate on dealing with the past. We also believe that, subject to a number of caveats, it could be compliant with human rights standards.[5]

Among its proposals, the Agreement called for the establishment of a single 'Article 2 compliant' Historical Investigations Unit (HIU), which would take over the historic investigations roles of the PSNI Historical Enquiries Team (HET) and Police Ombudsman. Also proposed was an Independent Commission for Information Retrieval (ICIR), which in addition to dealing with individual cases would have had a role in the thematic assessment of patterns beyond individual acts to place in context the "policies, strategies and broad goals of those who committed violence". The document suggested a number of appropriate themes or hypotheses

[1] Proposed Agreement 31 December 2013 (Haass-O'Sullivan Proposed Agreement) 'An Agreement among the Parties of the Northern Ireland Executive on Parades, Select Commemorations, and Related Protests; Flags And Emblems; and Contending With The Past'. Published by the Office of the First and deputy First Minister.

[2] Summary statement on publication of the Stormont House Agreement, Northern Ireland Office, 23 December 2014.

[3] CAJ S419 'CAJ's submission to the multi-party group chaired by Richard Haass' August 2013.

[4] During the talks the Secretary of State for Northern Ireland stated the UK Government would not countenance any plans emerging from the talks that 'put those who uphold the law on the same footing as those who seek to destroy it', be costly or involve public inquiries. (See 'Haass promises 'no restrictions' on dealing with Northern Ireland's legacy' *The Detail* 13 September 2013) This statement was made just months after HM Inspectorate of Constabulary had held, that granting any such differential and preferential treatment to members of the security forces during legacy investigations was unlawful (HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team').

[5] CAJ S424 'The Haass Proposed Agreement on dealing with the past: analysis from a human rights perspective' January 2014.

with which such a mechanism would deal.[6] Haass-O'Sullivan also provided that conflict-related inquests should continue alongside these mechanisms.

CAJ stated at the time that taking forward the HIU and ICIR would require legislation and detailed policy. The devil, as always, would be in the detail, as to how effective such a body could be in meeting its stated objective of conducting investigations in a human rights compliant manner. The Proposed Agreement stated clearly that HIU would be a 'new institution' yet there was concern this would be rolled back by seeking to take forward the HIU as a unit of PSNI, which would lack requisite independence.

The Stormont House Agreement

The 2014 Stormont House Agreement commits to legislation to establishing the HIU as a new independent body, rather than as a PSNI unit. It also commits to setting up the ICIR. It also envisages an Implementation and Reconciliation Group (IRG), with a remit to 'oversee themes, archives and information recovery'. The Agreement is not explicit as to whether this is intended to complement or replace the envisaged thematic role of the ICIR. The Agreement also commits to the Northern Ireland Executive, by 2016, establishing an Oral History Archive.[7]

No timeframe is set out for legislating for HIU, and the Haass-O'Sullivan Proposed Agreement did not envisage a transfer of cases to the new body until it was fully established.

The Stormont House Agreement commits to maintaining conflict-related inquests separate from the HIU. Pending any establishment of the HIU a number of existing mechanisms, which can be referred to as the 'package of measures' remain.

Current mechanisms, the law and the 'package of measures'

The current mechanisms which deal with the legacy of the conflict were not provided for in the Belfast/Good Friday Agreement 1998. With the principal exception of the Weston Park Agreement 2001, which committed to the Cory Collusion Inquiries, the existing mechanisms do not derive from the other implementation Agreements of the peace settlement. Rather, in addition to other initiatives, the origin of current range of mechanisms principally lies with the 'package of measures' proposed by the UK to the Council of Europe on the back of a series of cases taken to the European Court of Human Rights (known as the *McKerr*[8] group of cases or Cases concerning the action of the security forces in Northern Ireland). CAJ acted for the applicants in a number of these cases which came before the court in 2001-2003. The Court found the UK to be in breach of its *procedural* duties for effective and independent investigations under Article 2 (right to life) of the European Convention on Human Rights (ECHR). As a result of these legal challenges the package of measures led to changes to inquests and prosecutorial procedures. The HET and the remit of the Police Ombudsman to investigate the past are also referenced as part of the package of measures. It is notable that over ten years later there are still significant delays, deficiencies and obstruction of the implementation of resolution in the very cases which were the subject of these judgments.

In the meantime the case law of the ECHR has moved on in relation to its examination of killings in other member states. In addition to finding *procedural* violations of the duty to

[6] Namely "alleged collusion between governments and paramilitaries; alleged ethnic cleansing in border regions and in interface neighbourhoods; the alleged UK 'shoot to kill' policy; the reported targeting of off-duty UDR soldiers, prison officers, and reservist Royal Ulster Constabulary officers; the degree to which, if at all, Ireland provided a 'safe haven' to republican paramilitaries; intra-community violence by paramilitaries; the use of lethal force in public order situations; detention without trial; mistreatment of detainees and prisoners; any policy behind the Disappeared; or the sources of financing and arms for paramilitary groups" (Proposed Agreement, page 33).

[7] Stormont House Agreement, paragraphs 21-55.

[8] *McKerr v the United Kingdom*, judgment of 4 May 2001, final on 4 August 2001.

investigate under Article 2, the Court has found a number of *substantive* violations of the right to life in circumstances where the *modus operandi* of the security forces at the time of a death makes it clear they were responsible.[9] In addition, the Court has held that in certain circumstances the anguish caused to family members by the obstruction of an effective investigation into a death at the hands of the state is a violation Article 3 of the ECHR, which protects against inhuman and degrading treatment.[10]

In this context it is opportune to summarise and highlight in one place the main limitations of the existing mechanisms in Northern Ireland regarding their ability to meet the requirements of international obligations to ensure an end to impunity for human rights violations. This includes mechanisms which have either been shown not to have the necessary independence, effectiveness or impartiality to investigate state actors, or those which have faced limitations on their powers, delay and even obstruction in undertaking their work. This examination takes place in the context of significant controversy over the operation of mechanisms such as the HET, whose work on military cases was suspended further to an HM Inspectorate of Constabulary report which concluded that the HET had acted unlawfully in state involvement cases. The HET was subsequently stood down at the end of 2014.

The HET was not the only element of the package of measures meant to deal with the past which has been found lacking. This report also maps problems in the inquests system, the framework for inquiries, prosecutions, the impact of PSNI rehiring, the expansion of secret courts, the attempts to redefine key terms such as 'collusion', 'miscarriage of justice' or 'national security', the fettering of powers of key oversight and accountability institutions, and even the 'lowering of independence' during the term of the second Police Ombudsman - the one office constituted in a manner permitting it to conduct independent investigations.

At times the deficiencies in current mechanisms are down to the legislation attributable to Parliament and Government. In other cases, the failure to conclude effective processes is attributable to actors in key positions who appear able to actively obstruct and thwart the progress of independent investigations in which the state or its agents are implicated. There is a risk that by examining each mechanism or phenomenon on its own an impression might be created that such obstructionist activities are institution specific or aberrational. From a broader perspective, the failings and organisational resistance that has become apparent in many of the existing mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses and those who were responsible for such abuses (or for covering them up) being held accountable. The starting point for developing past focused mechanisms in light of the Stormont House Agreement has to be ensuring these flaws are not allowed to recur.

Human rights, accountability and the official narrative

The laws applicable during the 'Troubles' were those of international human rights law and not the laws of armed conflict (international humanitarian law), and it is these standards to which the state is to be held to account. Domestic law, including the charge of murder, also applies

[9] See for example recent case of *Avkhadova and others v. Russia,* (Application no. 47215/07), judgment of 14 March 2013.

[10] In the *Case of ER and Others v. Turkey* (Application no. 23016/04, judgment of 31 July 13) the ECtHR held there was an ongoing violation of ECHR Article 3 for family members who sought to learn what happened to their relative after being detained and subsequently disappeared by the Turkish authorities. In this case, the Court found that the applicants "suffered, and continue to suffer, distress and anguish as a result of the disappearance of their relative and their inability to find out what happened to him. The manner in which their complaints were dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3 of the ECHR" (see *Tanış and Others*…§§ 218-221). The Court concluded that there had "been a violation of Article 3 of the Convention in respect of the applicants" (§97). CAJ also notes the ECtHR commentary on the 'right to truth' in *El Masri v The former Yugoslav Republic of Macedonia* (application no. 39630109, judgment of 13 December 2012) which criticised 'the concept of 'State Secrets' being used to obstruct the search for the truth.

to everyone including state actors, who must, in principle, like others involved in intentional killings, rely on exceptions such as 'self-defence' in order not to be found guilty of such a charge.

In her controversial post-Haass April 2014 '*Moving Politics Forward'* speech the Secretary of State for Northern Ireland Theresa Villiers spoke of her appreciation of 'concern' that new investigative structures "could lead to a one sided approach which focuses on the minority of deaths in which the state was involved rather than the great majority which were solely the responsibility of the terrorists..." She also argued that with a new process there was now "scope to write in from the start the need for an objective balance and with proper weight and a proportionate focus on the wrongdoing of paramilitaries. Rather than the almost exclusive concentration on the activities of the state which characterises so many of the processes currently underway."[11]

Such an assertion does seem remarkably ahistorical. It is arguable that there is a greater focus now on holding state actors accountable than during the conflict. However, in our view this is reflective of flawed investigations and ineffective remedies in the past. Estimates of the number of republican and loyalist prisoners during the conflict range from around 20,000–40,000.[12] By contrast only a handful of state actors served prison sentences during the conflict, and those who did were often released early by Government intervention.[13] Among (the generally small number of) post-Agreement prosecutions we have been unable to locate one single state actor who has to date been tried and convicted as a result of legacy investigations.

The usual figure in both official and media discourse is that state actors were responsible for 10% of deaths in the conflict. Of course this figure does not factor in deaths caused by collusion or otherwise unattributed[14] to the security forces and is a clear underestimate. For example, the main-Belfast based representative group for victims of the security forces, Relatives for Justice (RFJ), has dismissed the 10% figure as a 'propaganda myth' and has provided its own estimate that, when collusion is factored in, the state is culpable in approximately a third (33%) of all killings. RFJ suggest that this figure was reached through existing evidence on collusion. While of course one cannot definitively state that such a figure is true, the broader point (made by RFJ themselves) is that an organised process of truth recovery is likely to provide a more accurate overall figure of the number of deaths in which state actors were actually involved.[15]

Concerns have also been expressed that investigating state actions could lead to the 'rewriting' of history. This concern is for example articulated as the primary reservation to legacy investigations of the Northern Ireland Retired Police Officers Association (NIRPOA) in their submission to the Haass-O'Sullivan process:

[11] Speech by the Rt Hon Theresa Villiers MP 'Moving politics forward' published 16 April 2014. For a critique see 'Clueless, Clumsy, Claptrap – Brian Rowan on Theresa Villiers play on the past' @EamonnMallie.com 16 April 2014.

[12] OFMDFM 'Report of the Review Panel, Employers' Guidance on Recruiting People with Conflict-Related Convictions', March 2012, page 14.

[13] During the conflict two RUC officers and four British soldiers were convicted of murder/manslaughter. There were also 17 members of the UDR convicted. (see Moffett, Luke *The applicability of the prisoner early release scheme to state actors*, unpublished paper citing Chris Ryder, *The Ulster Defence Regiment: An Instrument of Peace*, Metheun 1991 p150-185). This figure includes members of the 'UDR 4', whose convictions were quashed in 1992.

[14] For example, declassified documents also indicate that 'members of the UDR have been successfully prosecuted in the courts without their membership of the security forces being disclosed' (CWU004 07/0953 158C0851. See 'Declassified NIO telegram confirms UDR/RUC collusion in 70s files passed to loyalists - information withheld from courts etc' published by the Pat Finucane Centre.

[15] RFJ Press Statement 'RFJ respond to SoS Propaganda Myths' 16 April 2014.

> In relation to the past our principle concern is that there will be no attempt to rewrite history in a way which seeks to imply some sort of moral equivalence between the police (and other elements of the security forces) and the terrorists.[16]

Five years earlier in a submission to Eames-Bradley similar sentiments were expressed by NIRPOA who argued that:

> ...at this moment in time, a pervasive propaganda campaign that is seeking to rewrite history in support of a false ideology that implies parity, between the actions of the police where deaths of terrorists or civilians occurred and those murdered by the actions of paramilitaries. This is a patently absurd assertion that is incapable of being sustained by any credible analysis of the facts.[17]

It is however precisely a credible analysis of the facts which is proposed by establishing effective investigative mechanisms. It is not clear how tribunals or investigations which fairly assess the available evidence in a consistent manner as to whether state actors were operating outside the rule of law can be interpreted as 'rewriting history'.

It has become apparent that there were areas of security policy that regularly ran outside of the law. One obvious example, (as detailed in the de Silva review and official documents discussed later in this report), is the system for running informants within RUC Special Branch in the 1980s. Given that the system itself, which Government was well aware of, facilitated, directed and permitted agents to operate outside of the law what follows is that numerous offences will have been committed by officers who have never been held to account. Relatively junior officers are unlikely to be willing to face imprisonment without passing responsibility up the line. In this sense whilst efforts to ensure such areas of security policy are not scrutinised will relate to maintaining an official narrative, they can also equally be seen as aimed at protecting the interests of particular and often powerful protagonists from criminal sanctions.

Regardless of this however, from a human rights perspective it is vital to hold the state to account for its past actions and hence ensure that its actions are effectively investigated. This is not least from the perspective of non-recurrence, ensuring that such practices are not repeated and again undermine the legitimacy of the state and the rule of law.

There are elements of the security forces who believe that actions outside the law were justified and helped resolved the conflict.[18] CAJ has taken the opposite view arguing that the state acting outside the law fuelled and exacerbated the conflict. We are concerned that if there is not an accurate picture and accountability for such practices then the very institutions which advocated them, and feel they were justified, will be minded to do so again.

This present report shines a light on how the current system of past investigation has been officially undermined and limited. In doing so we attempt to highlight which restrictions and practices would need to be addressed in the context of ensuring the proposed HIU and other mechanisms do not suffer similar flaws.

---

[16] NIRPOA 'Written Submission by the Northern Ireland Retired Police Officers Association to Dr Richard Haass on Dealing with the Past', page 5.

[17] NIRPOA 'Submission by the Northern Ireland Retired Police Officers Association to the Consultative Group on the Past', Page 14.

[18] An example of this was provided in the BBC Panorama programme in November 2013 whereby former members of an undercover army unit, the Military Reaction Force (MRF), remarkably argued that MRF killings, including of civilians, when operational from 1971-1973 had "ultimately helped bring about the IRA's decision to lay down arms." See 'Undercover soldiers 'killed unarmed civilians in Belfast' *BBC News Online* 12 November 2013.

CHAPTER ONE:

Controlling the evidence and process: paper, personnel, and money

The right to know implies that archives must be preserved. Technical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law...Access to archives shall be facilitated in order to enable victims and their relatives to claim their rights.

UN Principles on Combating Impunity[19]

For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events... This means not only a lack of hierarchical or institutional connection but also a practical independence.

Jordan v the UK

Independence is an elementary principle of human rights compliant investigations into matters such as deaths in which the state may be implicated. Put simply those conducting or in any way controlling investigations should be entirely independent from those potentially implicated in the events being investigated.

As well as the personnel involved in managing the investigation itself, the question of who controls the evidence made available to be investigated (e.g. the disclosure of records, intelligence files and other similar documents) speaks directly to the independence of an investigation. A position to control would include those with powers to block or delay the disclosure of documentation.

The *Jordan v UK* case is generally understood to have laid down the essential characteristics of an investigation into potentially unlawful killing.[20] This refers to the persons 'r*esponsible for* and *carrying out* the investigation' (emphasis added) as needing to be 'independent from those implicated in the events' meaning persons managing or commanding an investigation as well as those individuals undertaking it.

[19] UNESC 'Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity' E/CN.4/2005/102/Add.1, 8 February 2005.These principles were updated from an earlier version from 1997. The principles define impunity as: *...the impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims*.

[20] Jordan v UK [2001] 24746/94 paragraph 106 reads: "*For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. the Güleç v. Turkey judgment of 27 July 1998, Reports 1998-IV, §§ 81-82; Öğur v. Turkey, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the Ergı v. Turkey judgment of 28 July 1998, Reports 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident).*"

Jordan holds that "This means not only a lack of hierarchical or institutional connection but also a practical independence."[21]

The UK never applied the 'laws of war' (International Humanitarian Law) to the Northern Ireland conflict and hence normal criminal and human rights law (albeit amended by emergency legislation) is the framework on which protagonists are to be held to account. Police officers and soldiers in the course of their duty *are* bound by the law, including the law of murder, in the same manner of others. It would appear that this basic assumption was less axiomatic than one might assume in some institutions. For example, the HM Inspectorate of Constabulary found in their investigation report into the HET, that in fact the PSNI had adopted a contrary and erroneous position for their legacy investigations.[22]

The starting point for any investigation into the past is an analysis of the available evidence and the variables which either assist or impede such analysis. The first chapter of this report therefore looks at past practices of record keeping in key state agencies. It then explores how records have been controlled since and the extent to which independent investigators have been obstructed. The chapter then looks specifically at more recent phenomena which can institutionalise limitations on investigations namely the impact of the PSNI 'rehiring scandal' on the independence of investigations and the procedures for controlling 'supergrass' accomplice evidence. Finally, the issues of control of resources and the costs of cover up will be discussed.

Obstruction, concealment and the 'wilful failure to keep records'

Lord Stevens, who became Commissioner of the Metropolitan Police and is now a member of the House of Lords, conducted three police investigations (1989-2003) into allegations of RUC collusion with loyalist paramilitaries.[23] Whilst the three Stevens Enquiries Reports have not been made public a summary of his overall conclusions was published. Among the key findings of the investigation in to RUC practices was "the wilful failure to keep records."[24]

The media and public inquiries have also exposed a policy and culture developed within RUC Special Branch of not keeping records and of preventing detectives from gathering evidence in cases where collusion was suspected. Although its existence was not revealed for many years a system of RUC Special Branch primacy was apparently implemented further to the 1981 'Walker Report' (named after its author, a senior MI5 officer). As one analysis succinctly noted the system's "focus was on making it absolutely clear that all decisions about arrest, the investigation of particular activities and the responsibility for the circulation of intelligence all rested with Special Branch."[25] The central concern with protecting agents, and by extension those officers involved in managing those agents who were by definition implicated in the illegal activities of such agents, was a key organisational feature of RUC Special Branch since its inception. The *Sunday Times* subsequently reported that the Walker Report specified "that records should be destroyed after operations, that Special Branch should not disseminate all information to Criminal Investigations Detectives (CID) and that CID should require permission from Special Branch before making arrests, or carrying out house searches in case agents

[21] Jordan v UK [2001] [106].

[22] HM Inspectorate of Constabulary 'Report on the on PSNI Historical Enquiries Team' (HMIC, 2013), 2013 section 4.8.2.

[23] Stevens I dealt with 'allegations of collusion between members of the security forces and loyalist paramilitaries'; Stevens II focused on allegations raised in Stevens I relating specifically to 'Brian Nelson and the security forces/services'; and, Stevens III investigated the circumstances surrounding the murder of Patrick Finucane. See 'Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.265 & 1.266.

[24] Stevens Enquiry 3, para 1.3.

[25] Hillyard, Paddy 'Regulating state political violence: Some reflections on Northern Ireland', February 2009, p4.

were endangered."[26] Giving evidence to the Billy Wright Inquiry a former RUC Assistant Chief Constable spoke of:

> ...a practice or culture that existed in an organisation where the members did not keep records, so there was no audit trail. Nothing could be traced back, so that if they were challenged they denied it, and that denial, being based on no documentation, would become 'plausible deniability'. [The system in Special Branch was such] that it didn't give proper audit trails and proper dissemination, and at times it would appear that it allowed people at a later date to have amnesia, in the sense that they couldn't remember because there was no data on the system.[27]

Concerns in relation to RUC Special Branch powers had been observed much earlier by the inquiries of John Stalker in the early 1980s. Stalker a former deputy chief constable of Greater Manchester Police had been tasked with investigating a specialist RUC unit, the Specialist Support Unit (SSU) allegedly conducting extrajudicial killings. These cases were known as the 'shoot-to-kill' or 'Stalker-Sampson' cases.[28] Stalker in his book on the matter stated the following views on practices after initial investigations:

> The Special Branch targeted the suspected terrorist, they briefed the officers, and after the shootings they removed the men, cars and guns for a private de-briefing before CID officers were allowed any access to these crucial matters. They provided the cover stories, and they decided at what point the CID were to be allowed to commence the official investigation of what had occurred. The Special Branch interpreted the information and decided what was, or was not, evidence...I had never experienced, nor had any of my team, such an influence over an entire police force by one small section.[29]

The first problem faced by historical investigations is therefore that some of the records which should exist, do not, and human testimony will have to be relied upon. Many records and other forms of evidence were gathered during the conflict. Despite their crucial importance to historical investigations many records have since been concealed or destroyed following the end of the conflict.

In late 2013 *The Guardian* revealed the existence of a hidden archive in southern Derbyshire of at least 66,265 Ministry of Defence documents, many of which related to the Northern Ireland conflict from the 1970s and 1980s. These files had not been handed to the Public Records Office, nor had the PSNI HET been informed of their existence despite its role in reviewing unresolved army killings.[30] It was also recently revealed, in declassified documents uncovered by the Pat Finucane Centre, that the UK withheld evidence of the existence of an 'interrogation' centre at Ballykelly Army base from two inquiries and the European Court of Human Rights in relation to their investigations into the torture of detainees.[31]

There are also significant concerns related to the destruction of documents. In 2011 the PSNI destroyed a large volume of police records, including interview notes, held in Gough Barracks Armagh, after asbestos had been discovered at the premises. Despite documents being

[26] Clarke, Liam 'MI5 pays for murder in Northern Ireland' *Sunday Times*, 28 January 2007.

[27] Billy Wright Inquiry Report, para 5.141.

[28] After Colin Sampson who took over the investigation following a smear campaign and suspension of Stalker, in controversial circumstances.

[29] Stalker, J. (1988). Stalker. London, Harrap, pp. 56-57. Cited in Hillyard, Paddy 'Perfidious Albion: Cover-up and collusion in Northern Ireland' *Statewatch Analysis* (undated).

[30] Cobain, Ian 'Ministry of Defence holds 66,000 files in breach of 30-year rule' *The Guardian* 6 Oct 2013.

[31] See '"Hooded Men" launch legal case' *Pat Finucane Centre Newsletter* Issue 11 Winter 2013.

presumably inside filing cabinets on apparent 'health and safety' as well as 'cost' grounds, decisions were taken both to destroy significant quantities of material and to make no copies of them prior to destruction.[32] Correspondence to a law firm on the subject states that following a decision in July 1998, a 'destruction order' destroyed all interview notes from 1985-1993 from suspects detained at the barracks with 'no exceptions' and there was 'no evidence' that copies of the material were retained and relocated. The letter is signed off by stating:

> We are unable to assist any further apart from saying that our records from October 1998 state all the documents held at the asbestos contaminated store in Gough have been shredded or buried at a named dump.[33]

It is also the case that records were destroyed by others. For example, the IRA attacked police stations which held records and in 1992 destroyed the Northern Ireland Forensic Science laboratory in south Belfast. Weapons decommissioning, as part of the peace process also led to the destruction of significant forensic evidence. There are individual acts too. For example a recent legacy inquest heard from the local head of RUC Special Branch at the time of the incident under examination, who had subsequently taken police notebooks home and burned them.[34]

[32] 'Police records destroyed in Armagh' UTV News Online, 12 September 2011.

[33] Correspondence to KRW Law dated 19 August 2011, from ACC Drew Harris, PSNI.

[34] 'Roseann Mallon murder: Top Special Branch officer burned notebooks after pensioner murdered by loyalists' *Belfast Telegraph* 21 November 2013.

It is not just paper which goes 'missing,' this appears also a not infrequent occurrence with surveillance tapes.[35]

Obstructing investigations

Concerns about the destruction of information and other obstructionist tactics on the part of the security forces have been expressed explicitly in a range of high profile investigations. For example, Lord Stevens encountered a concerted campaign to obstruct his three police investigations (1989-2003) into allegations of RUC collusion with loyalist paramilitaries. Stevens concluded that the obstruction was 'cultural' in nature and 'widespread' within parts of the Army and RUC.[36] A significant problem, up to ministerial level, related to lengthy delays in disclosing documents, or even stating documents did 'not exist' when it subsequently transpired they did. Stevens initiated an investigation as to "whether the concealment of documents and information was sanctioned and if so at what levels."[37]

[35] For example in one recent case the Court of Appeal quashed the conviction of Martin McCauley who was shot and wounded by the RUC, along with 17 year old, Michael Tighe, who was killed, in a hayshed in 1982. The RUC had claimed McCauley had confronted them with a rifle and that they had given warnings, whereas McCauley insisted the pair were unarmed and no warnings had been given. At the original trial the Judge was aware the police officers had knowingly given a false account in their first written statement on the instructions of Special Branch in order to protect a source whose information had led to the patrol having been directed to the hayshed. An investigation by the Criminal Cases Review Commission, who brought the appeal uncovered that Special Branch with the assistance of the Security Service had in fact bugged the hayshed. This had been revealed to the Director of Public Prosecutions (DPP) but not the trial judge or defence. The CCRC found that the DPP had not been told the bugging operation had audio recorded the events before and during the raid. The Court of Appeal records "*The recording revealed that no warnings were shouted by the RUC officers before they first opened fire. The CCRC discovered a memo dated 25 November 1982 from an officer who said that he had learnt that the RUC officers had exceeded their orders and shot the terrorists without giving them a chance to surrender. The Deputy Head of Special Branch had had the tape and monitor logs destroyed because of the deep embarrassment this might cause. An unauthorised copy of the relevant tape had been made by the army and eventually came into the possession of the Security Service. This copy was retained by the Security Service until the summer of 1985 when it was destroyed. This means that a copy of the tape was held by the Security Service at the time of the appellant's trial. Transcripts of the audio recordings were also made to which the Security Service had access.*" In relation to a 1983 meeting at the DPP office with the RUC the judgment comments that the minutes suggest Special Branch deliberately misled the DPP by concealing the bugging operation, this was subsequently revealed to the DPP by the Security Service, but not that a recording or transcription was available. The DPP requested what became the Stalker-Sampson investigation, which made clear the RUC would not hand over the device, and that the Security Service failed to inform Stalker it had its own copy of the recording. Stalker also was critical of the RUC investigation into the incident noting senior officers were unwilling to follow natural lines of enquiry, and appeared to have cleaned up the crime scene before detectives were given access. The Lord Chief Justice in granting the appeal stated: *"It is not possible now to determine what if anything was recorded in relation to the events immediately after the shooting but the misconduct of the police in deliberately destroying this source of evidence deprived the appellant of the opportunity to examine the product of the device for the purpose of assisting his defence on that issue. In those circumstances the deliberate destruction of the first tape and the withholding of the copy tape by the Security Service in our view rendered the appellant's trial unfair."* The Lord Chief Justice commented that the failure of MI5 to disclose the tape to both the Stalker investigation and DPP was "reprehensible" and described the RUC actions of officers under instruction to lie to detectives and deliberately destroying the tape as "at least arguably" a perversion of the course of justice. See Summary of Judgment - Court of appeal finds misconduct by police and security services renders conviction unsafe, Northern Ireland Courts and Tribunals Service 10 September 2014. In January 2015 the DPP asked the PSNI and Police Ombudsman to investigate the alleged destruction of evidence by RUC Special Branch and MI5 in relation to this case. The PSNI announced they had asked HM Inspectorate of Constabulary to bring in an outside police force to investigate the matter.

[36] Stevens Enquiry 3, para 3.1 & 1.11.

[37] Stevens Enquiry 3, para 3.5 & 3.6.

Stevens' overall conclusions highlighted "the withholding of intelligence and evidence" and the timing of the mysterious fire which destroyed his operations room.[38]

In a similar vein, Justice Cory in his independent Collusion Inquiry Reports (resultant from the Weston Park Agreement 2001) found it 'disturbing' to learn that RUC Special Branch and the Army's Force Research Unit (FRU) seemed to have taken "active and deliberate steps to obstruct the progress of the Stevens Inquiry from the time of its inception."[39] Significantly Cory attributes the withholding of pertinent information from the Stevens Inquiry to collaboration at the most senior levels of the RUC and military. Cory reviewed documents, including the minutes of meetings attended by senior officials including the head of the Army. These state that the RUC Chief Constable decided Stevens would have "no access to intelligence documents or information, nor the units supplying them."[40]

Of course, there are also difficulties for any external investigator in assessing whether they have been given all the available material. A critique published by *Statewatch* notes that Justice Cory had been under the impression he had been provided with all the relevant material for his Collusion Inquiry Report into the killing of human rights lawyer Pat Finucane, yet Desmond de Silva, in his subsequent review on the same case, stated he had been given a much broader range of material.[41]

It has also become apparent that the prohibitions on unauthorised disclosures of information by state agents subject to the Official Secrets Act 1989 can be used to obstruct disclosure to investigating detectives. With respect to one of the suspected extrajudicial killings by the RUC Special Branch Special Support Unit (SSU),[42] recent court documents record that:

> Following the shooting, the SSU Officers involved, together with other members of the unit, including Officer [...] who was the head of the unit, took part in a debriefing prior to their interviews with the CID Officers tasked to investigate the shootings. At that debriefing, senior officers required the SSU Officers involved not to disclose the involvement of Special Branch or the fact that the interception of the suspect vehicle had been a planned operation. Alternative explanations for the involvement of police at the scene were suggested by those senior officers. All the officers involved made false statements in accordance with the cover story.[43]

---

[38] Stevens Enquiry 3, paras 1.3 and 3.4. Stevens recorded how British Army agent Brian Nelson was tipped off by his handlers about Stevens teams planned arrest of him, as well as information on the arrest operation being leaked to loyalist paramilitaries and the press. The operation was postponed, yet the night before the new date the Stevens Incident Room was burned to the ground. Stevens states "This incident, in my opinion, has never been adequately investigated and I believe it was a deliberate act of arson."

[39] Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.267.

[40] Cory Collusion Inquiry Report: Pat Finucane' HC470, 2004, para 1.269.

[41] Paddy Hillyard and Margaret Urwin 'Shining a light on deadly informers: The de Silva report on the murder of Pat Finucane', *Statewatch Journal vol* 23 no 2 August 2013 page 9. The critique states: "de Silva asserts: "[I] was given access to all the evidence that I sought, including highly sensitive intelligence files". But given the extent of the duplicity detailed in his report, how can he be sure that he saw all the relevant material? Judge Cory told the Joint Oireachtas Committee that he was satisfied he had seen all relevant documentation but now de Silva informs us that he had "a wider evidential base" which suggests that he received more documentation than Cory. Deep in the heart of his report, de Silva examines the disappearance of the tape on which Ken Barrett, one of the known killers of Pat Finucane, confesses to the murder in the back of a police car. It was replaced by another tape recorded a week later at the exact same location which does not have a confession on it. Thus, what confidence can anyone have that other crucial evidence has not also disappeared or been substituted?"

[42] Subsequently re-named as Headquarters Mobile Support Unit-HMSU.

[43] Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1) for Judicial Review [2014] NIQB 11, paragraph 50.

A leading account of the 'shoot-to-kill' incidents has argued that officers were ordered to give such cover stories under the terms of the Official Secrets Act.[44]

Documents declassified by the de Silva Review into the killing of Pat Finucane include records of a high level RUC–NIO meeting on the 13 March 1987 which sets out that the *modus operandi* of handling paramilitary informants during the conflict was "placing/using informants in the middle ranks of terrorist groups. This meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution." The system also involved holding back information from the judicial processes to protect informants.[45]

The first Police Ombudsman, Nuala O'Loan, also faced obstruction in her inquires into covert policing.46 In January 2007 she released the public statement into her landmark Operation Ballast investigation into Special Branch collusion with a loyalist paramilitary unit. Ballast uncovered practices of failures to arrest informants for crimes to which those informants had allegedly confessed; subjecting informants suspected of murder to lengthy sham interviews and releasing them without charge and falsifying or failing to keep records and interview notes.47 Whilst Operation Ballast only analysed a small part of the informant handling of RUC/PSNI Special Branch it emphasised there was no reason to believe that the findings were isolated, recording that, on the contrary, they were highly likely to be 'systemic' and the implications hence were 'very serious.'[48]

The *Hooded Men* case, the UK's actions before the European Court

Official dishonesty has also manifested itself towards even the most serious of international investigations into state practices. The Pat Finucane Centre, following their uncovering of declassified documents, have characterised the UKs approach as one of 'hide and lie' towards the European Court of Human Rights, in the interstate Ireland v the UK case. In 1976 the European Commission on Human Rights upheld complaints of torture against the UK, and referred the matter up to the Court. The Court subsequently in 1978 downgraded its finding of an Article 3 violation to 'inhuman and degrading treatment' rather than torture. However PFC contend that internal documents accepted that torture was used, that the UK both withheld evidence from the Court but also lied to it on key matters including what they knew at the most senior level about the medical impacts of the 'five techniques' being applied to detainees. By 1974 a Labour Minister, Roy Mason, was aware of 'substantial medical evidence of lasting psychiatric damage' to a detainee. Far from being a practice of 'bad apples' one 1977 memo from the then Northern Ireland Secretary of State Merlyn Rees to Prime Minister James Callaghan on the case stated "It is my view, (confirmed by [former Northern Ireland Prime Minister] Brian Falkner before his death) that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by Ministers, in particular Lord Carrington, then Secretary of State for defence."

[44] Rolston, Bill 'Unfinished Business: State Killings and the Quest for Truth' Beyond the Pale Publications, 2000, chapter 8.

[45] The Report of the Patrick Finucane Review Volume 1 [de Silva Review], paragraph 4.36.

[46] See Office of the Police Ombudsman for Northern Ireland, 'Statement by the Police Ombudsman for Northern Ireland on her investigation of matters relating to the Omagh Bombing on August 15 1998'. In her conclusions the Police Ombudsman noted that notwithstanding the cooperation of some police officers, "At senior management level the response to this enquiry has been defensive and at times uncooperative" (paragraph 7.2).

[47] 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007.

[48] Operation Ballast Report, para 33.2.

All of this and other matters such as where the real location torture had taken place was (Ballykelly airfield), were kept from the court.49 In light of this the Irish Government in December 2014 formally asked the Strasbourg court to re-open the case.

The 1978 Court decision that the 'five techniques' did not constitute torture has subsequently been cited by other states, including the infamous Bush administration 'torture memos' used to justify the US 'war on terror' when seeking to justify the use of torture. Essentially, the case was used as legal cover to argue that the US's actions did not constitute an international crime of torture. Reports of the final report of the Brazilian Truth Commission on violations committed mainly under 1964-1985 military rule reveal the UK trained Brazilian torturers in the same techniques, which it referred to as 'clean' torture techniques or the 'English system.' [50] The Commission concluded torture persists in Brazil as the crimes committed under military rule were never properly investigated and remedied.

The urgent need to revisit the Ireland v UK case therefore goes well beyond the important need for justice for the 'Hooded Men'. This case well illustrates that when states are not held to account for human rights violations, such impunity has knock on consequences elsewhere.

The archives also demonstrate the lengths the UK Government were willing to consider in order to evade accountability for its actions. One official document from the archives, entitled 'Irish state case at Strasbourg: the next stage' reveals that among the retaliatory measures considered were: economic sanctions, stripping Irish citizens of the right to vote in UK elections, changing nationality law to prevent Irish citizens from being British citizens, taking Ireland to the UN and even taking a counter case to the European Court of Human Rights against Ireland on matters such as "their prohibition on divorce and birth control."[51] The paper concludes otherwise stating that HMG (Her Majesty's Government) should, before a proposal for settlement is published, "make it plain to the Irish…[that]… their activities at Strasbourg" did not entitle them to any special role in the process of negotiating final settlement for Northern Ireland and would instead make ministers "less likely to keep in touch with them." It also

[49] See O'Connor, Paul (forthcoming) 'British state torture: from 'Search and Try' to 'Hide and Lie'.

[50] The report includes reference to testimony from former Colonel Paulo Malhães. The Colonel detailed to the Commission how he had tortured many victims, and gave details about training on torture techniques he and others had received in the UK. A section in the report entitled 'UK collaboration' highlights the Brazilian military's admiration for British 'interrogation' methods, especially the UKs 'clean torture' techniques. Colonel Malhães particularly admired the 'psychological torture' which was known as the 'English system'. *The Guardian* reports that the Commission quotes former General Hugo de Andrade Abreu as saying in 1970 he and a group of the regime's officers travelled to England to be trained on the 'English system.' It is claimed these techniques were then put into practice in Rio Army HQ in 1971. An army psychiatrist, Amílcar Lobo, who worked in a torture centre known as the 'house of death', is quoted as stating that the torture methods were "variations on the techniques used by the British army against Irish terrorists." Comissão Nacional da Verdade – Relatório (Report of Brazilian National Truth Commission December 2014, p334-6.

[51] It is in the section of the paper entitled 'Possible pressure on the Irish' that other options are considered. Economic sanctions are mooted but considered 'difficult' to devise in a way that hurt Ireland more than the UK, and that would not break EEC rules. Removing Irish citizens' entitlements to British citizenship was a 'possibility' but considered an 'empty gesture'. In short HMG appears to feel no one would care. A similar attitude was taken to removing the right to vote of Irish citizens in UK elections, which was equally considered unlikely to persuade Ireland to withdraw the case. Also considered was taking Ireland to the International Court of Justice (ICJ) or UN and accusing Dublin of allowing its territory to be used as "a base or place of refuge for terrorists mounting attacks on another country." Whilst the UN route was felt to have 'some propaganda advantage' this consideration was outweighed by the risk of internationalising the Northern Ireland conflict, when the London Government had 'hitherto maintained' it was an internal affair. Similarly with the ICJ, Ireland was not then party to the court. Submitting an application and mounting 'a propaganda campaign' to argue Ireland's non-response as 'an admission of guilt' was considered but overridden by concerns it would bring the ICJ into disrepute and would in any case, not result in Ireland withdrawing the case. The same was felt of a counter case to the European Court on Human Rights on matters ranging from the prohibition of divorce and birth control, censorship and 'possibly' religious discrimination. However, the UK was concerned this would be "widely regarded as a petulant and irrelevant tu quoque provoked by our chargrin at facing more serious charges".

concludes HMG should "spin out the proceedings as long as possible" and gather together whatever evidence is possible to "rebut, or at least minimise" the impact of the allegations. In an indication of HMG's reputational priorities, it states this should involve 'special attention' to cases that occurred "after Direct Rule."[52]

Present day investigations

In relation to contemporary investigations, including inquests, CAJ has been repeatedly informed by legal representatives and others, of consistent problems relating to disclosure of documents and other items which have the purpose or effect of drastically delaying or obstructing investigations. Among the patterns identified as contributing to persistent delays and limiting the effectiveness of proceedings are:

- The over classification of material as 'Top Secret', when the threshold for such a classification has not been met with resultant costs and delays, unnecessary protective controls which inhibit the sharing of relevant material;
- Disputing the scope of which material is relevant to the disclosure obligation, for example into 'similar-fact' or 'bad character' issues;
- Overly generous time limits for bodies such as the PSNI to produce disclosure, and no sanctions when time limits are not complied with;
- Inconsistencies in relation to the retention of weapons used in lethal force incidents;
- Lack of resourcing of the disclosure obligation;
- Overly and heavily redacting documents on 'public interest' and ECHR Article 2 (right to life) and 8 (private life) grounds, including the redaction of material relating to previous legal proceedings, despite such processes having been public hearings at the time (in some documents the PSNI has sought to redact the words 'Special Branch' from documents, despite it not being a secret such a unit of the RUC existed);
- Pressing for blanket anonymity for state agents giving evidence during proceedings, which may inhibit cross examination (for example as to whether the same officers had been involved in other lethal force incidents), this includes redacting out names which were previously in the public domain, and often are well known;
- The difficult position families are put in when they know the identity of individuals or other public domain information that is then redacted in disclosed information. While families may know the information from other sources (including original unredacted trial transcripts/inquest papers) a chill factor can creep in that they may be required (as a condition of disclosure) to sign very restrictive confidentiality undertakings that they will not share or discuss the disclosed information with others;
- Potential conflicts of interest of personnel currently involved in managing the disclosure of material and their previous roles within the security forces.

A number of the above issues have manifestedthemselves in relation to the 'Stalker-Sampson' or 'Shoot-to-kill' cases. Despite a European Court of Human Rights ruling in favour of the families, and the events being over 30 years ago, the Stalker-Sampson reports have never been disclosed in full. Inquests were reopened in 2007, delay in disclosure has been endemic,

[52] Holder, Daniel 'The Hooded Men: why the Irish government has agreed to re-open these cases' @eamonnmallie.com 14 December 2014.

and was not completed in 2014 despite PSNI assurances that it would be. The PSNI had to be taken to court to disclose Stalker-Sampson information to the Coroner.[53]

Disclosure to families to date has been heavily redacted which caused exceptional delay to the process, to the extent that the parents of one of the deceased both passed away in 2013 before any public hearing had taken place. The PSNI even sought the redaction of a transcript of a related trial of RUC officers in the 1980s, despite the trial being a public hearing. Even when redacted information has been provided to families after years of delay a confidentiality undertaking has to be signed. This means families can be sitting for several years on information they cannot share, render public or disseminate, despite, such information not posing a 'security' risk, as it has already been redacted on ECHR Article 2 and 8 grounds. In the case of the Stalker-Sampson cases families cannot even use information despite some of it being part of a publicly available court record relating to a judicial challenge to another inquest (the *Jordan* inquest).

The PSNI has taken the position that it had allocated sufficient resources to the disclosure proceedings despite the excessive delays. It has transpired that either all or almost all of the material in the Stalker-Sampson inquest has been classified as 'Top Secret' by the PSNI or RUC. This has significant practical implications for the coronial process. One example given in court by senior counsel for the Coroner is that notes on the materials taken by junior counsel have to remain in the same secure location as the materials, creating extreme difficulty in accessing the information. Counsel for the Coroner argued this classification imposed an 'enormous' and 'unrealistic' burden on practitioners and participants to prepare for inquests in a meaningful way and questioned whether in fact such information should be classified as 'Top Secret' indicating that it includes "transcripts of court cases in the past, newspaper cuttings, published articles, this sort of thing..." that would clearly not normally be considered 'Top Secret'.

Government classifications place classified material into three categories of 'official', 'secret' and 'Top Secret'. The 'Top Secret' category is supposed to refer to material which is "... *exceptionally sensitive*" to "*her Majesty's government partners information assets that directly support or threaten the national security of the UK or allies and require extremely high assurance of protection from all threats*." This refers to information which if 'compromised' would likely lead to such matters as:

- 'widespread loss of life'
- 'threaten directly the internal stability of the UK or friendly nations'
- 'raise international tension'
- 'cause exceptionally grave damage to the effectiveness or security of the UK or allied forces leading to an inability to deliver any of the UK defence military tasks'
- 'cause exceptionally grave damage to relations with friendly nations'
- 'cause exceptionally grave damage to the continuing effectiveness of extremely valuable security or intelligence operations'
- 'long-term damage to the UK economy' and

[53] The decision of the Coroner to order that the Stalker-Sampson reports and underling material be disclosed led to significant legal wrangles and was challenged by judicial review by the PSNI in 2010 and 2011, including an appeal to the Court of Appeal, where the order for disclosure was upheld. The current disclosure process is effectively four years old and has not been completed, with an original timeline of May 2013 missed.

- 'major long-term impairment to the ability to investigate or prosecute serious organised crime'.

Clearly it is to stretch beyond the bounds of all credibility that Stalker-Sampson material relating back to 30 years ago and inclusive of once publicly available court transcripts and press clippings, fall within this category.[54]

There has also been the issue of who within PSNI is controlling the disclosure process, given the involvement of rehired former RUC Special Branch officers who may have potential conflicts of interest with their previous roles, as their former associates may be implicated in the matters under investigation.[55] In this instance the Stalker-Sampson files have been in the control of RUC/PSNI for 30 years whilst other external investigations took place, meaning material may have 'gone missing' at a much earlier stage.

Recently it was however revealed that top secret files relating to the killings had been destroyed just weeks before the inquest was due to begin. The investigative website *The Detail* revealed in September 2014 that it had obtained Government correspondence confirming that Stalker-Sampson files had been destroyed in February 2013, just weeks before the Coroner had hoped to open the inquest in April 2013. The Coroner's office was however not informed until July 2014 that the files had been destroyed. *The Detail* outlines that it is not clear how many files were destroyed or whether it was a Government department or MI5 who took the decision.[56]

Police Ombudsman investigations have also had to contend with the issue of 'missing' material. There has also been a persistent problem of retired officers refusing to cooperate with Ombudsman investigations.[57] As detailed in a later chapter the Ombudsman in 2014 had to resort to the extreme measure of initiating judicial review proceedings against the Chief Constable when the PSNI refused to disclose documents sought for his investigations.

In May 2014 a judgment granted compensation for the protracted delays in inquests.[58] The Policing Board issued a statement which outlined that it had raised questions with the PSNI on issues relating to disclosure and resourcing of the PSNI Legacy Support Unit (LSU). The Board stated:

Whilst it is acknowledged that in some cases the disclosure process can be lengthy and complex, Board Members have expressed serious concern about the continued delays in the provision of material and the impact for the families involved. [59]

The statement went on to note Board Members had highlighted the impact delays have on confidence in the PSNI and the Criminal Justice System.

---

[54] Information disclosed during cross examination by Counsel for the Coroner Frank O'Donoghue QC of DCC Drew Harris PSNI, 22 September 2014, Stalker-Sampson Preliminary Hearing, Coroners Court for Northern Ireland.

[55] McCaffery, Barry 'Coroner told former Special Branch officers in charge of redacting `shoot to kill' files' *The Detail* 19 October 2012.

[56] McCaffery, Barry Government destroyed Stalker Sampson files weeks before 'Shoot to Kill' inquest was due to open *The Detail* 19 September 2014.

[57] For example see the Police Ombudsman's *Public Statement On PSNI Operation Rapid, Matters Arising From The Ruling In R V John Anthony Downey* which for example records "The e-mail references a 'Gold Policy file'. In interview with my Investigation Team the Detective Chief Superintendent relayed that he ran a 'Gold policy book'. This was also supported by the Operation Rapid Senior Investigating Officer when interviewed. Neither a Gold Policy file nor book have been identified or located by the PSNI during the course of my investigation." (paragraph 4:64) and paragraph 4.8 on the non-cooperation of a Detective Inspector who was 'clearly instrumental' in the matter under consideration but had subsequently retired.

[58] Jordan and five other applications [2014] NIQB 71, 20 May 2014

[59] NI Policing board, Press Statement, dated 20 May 2014.

Another key question in relation to the powers of investigative bodies is as to whether their powers are qualified to prevent them from obtaining certain evidence, such as that held by the UK Government. It is notable that the statutory basis for the Inquiry into Historical Institutional Abuse set up by the Northern Ireland Assembly, contains a provision which explicitly excludes the inquiry from obtaining evidence controlled by London.60 Notably this exclusion was only inserted at the request of the NIO at a late stage of the Bill's passage. During the Consideration Stage the Minister, Jonathan Bell MLA, stated the purpose of the amendment, passed unanimously, was to "make it clear the Act will only bind the devolved administration." It is this power which could be used to ensure the inquiry cannot compel evidence in relation to the controversial role of MI5 in relation to historical child sexual abuse at the Kincora boys home in East Belfast, and the subsequent calls in 2014 by the Northern Ireland Assembly, Human Rights Commission and Amnesty for Kincora to be included in a UK-wide abuse inquiry.61 It is therefore clear that the NIO at least was concerned that if not for this caveat the Inquiry's powers might have otherwise extended to the UK Government, although there are certain limitations and hurdles that bodies established by the Assembly may in any case face in exercising powers to obtain such information.[62]

All of the above speaks to two issues. First investigators of state involvement cases will be faced with considerable 'missing' material, and hence will need to also rely on human testimony of current and former personnel, and need powers to require their cooperation. Second, there have been clear instances of obstruction, including through delaying or refusing to disclose those documents which do exist. This latter issue requires redress through both ensuring investigating bodies have the necessary legal powers to compel the production of documents from state archives without interference, but also that those in a position to control the disclosure of information from police and other state archives are themselves sufficiently independent from the persons and institutions potentially implicated. Clearly *all* the evidence cannot be hidden. However, persons with conflicts of interest in key positions would be in a powerful position to 'filter' disclosure. As further discussed in other sections of this report this issue has been particularly acute in relation to control of the dissemination of intelligence material. The issue has also come to further prominence recently in relation to PSNI rehiring.

Controlling personnel, legacy investigations and conflicts of interest

A police officer involved in an investigation must immediately report any potential conflict of interest to his or her supervisor, for example, where the investigation concerns a relative, friend, associate or colleague of the police officer.

Explanatory Notes, Article 2 PSNI Code of Ethics (2008)

[60] Historical Institutional Abuse Act (Northern Ireland) 2013, the Inquiry's powers to compel evidence are explicitly constrained to be "exercisable only in respect of evidence, documents or other things which are wholly or primarily concerned with a transferred matter" ((s9(7) see also s22(2)).

[61] See statements by Naomi Long MP [Hansard House of Commons 22 Oct 2014 : Column 1006] in relation to the matter, including: "What differentiates Kincora from other cases of historic child abuse in Northern Ireland, but links it, crucially, to others such as Rotherham, are the allegations that persist that Government and their agencies, such as MI5, had full knowledge of the allegations at the time and acted to prevent appropriate investigation taking place. There is further suspicion that MI5 and the security agencies were complicit in the abuse in order to collect information that could be used to blackmail those in positions of power."

[62] See Holder, Daniel 'Could the NI Assembly legislate for the Haass 'Historic Investigations Unit'?' Rights NI 28 November 2014.

The issue of former RUC Special Branch and other RUC personnel being put into positions whereby they control the disclosure of police-held information despite potential conflicts of interest with their former roles has been controversial in recent years. At the aforementioned Stalker-Sampson Inquest it was reported that not only were the five assigned police personnel working in the PSNI's Legacy Support Unit (LSU) tasked with disclosing materials to the coroner, all former RUC covert policing officers (four Special Branch and one intelligence officer) but that they had served directly with an astonishing 92 serving and former police officers who could potentially be called as witnesses at the inquests.[63] The legislation sets out that PSNI Code of Ethics applies these key ethical standards to 'police officers' and therefore may not apply to retired officers rehired in a civilian capacity.[64]

PSNI legacy units

Details of the roles of internal PSNI units, which control flow of intelligence and other data to legacy investigations, have emerged. In 2012 the PSNI did inform CAJ there was a 'Legacy Support Unit' staffed by solicitors and retired police officers whose role is to identify and provide material to the Coroner in relation to legacy inquests. There is also a named PSNI 'Legacy Gold Group' which also services the Coroner and other investigations.[65]

The PSNI have set out that they set up a Public Inquiry Unit in 2005 to prepare for the Hamill, Nelson and Wright public inquiries. This was renamed in 2007 as the Public Inquiry and Legacy Unit and subsequently subsumed into the PSNI Legacy Support Unit (LSU).[66]

In 2014 a full time 'Disclosure Manager' post was recruited to head up the LSU. It was noted in court that despite this post attracting a salary £45-55k no formal qualifications were required for it. The appointed person is stated to have an RUC Special Branch background and was previously temporarily employed as the LSU's Public Interest Immunity Consultant, in what it appears is a similar role.[67]

The PSNI deny that the role of the LSU is part of the investigative process, despite it being undisputed that the LSU role lies in:

- sourcing and retrieving information;
- reading the information;
- deciding which information is 'relevant', and
- altering the content of the information through redactions. [68]

The role of staff in such units is therefore very significant to legacy investigations.

[63] McCaffery, Barry 'Coroner warns PSNI delays threatens his ability to hold proper inquiries' *The Detail* 31 May 2013.

[64] s52 Police (Northern Ireland) Act 2000.

[65] PSNI correspondence to CAJ, March 2012.

[66] Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1) [2014] NIQB 11, [310].

[67] Cross examination by Counsel for the Coroner Frank O'Donoghue QC of DCC Drew Harris PSNI, 22 September 2014, Stalker-Sampson Preliminary Hearing, Coroners Court for Northern Ireland. This records that the advert set out the wide criterion of 'experience of the application of human rights and public interest immunity law', but required no qualification per se and indicated no minimum requirement for experience.

[68] As above.

The Northern Ireland Retired Police Officers Association (NIRPOA)

Police officers shall notify the Chief Constable of their membership of any organisation which might reasonably be regarded as affecting their ability to discharge their duties effectively and impartially in accordance with the Police Service policy on registration of notifiable memberships.

Article 1.7 PSNI Code of Ethics 2008

There is no requirement for members employed in LSU to notify membership of the NIRPOA.PSNI FoI Response as to whether members of NIRPOA are employed in the LSU.

A further issue in relation to the LSU has been the question of whether membership of the Northern Ireland Retired Police Officers Association (NIRPOA) can present a conflict of interest with LSU work. NIORPA is the main representative group and describes itself as the recognised voice for retired RUC officers.[69] NIRPOA has a legacy sub-group chaired by a former ACC and head of Special Branch[70] who himself allegedly would not cooperate with the first Police Ombudsman's Operation Ballast investigation.[71] In response to an investigation by the current Police Ombudsman NIRPOA stated it would not encourage its members to engage with Police Ombudsman's investigations into conflict legacy issues which engaged ECHR compliance by the RUC.[72]

Examination of NIRPOA policy submissions to the Haass-O'Sullivan process shines a light on the association's concerns and positions in relation to legacy investigations. As referenced in the introduction to this report the UK authorities adopted a 'package of measures', including changes to coronial legislation and ensuring the Police Ombudsman's remit could extend to historic cases where grave and exceptional matters were concerned. These measures were adopted with the Committee of Ministers (representative of the around 50 Council of Europe member states) as part of the implementation of judgments of the Strasbourg Court. NIRPOA denounces the changes however as 'concessions' to those 'formerly engaged in terrorism' the outworking of which was to include the facilitation "often at public expense, of a continual campaign of baseless denigration of the members of the Royal Ulster Constabulary George Cross..."[73] In apparent reference to the outworking of legacy investigations NIRPOA argues:

> We cannot allow to go unchallenged the current prolonged attempt by former terrorists and their spokesmen [sic] to rehabilitate themselves by blackening the reputation of our members.

[69] The Association describes itself as "The Northern Ireland Retired Police Officers Association has a membership of some 3,000 retired officers of the Royal Ulster Constabulary George Cross (RUCGC) and the Police Service of Northern Ireland (PSNI). It seeks to represent the interests of all retired police officers within Northern Ireland (numbering some 10,000) as well as their families. It is recognised by the government and by local politicians as the voice of retired members of the RUCGC and PSNI. It is funded by a modest annual subscription levied on its members."

[70] In the Matter of an Application by the Northern Ireland Retired Police Officers Association for Judicial Review, [2014] NIQB 58, paragraph 21.

[71] See: Ex-officers 'may meet Operation Ballast families' *Belfast Newsletter* 20 July 2007.

[72] 'Former officers withdraw police ombudsman help' *BBC News Online* 24 October 2013.

[73] NIRPOA 'Written Submission by NIRPOA to Dr Richard Haass on Dealing with the Past', Executive Summary page 3 paragraph 1.

> ...it is apparent that republican propagandists are desperate to ensure that their narrative should predominate. They are therefore using all their political muscle to skew the work of the relevant institutions in Northern Ireland in order to create a false narrative...
>
> ...The determination of the propagandists should not be underestimated. A monolithic and intolerant edifice of lies is being created.
>
> As part of this process a number of these propagandists have attempted to foster the myth of 'collusion'.[74]

Whilst not explicitly naming organisations the document appears to regard human rights or victims NGOs as republican fronts. For example, persons whose critique of the HET subsequently ended up reflected in media and Policing Board discussions following the findings of a HM Inspectorate of Constabulary report are referred to by NIRPOA as 'non-statutory republican pressure groups' with 'whom we would have no sympathy.'[75]

The submission also questions the competence of existing statutory mechanisms, stating that the HET and Police Ombudsman have appointed staff who are 'poorly equipped' and leaders who have shown 'flawed judgement'. NIRPOA regards two of the three Police Ombudsmen as having overstepped their remit and in doing so have been 'abetted by those politicians and pressure groups who seek to denigrate the RUCGC' and politicians who have 'failed to understand' or 'colluded' in the agenda of such groups. Senior Investigators in the Ombudsman's Office are said to lack 'professionalism', 'training' and 'experience' with the outworking of a "total failure to understand context" and reports "based on assumption and conjecture instead of evidence". NIRPOA speaks of the Office's 'incompetence' and 'apparent difficulty with the concept of impartiality.'

NIRPOA raises similar issues about the HET raising serious concerns about a 'lack of contextualisation and understanding of the realities of the times about which they are writing.'[76] Inquests are also denounced as a vehicle that 'terrorist organisations' seek to use to discredit the security forces, and the Association is opposed in principle to any further public inquiries. NIRPOA claims that "many of those present at these [legacy] inquests will be members of criminal organisations or their fellow travellers." NIRPOA also states that obliging retired officers to spend time on legacy investigations into their actions may breach their rights under ECHR Article 4 (prohibition of slavery and forced labour.)[77] In relation to future mechanisms NIRPOA, in its submission to the Consultative Group on the Past, made clear which type of mechanism it would not cooperate with:

> We will not be drawn into participation in any alternative forum, commission, or other body that is intent on pandering to the wholly spurious, cynical and absurd attempts currently underway by various 'justice' groups and other apologists to rewrite history by equating the actions of the police in combating terrorism with those of so called 'freedom fighters'.[78]

[74] As above, page 6.

[75] As above, page 8-9.

[76] As above, page 7-8.

[77] As above, page 15.

[78] NIRPOA submission to Consultative Group on the Past, page 15.

There are clearly therefore compatibility questions regarding NIRPOA membership with a role in the PSNI LSU handling disclosure to legacy investigations. In 2013 the PSNI responded to a freedom of information request as to how many members of the LSU were also members of NIRPOA, by merely stating that LSU members were not required to disclose membership of NIRPOA.[79] The same question was put by the Policing Board in September 2014 and the PSNI set out that five current LSU members were also NIRPOA members.[80] The recent Stalker-Sampson Preliminary Hearings made reference to five members of the LSU, although it is not clear if this is still the case or if this reflects the totality of the unit. However it does appear a significant proportion of the LSU are members of NIRPOA, yet the only requirement cited in relation to conflicts of interest is whether LSU staff had *operational involvement* in the incidents which they are responsible for handling information about.[81]

The PSNI Rehiring Scandal

What CAJ has referred to as the PSNI 'rehiring scandal' largely involved the re-contracting of former RUC officers who had received severance packages under the Patten reforms into seemingly key positions in the PSNI via an employment agency. The controversy was exacerbated by the lack of willingness of the PSNI to be fully transparent on the issue for some considerable time, including to the Policing Board. Such staff, despite often undertaking policing roles, are classified as civilian staff. This means as non police officers, they cannot be held to account by the Police Ombudsman and may not be bound by the PSNI Code of Ethics. Whilst there are a number of issues with the practice of rehiring, including issues on equality of opportunity in recruitment, CAJ stated at the time our most urgent concern was:

> the potential conflict of interests some re-hired staff may have between their past and present roles. CAJ does not hold the view that all former RUC officers are an obstacle to change or police reform. However, serious concerns arise when re-hired former RUC officers are placed in the investigative chain for historic investigations. This potential conflict is acute when the actions of their former units, those under their command or associates may be directly or indirectly the very subject of such investigations. In particular, there is the scenario when investigations by the Police Ombudsman or Historical Enquires Team (HET) engage the activities of police agents, yet former special branch officers are involved in providing the intelligence data on which the same investigations are reliant.[82]

In November 2011 the BBC revealed that among those re-hired was a former Acting Assistant Chief Constable and Special Branch head. This individual had previously inappropriately lobbied the Police Ombudsman to encourage this Office to desist from using the term 'collusion' arguing that its use 'undermined the credibility of RUC Special Branch.' The BBC reported that the officer was rehired into the PSNI 'legacy unit'.[83] The role of this officer, reportedly as an advisor on legacy matters to the Chief Constable, was not entirely clear. The PSNI have justified the rehiring of retired officers stating that it was necessary to employ personnel who had a 'working knowledge of RUC intelligence systems' due to the 'sensitive nature of the intelligence materials involved.'[84]

---

[79] PSNI Freedom of Information response F-2013-05780.

[80] Board Members Questions to Chief Constable – September 2014 Meeting, Legacy Information Evenings (Pat Sheehan), p40.

[81] Board Members Questions to Chief Constable – September 2014 Meeting, Legacy Information Evenings (Pat Sheehan), p40.

[82] CAJ 'The PSNI Rehiring Scandal' *Just News*, March 2012, p1.

[83] Kearney, Vincent 'PSNI officer who protested use of term 'collusion' re-employed' *BBC News Online* 29 November 2011.

[84] Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1) [2014] NIQB 11, paragraphs 310, 315 330.

The Northern Ireland Audit Office conducted an investigation into the PSNI rehiring practices and released a report in October 2012.[85] The Audit Office report finds of all PSNI Departments the Crime Operations department, which includes the C3 Intelligence Branch, has the second highest number of rehired officers and that of persons rehired to work as 'Intelligence Officers' 97% were former retired officers.[86] CAJ provided evidence to the Audit Office and its report does address the issue of independence. Referring to 'conflicts of interest' of rehired officers in relation to the HET the Audit Office recommends further measures are introduced, including that all members of an investigative team are required to formally 'declare their independence' at the outset of an investigation.[87] The Audit Office indicates that at present procedures are limited to former RUC officers declaring if they had previously been involved in the RUC *investigation* into the same case. This in itself does not extend into examining any conflicts of interest in relation to otherwise being able to influence investigations through control of the intelligence and other records on which they rely. The aforementioned PSNI Code of Ethics however requires that police officers involved in an investigation immediately report any conflict of interest, including when the investigation concerns an associate.[88]

The independence of Government Ministers

The practice of PSNI rehiring has increased concerns about independence yet it is of course not just within policing whereby conflicts of interest can arise. There are powers also vested in Government, where in addition to making decisions on investigations relating to past executive action, ministers themselves may have a background in the organisations under investigation. For example, Mike Penning MP, the NIO security minister at a time of legacy inquests into the actions of the security forces were taking place, had the power to prevent the non-disclosure of information on 'national security' grounds despite himself being a former serving soldier during the conflict.[89] His successor in October 2013, Andrew Robathan MP, actually served in the SAS, who trained the RUC's Special Support Unit (SSU) whose actions are under scrutiny in current 'shoot-to-kill' inquests which have been subject to protracted delays due to the PSNI and Security Service insisting on further scrutiny of documents on 'national security' grounds before any disclosure to the Coroner.[90] Whilst not all NIO ministers will be former service personnel they are nevertheless in a powerful position to make decisions as to whether it is in the 'public interest' or the interests of 'national security' to investigate their own army.

'Supergrass' and controlling accomplice evidence

All legal systems will rely to an extent on accomplice evidence. There has been significant controversy however in relation to the use of 'supergrass' evidence in Northern Ireland. The current 'supergrass' system is provided for under s71-75 of the Serious Organised Crime and Police Act 2005 (SOCPA). This provides a framework whereby an 'assisting offender' can be offered immunity from prosecution, a reduced sentence or undertakings that evidence will not be used in prosecutions.

The issue returned to prominence following the high profile trial of *R v Haddock and others* in which 12 of the 13 defendants were acquitted of all charges.[91] A number of the accused,

[85] '*The Police Service of Northern Ireland: Use of Agency Staff'* Report by the Comptroller and Auditor General, 3 October 2012.

[86] As above, figure 7; p23 ,figure 14; p35.

[87] As above, paragraph 3.18.

[88] PSNI Code of Ethics 2008, Article 2.

[89] See 'Inquest delays 'embarrass' coroner' *Irish News* 7 February 2014, p11.

[90] McCaffery, Barry 'Coroner launches unprecedented attack over delays in 'Shoot to Kill' inquests' *The Detail* [14] May 2014.

[91] One defendant was convicted of a lesser charge of possession of a sledgehammer intended for use in terrorism.

and by extension their RUC Special Branch handlers, had been linked to a range of serious offences, including killings, in the Police Ombudsman's 'Operation Ballast' report into the UVF Mount Vernon gang in north Belfast. This particular trial, one of the longest in local legal history, was limited to largely focusing on the evidence of two 'supergrasses' who had pleaded guilty to murder but had received a substantial reduction in the tariff sentence imposed on them in exchange for their evidence which was ultimately deemed too unreliable for a conviction.[92] To date no charges have ensued against any RUC handlers, although follow up investigations by both the PSNI and Police Ombudsman continue.

Further high profile SOCPA cases have followed. In January 2013 a decision was taken not to prosecute persons accused of the loyalist murder of journalist Martin O'Hagan, on the basis that evidence provided by an assisting offender would be insufficient to secure a conviction.[93] The Assisting Offender was nevertheless given a reduced sentence from 18 to 3 years for having provided the information. The PPS reviewed this decision and held the SOCPA agreement had not been broken, but did refer the case to the Police Ombudsman.[94] There have long been allegations that the murder investigation has been hampered to protect an MI5 or RUC informant.[95]

A further long running case linked also to the Mount Vernon UVF is that of Gary Haggarty who was charged with the 1997 murder of William Harbinson following a HET investigation. In 2010 Haggarty agreed to become an 'assisting offender'. Haggarty, described in the media as a 'former UVF leader', has had reportedly over 30,000 pages of material and 760 interview tapes amassed with him.[96] It is known through subsequent judicial review proceedings that "during the interviews he disclosed criminal conduct by him and criminal conduct by others, including police officers." The judicial review was brought by Haggarty to seek release of his own interview notes and tapes after he had been charged with additional offences. The PSNI opposed the release of the tapes arguing it would prejudice the ongoing police investigation and potentially endanger the lives of persons implicated by Haggarty, stating "it is inevitable that SOCPA tapes will include sensitive materials from a human source; will include allegations against third parties of serious criminal conduct; and will be likely to create circumstances in which the safety and security of persons may be imperiled if its contents are disseminated or further disseminated." Haggarty's application was denied. However the Court held that the matter of disclosure should be dealt with by his trial.[97] In November 2012 the media reported he had been released on bail, with committal proceedings expected to start in 2013.[98] Ultimately a Preliminary Enquiry was scheduled for October 2014. Haggarty faced 212 charges spanning between 1991 and 2007 including five counts of murder, 31 conspiracy to murder and 6 attempted murders. His defence sought an adjournment to process what were ultimately the 10,000 pages of evidence which had been compiled in the case.[99] Reports in the *Irish News* state that on the basis of the evidence compiled in Haggarty case other loyalists could now face serious charges but that:

[92] R v Haddock and Others, [2012] NICC 5.

[93] 'Decision not to prosecute in Martin O'Hagan murder case' PPS Press Release 25 January 2013.

[94] 'Ombudsman called in to investigate journalist Martin O'Hagan's murder' *Newsletter* 25 September 2013.

[95] See McDonald, Henry '*Murder probe 'blocked to protect police informer' The Observer* 11 November 2001.

[96] 'Former UVF leader Gary Haggarty granted bail by Belfast court' *BBC News Online* 22 November 2012.

[97] Haggarty's (Gary) Application [2012] NIQB 14, paragraphs 4 & 7.

[98] 'Former UVF leader Gary Haggarty granted bail by Belfast court' BBC News Online 22 November 2012

[99] Morris, Alison 'Huge volume of evidence compiled against loyalist' *Irish News* 14 October 2014, p5.

> What remains unclear is whether or not members of RUC Special Branch, who were responsible for 'running' Haggarty during his time at the head of the Mount Vernon UVF, will now also face questioning and potentially criminal charges.[100]

To date much of the human rights discourse on SOCPA issues has focused essentially on the issues around a fair trial and due process. This is the obvious issue when considering the potential for unsound convictions of accused persons purely on the basis of uncorroborated 'supergrass' evidence. There is however a separate human rights angle on SOCPA namely the extent to which its processes are compatible with duties to independently investigate deaths in which the state and its agencies, including the police, may be implicated. As referenced earlier, these obligations to investigate exist under the procedural limb of Article 2 ECHR, the right to life, and increasingly also under Article 3 ECHR (torture and inhuman and degrading treatment). As *Shanaghan v UK* put it, in that case, the shortcomings included the:

> Lack of independence of the police officers investigating the incident from the security force personnel alleged to have been implicated in collusion with the loyalist paramilitaries who carried out the shooting.[101]

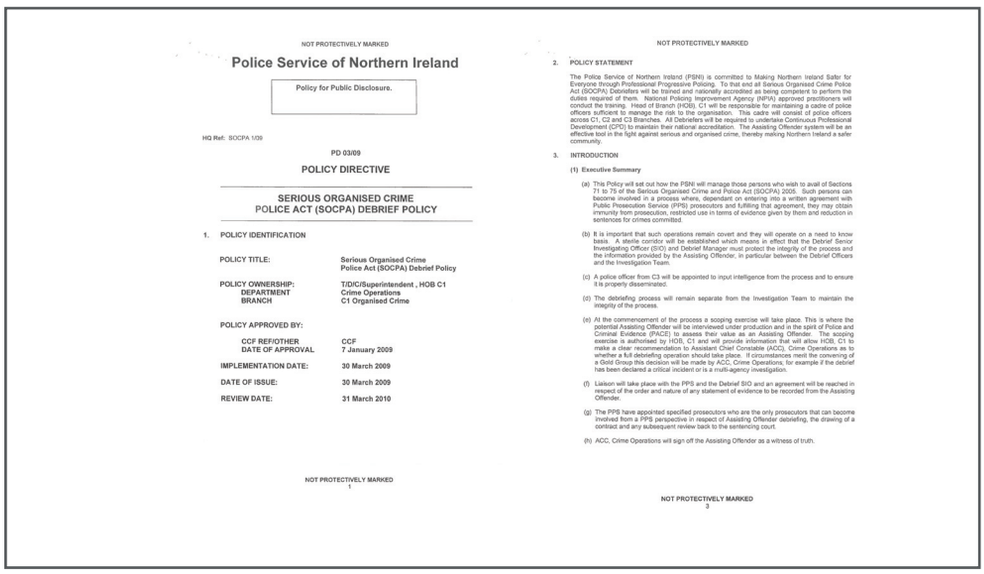
The same judgment also criticised the absence of opportunity to scrutinise the decision of prosecutors not to prosecute in respect of alleged collusion. These obligations are particularly relevant to the role of paramilitary informants implicated in killings now subject to SOCPA processes. Assisting offenders may themselves be paramilitary informants, and/or some of the evidence they have may relate to killings in which other paramilitaries who were informants were implicated. This could implicate the informants and their police handlers in unlawful activity. Yet it is the police themselves along with the prosecution service who have a level of control over the 'deal' with the assisting offender as to what evidence will reach court and form the basis of prosecutions. This could constitute a conflict of interest and engage Article 2 compliance given the apparent lack of independence and impartiality of those involved in making the decisions. Equally new proceedings may expose past decisions to discontinue prosecutions to protect informants and their handlers. Yet it is the prosecution body itself that has the formal role in determining the focus of any new proceedings.

SOCPA 2005 itself vests the formal power to grant immunity, exclusion undertakings, or a reduced sentence in the prosecutor – normally the Public Prosecution Service (PPS). The written agreement with the assisting offender is also made with the prosecutor. In practice however there is a considerable role in 'debriefing' the assisting offender vested in the PSNI. This was set out in PSNI Policy Directive PD 03/09 SOCPA Debrief Policy, which CAJ was subsequently told was under review, and was removed from the PSNI website. The policy was implemented in March 2009 and sets out that PSNI will manage such assisting offenders, such operations will 'remain covert' and on a need to know basis with a 'sterile corridor' established with a Debrief Senior Investigating Officer (SIO) and Debrief Manager protecting the information provided and liaising with the PPS. An officer from 'C3' (special branch) will control the input and dissemination of intelligence from this process, which will be firewalled away from the 'CID' Investigation Team.

One key safeguard is however the involvement of the Police Ombudsman when assisting offenders make disclosures that relate to *police* misconduct or criminality. However the Police Ombudsman's role is not provided for in the above Debrief Policy, nor would the Ombudsman have standing if the informants had been handled by agencies other than the police.

[100] Morris, Alison 'Ex-UVF leader offers evidence against his former associates' *Irish News* 21 October 2014, p 12-13.

[101] Shanaghan v UK (application no: 37715/97) judgment delivered 4 May 2001, final on 4 August 2001 [122].



NOT PROTECTIVELY MARKED

Police Service of Northern Ireland

Policy for Public Disclosure.

HQ Ref: SOCPA 1/09

PD 03/09

POLICY DIRECTIVE

SERIOUS ORGANISED CRIME
POLICE ACT (SOCPA) DEBRIEF POLICY

1. POLICY IDENTIFICATION

POLICY TITLE:	Serious Organised Crime Police Act (SOCPA) Debrief Policy
POLICY OWNERSHIP: DEPARTMENT BRANCH	TD/IC/Superintendent , HOB C1 Crime Operations C1 Organised Crime
POLICY APPROVED BY:	
CCF REF/OTHER DATE OF APPROVAL	CCF 7 January 2009
IMPLEMENTATION DATE:	30 March 2009
DATE OF ISSUE:	30 March 2009
REVIEW DATE:	31 March 2010

NOT PROTECTIVELY MARKED
1

NOT PROTECTIVELY MARKED

2. POLICY STATEMENT

The Police Service of Northern Ireland (PSNI) is committed to Making Northern Ireland Safer for Everyone through Professional Progressive Policing. To that end all Serious Organised Crime Police Act (SOCPA) Debriefers will be trained and nationally accredited as being competent to perform the duties required of them. National Policing Improvement Agency (NPIA) approved practitioners will conduct the training. Head of Branch (HOB), C1 will be responsible for maintaining a cadre of police officers sufficient to manage the risk to the organisation. This cadre will consist of police officers across C1, C2 and C3 Branches. All Debriefers will be required to undertake Continuous Professional Development (CPD) to maintain their national accreditation. The Assisting Offender system will be an effective tool in the fight against serious and organised crime, thereby making Northern Ireland a safer community.

3. INTRODUCTION

(1) Executive Summary

(a) This Policy will set out how the PSNI will manage those persons who wish to avail of Sections 71 to 75 of the Serious Organised Crime and Police Act (SOCPA) 2005. Such persons can become involved in a process where, dependant on entering into a written agreement with Public Prosecution Service (PPS) prosecutors and fulfilling that agreement, they may obtain immunity from prosecution, restricted use in terms of evidence given by them and reduction in sentences for crimes committed.

(b) It is important that such operations remain covert and they will operate on a need to know basis. A sterile corridor will be established which means in effect that the Debrief Senior Investigating Officer (SIO) and Debrief Manager must protect the integrity of the process and the information provided by the Assisting Offender, in particular between the Debrief Officers and the Investigation Team.

(c) A police officer from C3 will be appointed to input intelligence from the process and to ensure it is properly disseminated.

(d) The debriefing process will remain separate from the Investigation Team to maintain the integrity of the process.

(e) At the commencement of the process a scoping exercise will take place. This is where the potential Assisting Offender will be interviewed under production and in the spirit of Police and Criminal Evidence (PACE) to assess their value as an Assisting Offender. The scoping exercise is authorised by HOB, C1 and will provide information that will allow HOB, C1 to make a clear recommendation to Assistant Chief Constable (ACC), Crime Operations as to whether a full debriefing operation should take place. If circumstances merit the convening of a Gold Group this decision will be made by ACC, Crime Operations, for example if the debrief has been declared a critical incident or is a multi-agency investigation.

(f) Liaison will take place with the PPS and the Debrief SIO and an agreement will be reached in respect of the order and nature of any statement of evidence to be recorded from the Assisting Offender.

(g) The PPS have appointed specified prosecutors who are the only prosecutors that can become involved from a PPS perspective in respect of Assisting Offender debriefing, the drawing of a contract and any subsequent review back to the sentencing court.

(h) ACC, Crime Operations will sign off the Assisting Offender as a witness of truth.

NOT PROTECTIVELY MARKED
3

There may well be scenarios whereby it is right and proper for investigations to be firewalled away from each other. In addition agencies themselves may take measures to ensure those appointed to debrief, disseminate intelligence and handle prosecutions are individually independent from colleagues who may have a conflict of interests. There appears however to be no explicit provision to ensure this in either the legislation or aforementioned PSNI policy document, nor does it address the issue of institutional independence. The process could therefore be open to abuse beyond the question of who is granted immunity from prosecution under SOCPA. Take for example the scenario where evidence and information gathered via an assisting offender is then 'filtered' to selectively prosecute loyalist paramilitaries on selected charges in a manner designed to prevent evidence uncovered in the process being disclosed that relates to illegality by paramilitary informants and their police handlers.

Accomplice evidence is always going to have some role in the justice system. SOCPA appears to have been introduced largely as a mechanism to ensure assisting offenders followed through and gave the evidence they had earlier committed to rather than retracting it before reaching court. The legislation does not explicitly address the Article 2 context in a post-conflict society leaving risks that it could be abused to facilitate, not just immunity, but impunity.

Controlling resources and the uncounted costs of cover up

Regarding the possibility of delegating Article 2 responsibilities, I think it's quite clear that if a country were to do this…it would be quite a disaster ...with regard to the UK, as far as I am aware, the violations that took place during the Troubles took place primarily during a period of Direct Rule from Westminster. I don't think that the UK government can divest itself of investigatory responsibility or funding responsibility for investigations. Of course this must take place in conjunction with the devolved authorities, but I don't think Westminster can wash its hands altogether.

Nils Muižnieks, Commissioner for Human Rights, Council of Europe
Speaking at University of Ulster Conference in Belfast, 6 November 2014

In November 2013, shortly before the conclusion of the Haass-O'Sullivan talks, and one day after the Attorney General for Northern Ireland, John Larkin QC, had instigated a high-level political debate by advocating an end to all police investigations, inquests and inquiries, into conflict related killings, the Criminal Justice Inspection (CJI) for Northern Ireland issued a report on the 'cost and impact' to criminal justice institutions of dealing with the past. The headline finding of the report was that the "financial cost borne by criminal justice agencies in Northern Ireland in terms of dealing with the past is estimated to exceed £30m per year."[102] The £30 million figure was referenced by the Secretary of State in her 'Moving Politics Forward' speech, in which she referred to the 'major burden' on the policing and justice system of past investigations.[103] The Secretary of State has also advocated the bill for dealing with the past should be picked up by the devolved institutions, largely already the case.[104] The ECHR investigative duties are however the responsibility of the state and, as cited above, such an approach has been rebuked by the Council of Europe Human Rights Commissioner. The precedent it would set would be to allow any federal state in Europe to bypass its investigative duties by delegating them to a regional body that it then deprives of the resources to effectively discharge.

Whilst it outlines the current level of costs what the CJI costs and impact report does not however do is attempt to desegregate the level of resources which are inevitable with such a legacy caseload from those costs which are actually caused by avoidable delays and obstruction by state entities themselves. This has been apparent in the inquests system in particular with the Senior Coroner complaining that the PSNI's attitude to disclosing sensitive material to inquests is 'driving up costs'.[105] The successful judicial review of the inquest into the death of Pearse Jordan held the PSNI had created 'obstacles or difficulties' that had prevented the progress of the inquest.[106] Flaws and delays in relation not only to inquests, but also Police Ombudsman reports and HET reviews, and related decisions to refuse legal aid are regular occurrences in relation to legacy cases. Whilst at times dismissed as 'costly satellite litigation' many cases in fact have a favourable outcome for victims families in overturning decisions as unlawful or prompting a 'review' or re-running of previous investigations.

In May 2014 the Department of Justice actually had to pay £7,500 in damages to six victims as the delays in their inquests had been so severe they had breached the applicants' human rights and were rendered unlawful.[107]

Controlling resources also gives the state considerable power to control investigations, whether this relates to the budget allocated to the Police Ombudsman's Office for historic investigations, the HET, or the coroner's office. A letter sent on the 6 May 2014 by the Senior Coroner to the Department of Justice, revealed serious concerns in the office about the resourcing of legacy inquests in general and the failure to provide funding for an expert investigator to assist the Coroner's office, despite this being requested in 2011. The correspondence stated:

[102] 'A review of the cost and impact of dealing with The Past on Criminal Justice Organisations in N.I.' Criminal Justice Inspection for Northern Ireland November 2013.

[103] Speech by the Rt Hon Theresa Villiers MP "Moving Politics Forward" published 16 April 2014.

[104] McAdam, Noel 'Dealing with past: Stormont to pick up bill, hints Theresa Villiers' *Belfast Telegraph* 13 November 2014.

[105] McCaffery, Barry 'Coroner launches unprecedented attack over delays in 'Shoot to Kill' inquests' *The Detail* [14] May 2014.

[106] Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1) [2014] NIQB 11.

[107] Jordan's and five other Applications [2014] NIQB 71.

> The Senior Coroner is of the view that the inquests are being funded on a drip feed basis and that there is no demonstrable commitment to ensure that these inquests are properly resourced and otherwise facilitated so that they can take place timeously. In the meantime the families of the deceased and the witnesses age, and many have already died without these inquests having been heard. The delay for the families of the deceased and for many of the witnesses involved must be nothing sort of intolerable.
>
> The Senior Coroner remains deeply frustrated by the absence of an appointed investigator. It is essential this role is filled as early as possible. In the context of Article 2 complaint Inquests, there is no scope for any argument over budgetary constraints. The Senior Coroner has been actively seeking the appointment of an Investigator for going on three years … This Office has indicated the need for such an appointment for several years now and resources should have been in place to allow me to move directly to this appointment at the point it was required. Instead, the process currently embarked upon is highly bureaucratic and overly attenuated, with the practical effect being that we are still some considerable [time] away from a substantive appointment – with a lack of clarity still hanging over the appropriate method to be deployed for the appointment process itself. This situation is clearly untenable, and meanwhile, valuable time is being wasted and evidence likely deteriorating further.[108]

Legal challenges have been made to decisions not to investigate particular cases on grounds there were insufficient resources available.[109] It is not uncommon in such cases for the agency complained about to initiate, re-initiate an investigation, or review an allegedly flawed investigation in light of legal challenge being brought against it. Another key battleground in recent years has been the provision of legal aid to allow relatives to take legacy challenges or participate in inquests. In addition to general delays in decision making CAJ is aware of cases whereby legal aid has been initially refused to relatives but subsequently granted to them after they have instigated legal proceedings, or where the decision not to grant legal aid has been quashed by the courts.[110] The need to litigate however further contributes to delays in the system.

There is also the question of conflicts of interest in relation to the role a Minister may have in determining, for example, whether to waive financial eligibility criteria despite the case involving the government department itself. This situation is readily acknowledged by the Department of Justice itself.[111]

---

[108] McCaffery, Barry 'Coroner launches unprecedented attack over delays in 'Shoot to Kill' inquests' *The Detail* [14] May 2014.

[109] See for example Martin's (James) Application [2012] NIQB 89 in the matter of a decision of the Police Ombudsman for Northern Ireland.

[110] See Green's (Brigid) Application [2012] NIQB 48. Where a decision not to provide the applicant, the widow of a victim, with legal aid to challenge a Police Ombudsman's report into the 1994 Loughinisland massacre, was overturned in the courts.

[111] "[The backlog in legacy inquests] has not been assisted by the procedures involved where, in the circumstances of an individual case, an applicant may not be eligible for funded representation unless the financial eligibility criteria were varied or waived. In such circumstances, the Commission may make a request to the Minister to vary or waive those criteria. A Departmental official will then look afresh at the Commission's request and make a submission to the Minister who will then make a decision on the matter. However, this might add an unwanted element of delay to the process. Furthermore, there may be an argument that the Minister should be totally independent of the legal aid decision given he is a part of the state itself." Department of Justice, '*Consultation Document: Review of the Statutory Exceptional Grant Scheme'* April 2013, paragraph 3.6.

On 31 March 2014 the Department of Justice introduced the Legal Aid and Coroners Bill into the Northern Ireland Assembly. This Bill will dissolve the Northern Ireland Legal Services Commission and instead bring the legal aid function in-house inside the Department of Justice itself. Critics have raised concerns that safeguards preventing the Minister for Justice intervening in individual cases are being insufficient in light of the Minister's powers to determine the policy framework. Criticisms have also been levelled by highlighting the range of circumstances where litigation, potentially dependent on legal aid, could involve the Department itself.[112]

Finally there is the obvious question of the very costs of proceedings, and a political outcry against them, being used as a rationale for blocking future processes, including public inquiries. Northern Ireland public inquiries since 1997 have cost £270 million, although most of that figure (£191 million) was caused by the long running Bloody Sunday (Saville) Inquiry.[113] There is no delineation readily available of the extent to which costs were unavoidable, and the extent such costs were attributable to avoidable delay and obstruction. It was on the publication of the Bloody Sunday Inquiry that the Prime Minister announced there would be "no more open-ended and costly inquiries into the past."[114] Ironically the costs of the Bloody Sunday Inquiry could have been avoided in their entirety had the original Widgery Tribunal not produced such a false account.[115]

Notwithstanding the need to properly manage public funds it is difficult not to apply a degree of cynicism to cost-based objections to investigations into the Northern Ireland conflict, which have included criticism of the costs charged by members of the legal profession. The victims group Relatives for Justice (RFJ) have contrasted this with the lack of outcry when it comes to payments to members of the security forces and their legal representatives. In 2013 a freedom of information request revealed that £135 million had been paid for former Police Officers for hearing loss claims, and that £65 million of this was attributable to the legal costs of law firms representing the officers.

As RFJ points out there was no corresponding outcry at these costs once made public, the group states:

> Costs to the public purse in relation to the small number of families engaged within the courts are miniscule in comparison to what is regularly spent by the PSNI, MoD and other related government departments in these same cases in denying truth and accountability. These costs also come from the public purse courtesy of the allocated budgets yet there is absolutely no criticism or threats to curb that expenditure. Often it is increased.[116]

RFJ calculates that the main packages paid from public funds to the security forces have led to an estimated total around £1.2 billion being paid out. RFJ desegregates these costs as including, in addition to hearing loss claims, £500 million in the Patten RUC severance payments scheme, £250 million on payments to two locally recruited regiments of the British Army; 'a £20 million gratuity payment to the RUC reserve, £100 million on retiring rehiring; £70 million to prison officers in a Patten-style payout.'[117]

---

[112] See Stanley, Christopher Legal Aid and the Legacy: The Importance of Independence 29 April 2014 and evidence to the Justice Committee of the Northern Ireland Assembly from Niall Murphy, KRW Law, 14 May 2014.

[113] Written Answer from Secretary of State Theresa Villiers MP to Nigel Dodds MP, HC Deb, 12 May 2014, c303W.

[114] Hansard House of Commons, Prime Minister David Cameron MP 15 Jun 2010: Column 741.

[115] Report of the Tribunal appointed to inquire into the events on Sunday, 30th January 1972 [Widgery Report].

[116] RFJ's FoI on Hearing Loss Claim Another Stop for the Gravy Train 23 January 2014

[117] As above.

Whilst not querying the rights of former service personnel for compensation for injuries whilst on duty, this issue, along with the resources expended on delaying investigations contrasts with official attitudes to spending money on investigating the past, especially the actions of the state. The current costs of £30 million a year is clearly not insurmountable when contrasted with other legacy costs. The costs of dealing with the past could be significantly reduced by state actors cooperating more effectively with investigations.

The resources issue again came to a head in the latter half of 2014 when the undoubtedly real budget cuts facing the Northern Ireland administration led to significant cuts into past investigations in the PSNI and Police Ombudsman, which are detailed elsewhere in this report. This period also saw a particular period of 'buck passing' whereby the UK Government sought to delegate its international obligations to conduct human rights compliant investigations into conflict related deaths on to the devolved institutions in Belfast at the time it was seeking to slash their resources. In November 2014 the Secretary of State Theresa Villiers MP again advocated the bill for dealing with the past should be picked up by the devolved institutions.[118] The Minister for Justice for Northern Ireland, David Ford MLA, in his comments to the Northern Ireland Assembly and in subsequent interviews took the position that the London must step up and resource investigations into the past.[119] Speaking at a conference in Belfast on 6 November 2014 the Council of Europe's Commissioner for Human Rights, Nils Muižnieks, directly addressed the issue of London's responsibilities:

> Regarding the possibility of delegating Article 2 responsibilities, I think it's quite clear that if a country were to do this…it would be quite a disaster... I think with regard to the UK, as far as I am aware, the violations that took place during the Troubles took place primarily during a period of Direct Rule from Westminster....I don't think that the UK Government can divest itself of investigatory responsibility or funding responsibility for investigations. ...Of course this must take place in conjunction with the devolved authorities, but I don't think Westminster can wash its hands altogether...
>
> It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'. The UK Government cannot wash its hands of the investigations, including funding of the investigations. These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the Government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results. The issue of impunity is a very, very serious one and the UK government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general. [120]

The subsequent Financial Annex to the December 2014 Stormont House Agreement, set out that the UK government would now *contribute* to the costs of the HIU and the other bodies the Agreement proposes to deal with the past. It commits to up to £30m a year for five years will be made available for this. There is some ambiguity in the text of the Annex and Agreement as to whether this commitment is conditional on the implementation of other entirely unrelated matters, such as the welfare cuts.[121]

---

[118] McAdam, Noel 'Dealing with past: Stormont to pick up bill, hints Theresa Villiers' *Belfast Telegraph* 13 November 2014.

[119] Official Report (Hansard) Committee for Justice 1 October 2014; 'David Ford backs call for government to fund Troubles killings inquiries' *BBC News Online* 7 November 2014.

[120] McCaffery, Stephen 'UK Government cannot "wash its hands" of legacy of the Troubles' *The Detail* 6 November 2014.

[121] 'Stormont House Agreement - financial annex' Northern Ireland Office, 23 December 2014.

CHAPTER TWO:
Institutionalising Impunity?

The use of an amorphous concept of national security to justify invasive limitations on the enjoyment of human rights is of serious concern. The concept is broadly defined and is thus vulnerable to manipulation by the state as a means of justifying actions that target vulnerable groups such as human rights defenders, journalists or activists. It also acts to warrant often unnecessary secrecy around investigations or law enforcement activities, undermining the principles of transparency and accountability.

UN Special Rapporteur Frank La Rue[122]

This chapter will first examine the growing trend of Government legislating to prevent accountability through both the expansion of the national security doctrine and 'secret courts'. There will then be an examination of attempts to redefine terms such as 'collusion' and 'miscarriage of justice'. This chapter will end by looking at the application of the concept of 'Neither Confirm Nor Deny' (NCND).

The growth of the national security doctrine

The effectiveness of investigations into the past is dependent both on relevant evidence not being 'out of bounds' to their inquiries, but also in being able to put their conclusions and basis for the same into the public domain. In recent years there has been a dramatic extension of 'national security' exemptions made to investigatory powers. This process has been particularly exposed following the devolution of most justice powers to Belfast in 2010 with the legislation explicitly retaining a range of 'national security' powers with London. Notably there is no statutory definition of 'national security', the MI5 website states:

> The term 'national security' is not specifically defined by UK or European law. It has been the policy of successive Governments and the practice of Parliament not to define the term, in order to retain the flexibility necessary to ensure that the use of the term can adapt to changing circumstances .[123]

This 'flexibility' and vagueness of the term allows Government to reinvent the scope of 'national security', and recent years have seen a significant extension. CAJ has raised concerns about 'national security' exemptions a number of times in recent years.[124] The implementation legislation of the Belfast/Good Friday Agreement (although not provided for in the Agreement) contained a power for the Secretary of State to veto 'any action proposed to be taken by a Minister or Northern Ireland department' (including legislation) that she 'considers' incompatible with the 'interests' of national security.

[122] UNGA 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue' 17 April 2013, A/HRC/23/40, paragraph 60.

[123] See www.mi5.gov.uk/home/about-us/what-we-do/protecting-national-security.html [accessed March 2013].

[124] Submission to the Scrutiny Committee on Protection of Freedoms Bill, May 2011; Submission to the Department of Justice's DNA Database consultation, June 2011; Response to the Home Office Review of Counter-Terrorism and Security Powers, January 2011; Submission To The Home Office Policing Powers And Protection Unit Re Keeping The Right People On The DNA Database, July 2009.

The Secretary of State can also direct by Order that a Minister or Northern Ireland Department take 'any action' (including legislation) she again considers necessary to 'safeguard the interests of' national security.[125]

There are even exemptions in data protection legislation, when required for "the purpose of safeguarding national security".[126] Here a 'Minister of the Crown' has the power to issue a certificate to block the issuing of a person's own personal information. This power was used by Secretary of State for Justice and Lord Chancellor, Chris Grayling MP in 2014 to deny former internees access to their own 40-year old prison records, which they had been seeking in the context of a civil case against the Ministry of Defence for wrongful arrest and unlawful detention. The Department of Culture, Arts and Leisure and the NIO had previously agreed to release internment files before Mr Grayling issued the certificate. The scope of the power and human rights compliance was then questioned by the applicants. The internees' solicitor Padraig Ó Muirigh, outlined their view that the Minister had failed to take into account their rights under Articles 3 (freedom from torture and inhuman and degrading treatment), 6 (right to a fair hearing) and 8 (right to family and private life) ECHR.[127]

In October 2007 the UK Government formally transferred primacy for one of the most sensitive areas of mainstream policing, covert 'national security' policing, away from the Police Service of Northern Ireland (PSNI) to the Security Service MI5. This relates to the covert policing (surveillance, running of agents and informers etc) specifically in relation to paramilitary groups.[128] The transfer was first announced to the UK Parliament in 2005,[129] and the arrangements were set out in an annex from the British Government to the 2006 UK-Ireland St Andrews Agreement.[130] This move therefore led to this significant area of mainstream policing, now designated as 'national security', being transferred entirely outside of the remit and powers of both the oversight body – the Northern Ireland Policing Board and the investigatory complaints body – the Police Ombudsman. Primacy for this area of policing now sits with the Security Service MI5 which is entirely out of reach of the post-Agreement accountability bodies. It also creates a grey area for the PSNI in limiting its accountability when it is deemed to be working on 'national security' covert policing. The transfer limits the powers of accountability bodies over PSNI officers working with MI5, given the control the Security Service has over matters such as information disclosure.

The oversight bodies with competency over the Security Service MI5 have been heavily criticised by Parliament and human rights groups and include the Investigatory Powers Tribunal which had never upheld one single complaint against the agency.[131] Unlike the PSNI the Security Service MI5 has a blanket exemption from disclosing information under freedom of information legislation.[132]

---

[125] s26 Northern Ireland Act 1998.

[126] s28 Data Protection Act 1998.

[127] Morris, Allison 'Tory Minister forbids internees access to their prison records' *Irish News* 29 September 2014.

[128] The then PSNI Chief Constable stated that MI5 would only focus on republican paramilitaries, it is not clear if this is still the case.

[129] Written Ministerial Statement, National Security Intelligence Work, Paul Murphy MP, Secretary of State for Northern Ireland, House of Commons Official Record, 24 February 2005, column 64WS.

[130] Annex E. UK-Ireland St Andrews Agreement 2006.

[131] For further information see the CAJ report 'The Policing You Don't See: Covert policing and the accountability gap: Five years on from the transfer of 'national security' primacy to MI5' Belfast CAJ, 2012.

[132] s23-24 Freedom of Information Act 2000. There are also broader national security exemptions under this Act.

The re-designation of a whole area of policing as now being a 'national security' matter is particularly significant when considered alongside the range of 'national security' limitations that fetter the powers of oversight and accountability bodies in discharging their broader functions, including investigations into the past. Among the institutions which have their investigatory or oversight powers curtailed in circumstances when they engage 'national security' matters include:

- The Northern Ireland Human Rights Commission[133]
- The Northern Ireland Policing Board[134]
- The Office of the Police Ombudsman for Northern Ireland[135]
- The Prisoner Ombudsman[136]
- Criminal Justice Inspection for Northern Ireland[137] and
- Her Majesty's Inspectorate of Constabulary (HMIC)[138]

The power of Ministers to redact reports on 'national security' grounds extended to the Cory Collusion inquiry reports, where such redactions did take place on this ground prior to publication.[139]

For 'GB' Eyes Only

In April 2010 the UK Parliament transferred most policing and justice powers to the competence of the Northern Ireland Assembly and its executive. At this point 'national security' powers to redact 'protected information,' that is any information determined to be contrary to national security interests if published, have been further entrusted in the Secretary of State. The usual format involves a power for the Secretary of State to intervene to prevent disclosure to or publication of information by a Northern Ireland public authority.

[133] Under the Northern Ireland Act 1998 (as amended by the Justice and Security Act 2007) the Northern Ireland Human Rights Commission (the NHRI for Northern Ireland accredited with 'A status' by the International Coordinating Committee of NHRIs) has powers of investigations under s69A. However, under s69B the powers are extensively limited if they engage 'national security' matters.

[134] See sections 33A & 59 of the Police (Northern Ireland) Act 2000 (as amended by the Police (Northern Ireland) Act 2003) in relation to provisions in relation to police powers not to disclose 'national security' information to the Policing Board.

[135] See s63(4) s65(6) Police (Northern Ireland) Act 1998 as amended by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010; see also Police Act 2000 s66 as amended by 2010 order and s76A(1) as inserted by Police (Northern Ireland) Act 2003.

[136] Rule 79MA *Prison and Young Offenders Centre Rules (Northern Ireland) 1995 (as amended by* amended by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010).

[137] s49(4) Justice (Northern Ireland) Act 2002 (as amended by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, schedule 13 paragraph 7.

[138] s55(2) Police Act 1996 and s42 Police (Northern Ireland) Act 1998.

[139] Billy Wright Inquiry Report, paragraph 1.14.

The following table details the restrictions on a number of oversight bodies.

Public authority	National Security Provision
HM Inspectorate of Constabulary	In relation to cases where reports or duties of the inspectors may, 'in the opinion of the Secretary of State'[140] involve 'protected information,' i.e. information that deals with issues of national security, or where such information would be contrary to national security interests,[141] the Secretary of State may: - 'require the inspectors to refer the report to the Secretary of State'[142] (and no one else) - 'direct the inspectors to exclude' any protected information from the report[143] - Not be required to disclose any 'protected information' to the DOJ - 'exclude from publication' any protected information where the publication would be 'against the interests of national security'[144]
Police Ombudsman	Secretary of State must be informed and involved in reports made to the Police Ombudsman which contain information that ought not be disclosed on national security grounds. Reports by the Police Ombudsman that contain national security information in the opinion of the Chief Constable or the Board do not need to be disclosed to the DOJ.[145] Complaints are normally to be supplied by the Ombudsman to the Chief Constable (PSNI), but will be made to the Secretary of State (and not to the Chief Constable) where the Ombudsman is of the opinion that disclosure would be contrary to national security interests.[146]

[140] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3, Amendments relating to policing, [22], [41A(3)(b)].

[141] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3, Amendments relating to policing, [22], [41A(1)].

[142] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3, Amendments relating to policing, [22], [41A(2)(b)].

[143] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3, Amendments relating to policing, [22], [41A(7)(a)].

[144] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3, Amendments relating to policing, [22], [41A{23)(e)(b)].

[145] The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, Schedule 3, para. 33(3).

[146] Police Powers for Designated Staff (Complaints and Misconduct) Regulations (Northern Ireland) 2008, Part 8B. as amended by The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions)Order 2010, sch. 3, para. 111(7).

Chief Constable, provision of information to the Policing Board	The Chief Constable is required to inform the Secretary of State if information is provided to the Board that may involve national security. Similarly, if it appears to the Chief Constable that information in a report should not be disclosed due to national security interests, he should submit the report to the Secretary of State.[147] The Secretary of State will then determine if the report contains information that should not be disclosed due to national security concerns; the Chief Constable may not submit his report to anyone other than the Secretary of State until such time as the Secretary of State determines the report does not contain such information.
Chief Inspector of Criminal Justice	Chief Inspector must consult Secretary of State if inspections will cover national security activities. The report of such inspections also must go to the Secretary of State, as they will include protected information.[148] The report may not be disclosed to anyone other than the Secretary of State until such time as it is determined by the Secretary of State that there is no protected information, or the protected information has been removed. If the report contains protected information in the opinion of the Secretary of State, the Secretary of State may instruct the Inspector to exclude that information from the report before it is given to the DOJ, and the Secretary of State must inform the DOJ that the report will exclude protected information[149]
Parole Commissioners	Secretary of State retains the right to transfer or repatriate a prisoner if the decision is based on protected information.[150] Parole Commissioners' Rules (Northern Ireland) 2009 – refers to confidential information, which can be certified by the Secretary of State as dealing with national security
Compensation for miscarriages of justice	If the Department of Justice believes protected information is relevant to an application for a miscarriage of justice or compensation therefore, the DOJ must refer the application to the Secretary of State.[151]
Attorney General for Northern Ireland.	The Attorney General for Northern Ireland (an independent office in the jurisdiction) has a power to direct the coroner to hold an inquest.[152] However if the Secretary of State (a UK Government Minister) certifies that there is information the disclosure of which may be against the 'interests of national security' the Attorney General cannot exercise the power which instead passes to the Advocate General for Northern Ireland (a member of the UK cabinet).

The exercise of the Secretary of States' 'national security' veto over the Attorney General for Northern Ireland making decisions as to whether to reopen inquests is detailed later in this report. What is notable in general however is that the power, framed in terms of preventing 'disclosure' of information on national security grounds, only refers to 'disclosure' *to the Attorney General for Northern Ireland* in the context of making the decision. It would appear that the UK Government believes the post holder is not to be trusted to handle such information. Furthermore it would be reasonable to assume that such information that the UK Government holds and falls into this category, is not information which is otherwise available. This opens the question as to whether such information was or has been withheld from earlier inquests, or other legacy investigations by the HET, Ombudsman or others.

Devolution and 'national security'

In 2010 the UK Government produced a Protocol, obtained by CAJ under freedom of information, setting out '*Handling Arrangements for National Security Related Matters following the transfer of justice and policing powers*.'[153] Remarkably through its inclusion in the protocol the NIO seems to wish to re-designate the whole of the past as a 'national security' matter, stating in relation to both electronic or paper based material:

> The NIO [will retain] ownership and control of access to all pre-devolution records... and the NIO will provide access to DOJ officials to those pre-devolution NIO records relating to matters that are now devolved that are necessary for them to carry out their post-devolution functions effectively. DOJ officials will have no access to pre-devolution NIO records that relate to matters that remain the responsibility of the UK Government, including records that relate to matters of national security.[154]

The Protocols also states that the UK Government will 'determine what information pertaining to national security can be shared and on what terms' will be shared with the devolved Minister of Justice.[155] Among other matters it also states:

- The Minister of Justice and Northern Ireland Assembly will be responsible for 'all policing functions' except 'those aspects of the PSNI's work – past, present and future – that have a national security element or dimension.'[156]

[147] Police (Northern Ireland) Act 2000, s59(3).

[148] S49 Justice (Northern Ireland) Act 2002.

[149] Justice (Northern Ireland) Act 2002, section 49(1A)-(1E), as amended by Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, sch. 13, para. 7(2).

[150] Criminal Justice (Northern Ireland) Order 2008: Release and parole of prisoners, whose cases involved 'protected information.'

[151] Criminal Justice Act 1988, section 133(6C)(d)-133(6D), as amended by The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010, sch. 6 para. 2(1).

[152] Under s14 of the Coroners Act (Northern Ireland) 1959 as amended.

[153] NIO Protocol on 'Handling Arrangements for National Security Related Matters After the Devolution of Poling and Justice to the Northern Ireland Executive'. In response to a question in the UK Parliament the Minister indicated this protocol was shared with a Northern Ireland Assembly Committee in March 2010 (Official Record Hansard WPQ 15 March 2010: column 254W).

[154] As above, paragraphs 10-11.

[155] As above, paragraph 5.

[156] As above, Annex A, paragraph 3.1.

- The Police and Prisoner Ombudsman will normally report to the [Northern Ireland] Minister of Justice but will report to the Secretary of State on 'national security' matters who may issue the Ombudsman with 'guidance' on 'matters relating to national security.[157]

- The Chief Inspector of Criminal Justice will be appointed by the Northern Ireland Minister of Justice but insofar as their work 'touches on national security issues' the NIO Secretary of State will have a 'consultative role' in the development of the Chief Inspector's workplan and the Chief Inspector is required to obtain the Secretary of State's permission for publishing any reports which contain 'national security information'.[158]

- When the Northern Ireland Minister of Justice or Policing Board set up a Panel to adjudicate on misconduct by a police officer, if the case relates to national security information the 'UK Government will decide what information can be passed on to the panel and, if information is withheld, whether the panel can be informed of that fact.'[159]

The Protocol is clear that it 'is not legally binding and does not give rise to legal obligations' yet nevertheless is a statement of policy intent to restrict the disclosure of information.[160] The same can be said for an ill-fated NIO-held Memorandum of Understanding (MoU) drawn up for the Policing Board which, in effect set out a list of matters the PSNI Chief Constable was not to tell the Board. This includes stipulating that the Policing Board has no oversight role into 'National Security matters' (set out as 'any aspect of PSNI's work (past, present or future) with a national security' dimension) and directs (even within the confines of the confidential special purposes committee) the Chief Constable not to answer Policing Board questions which 'indirectly touch upon' national security matters if there is a 'risk' of damage to the interests of this undefined concept. The MoU makes also states that the PSNI Chief Constable is "directly responsible to the Secretary of State for Northern Ireland...for any aspect of the PSNI's work (past, present or future) with a national security element."[161] This assertion notably contrasts with the Policing Board's recent advert for a new Chief Constable for the PSNI which sets out that the post-holder will be 'accountable to the Board on all aspects of policing in Northern Ireland.'[162]

CAJ gave evidence to the Human Rights and Professional Standards Committee of the Policing Board in March 2013 and, among other matters raised the MoU. The Committee informed us the Policing Board had now been advised that the MoU had no legal standing and that the Board was not bound to operate under its provisions. CAJ was also informed it was not clear if the MoU been circulated to the full Policing Board and the 'MoU' was not formally approved or ratified by the Board but, rather appears to have been the product of an informal 'Gentleman's Agreement'. This whole episode therefore appears indicative of attempts by senior policing and security officials to fetter the powers of the Board.[163]

Even in the absence of their explicit exercise national security exemption powers can confer a significant expectation and chill factor on oversight bodies that they are not supposed to enquire into such matters and as such risk self-censorship or mission creep. In 2014 CAJ

[157] As above, Annex A, paragraph 3.2, 6.1.

[158] As above, Annex A, paragraph 9.1.

[159] As above, Annex A, paragraph 11.2.

[160] As above, paragraph 13.

[161] The Policing Board and National Security Matters MoU (undated, held by the Northern Ireland Office).

[162] NI Policing Board 'final version chief constable advert'.

[163] CAJ exchange of correspondence with NI Secretary of State 11 March 2013 and 10 April 2013.

wrote to the Criminal Justice Inspection Northern Ireland (CJI) to enquire as to why their planned thematic inspection into 'disclosure in serious cases' explicitly excluded 'national security' cases. We also asked how CJI was going to differentiate between 'national security' and other cases in the absence of definition and explicit classification of the same. The exclusion was a matter of concern to CAJ considering that if 'national security' was to be considered as referring to conflict-related cases this was the area wherein there had been the most controversy over disclosure. CJI responded by indicating that the differentiation would form part of the inspection methodology, that "National Security cases are excluded from the proposed inspection since 'excepted' matters are outside our legislative remit" and that that "The Devolution of Policing and Justice conferred primacy for national security to the security service who, as you will be aware, are not included within the statutory remit of CJI." [164]

In this instance neither CAJ nor CJI in a further response were able to locate a legislative provision which placed excepted matters per se outside the remit of CJI. Duties were placed on CJI to consult with the Secretary of State if its work was likely to cover national security matters and powers were granted to the Secretary of State to consequently redact reports.[165] CJI confirmed they had not consulted with the Secretary of State on the above disclosure inspection. This position raises a number of issues. Whilst there appears to be no legislation which specifically precludes CJI examining excepted matters, the oversight body itself has articulated that understanding. The provision therefore does have an impact on its role regardless of whether the Secretary of State actually exercises specific powers.

There are a number of possible interpretations of this type of situation. One that oversight bodies do effectively push the boundaries of their own remits by simply not designating matters as 'national security' until told otherwise. They then provide policy critiques and recommendations which, whilst explicitly precluded from dealing with 'national security', may nevertheless be as applicable to remedying cross-cutting problems. A more concerning interpretation however is that the national security caveats create a climate whereby oversight bodies are likely to self-censor and steer clear of any subject matter likely to result in 'flak' from the security and political establishment, and hence draw the body into conflict and controversy. If so, the doctrine becomes self-limiting without the NIO having to exercise its powers formally. In addition whilst, as referenced above the transfer of 'lead responsibility for national security intelligence work' from the PSNI to MI5 was announced to Parliament in 2005, yet on the devolution of policing and justice powers in 2010 no broader transfer was announced and it remains unclear the extent to which MI5, who have no standard police powers (of arrest, search etc), are involved in investigations and controlling disclosure of information, including in relation to legacy cases.

[164] CAJ correspondence with Chief Inspector for Criminal Justice of 25 June 2014, 9 July 2014, 29 July 2014 and 4 August 2014.

[165] The primary legislation setting out the CJINI remit is Part III of the Justice (Northern Ireland) Act 2002 (as amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010. Schedule 2 of the Northern Ireland Act 1998 'excepted' matters, which include 'national security', are those matters for which legislative competence is permanently maintained by Westminster and are outside the remit of the Northern Ireland Assembly. The 2010 devolution Order introduced national security caveats to CJINI powers. A duty was introduced to require CJINI to consult the Secretary of State if an inspection is planned which is likely to cover activities relating to 'national security'. The Secretary of State is then granted powers to 'require' CJINI to refer the report to her prior to publication; it also bans CJINI from disclosing the report to anyone else at this time and empowers the Secretary of State to redact the report before it is published. (Subsection 1A of s47(b) and s49(c) of the Justice (Northern Ireland) Act 2002, as inserted by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.)

Secret Courts: 'Closed Material Procedures'

Another area of concern has been the growth of 'Secret Courts'. Readers of this report will no doubt be familiar with how a court in a democratic society is meant to function. Save when, for example deemed necessary to protect children, most public civil and criminal procedures are held in open court, meaning the public and press can be present. Even if the press and public were excluded at least the applicant/defendant and their legal representative are present. The parties can hear the evidence against them and can cross examine and question it. In the world of 'Closed Material Procedures' however a different type of court exists. The press and public are excluded, but remarkably so are the parties (other than the state) and their legal representatives. Secret 'evidence', usually based on security force intelligence data, is then presented against the parties which they cannot challenge or scrutinise. A 'Special Advocate' is appointed to represent their interests but cannot discuss the secret evidence with the parties. At best, the parties and their representatives are given a 'gist' of what is being alleged.

This remarkable type of system has been around for a number of years in limited areas.[166] The ability of a court to introduce a 'Closed Material Procedure' (CMP) in any civil proceeding on its own initiative or on the request of the Secretary of State, was introduced under the Justice and Security Act 2013. The CMP can be invoked when there is sensitive information whose disclosure would damage 'the interests of national security'.[167]

The main driver behind the changes was in response to MI5/6 involvement in 'war on terror' practices such as 'extraordinary rendition' (i.e. the kidnap, torture and unlawful detention of persons) being increasingly challenged in Court, and in particular the compensation settlements being paid to Guantanamo Bay detainees. The UK Government argued it needed CMPs in order to allow secret trials to protect 'national security. ' Such trials also conveniently reduce the potential to hold the Security Services publicly accountable for malpractice or human rights violations in which they are implicated.[168] CAJ voiced concerns in submissions to Westminster that the introduction of CMPs in civil cases would have serious implications specific to proceedings dealing with the legacy of the conflict in Northern Ireland, including:

- Judicial reviews of investigations into conflict-related deaths (e.g. challenges to PSNI, Historical Enquiries Team, Police Ombudsman, and challenges relating to Inquests, decisions not to prosecute, etc).

- Civil actions for damages relating to miscarriages of justice, ill-treatment, unlawful killings, failing to take reasonable steps to protect life, etc.

CAJ also drew attention to the likely use of CMPs in what are already the most controversial of cases, namely those which engage the actions of informants and agents. Opposition, including from the Northern Ireland Minister for Justice, David Ford MLA, did mean that the UK Government did not include inquests within the extent of the proposals.[169] However, CMPs were introduced to other civil proceedings.

---

[166] In the Northern Ireland two controversial areas included the recall of prisoners under licence and the issuing of 'national security' certificates to prevent persons from taking employment discrimination claims. See CAJ's submission no. S374 CAJ's Submission to the Ministry of Justice 'Justice and Security' Green Paper on extending 'secret justice' provisions January 2012.

[167] Justice and Security Act 2013, s6(11).

[168] See CAJ's submission no. S374 CAJ's Submission to the Ministry of Justice 'Justice and Security' Green Paper on extending 'secret justice' provisions January 2012.

[169] See CAJ Submission (S387) to the Second Reading of the Justice and Security Bill on 'Closed Material Procedures', June 2012.

This was at a time in which there are increasing judicial challenges to flawed mechanisms dealing with the past and claims for damages for alleged human rights abuses at the hands of the state or its agents.

In the first year since the 2013 Act these fears have already been substantiated. Independent analysis of the Home Secretary's first annual statement on the powers indicates two of the five listed applications for CMPs relate to Northern Ireland cases. CAJ is aware of at least one other Northern Ireland case where an application was considered and one further high-profile legacy case where an application has been sought. This appears not to be counted in the official statement, potentially as it fell outside the time period.[170]

Among these cases is a civil claim brought by Margaret Keeley, reportedly the ex-wife of a former MI5 informant 'Kevin Fulton', who is suing the Ministry of Defence, PSNI and Freddie Scapaticci. [171] Mr Scapaticci is alleged to have been a British Army agent known as Stakeknife and to have led the IRA's internal security unit or 'nutting squad', a unit responsible for killing informants which is linked to more than 50 deaths.[172] In 2012 the British Army's former Commander of Land Forces claimed that Scapaticci was 'stakeknife', a member of IRA security team and described him as the British Army's most valuable spy.[173] Mr Scapaticci denies the claims. In *Keeley* the applicant alleges she was wrongfully arrested and falsely imprisoned by the police over a three day period in 1994 in order to protect her then husbands cover, and following her release was taken and interrogated by the IRA security unit, which she has alleged involved Mr Scapaticci.[174] On 28 May 2014 the PSNI lodged an application for a CMP. Thus in this instance civil proceedings taken by an IRA victim which have the potential to expose torture and killings undertaken by an alleged agent of the state, are subject to an application that they be held in secret. It is in this context that CMPs can be harnessed to cover up human rights violations.

A second case is that of Martin McGartland and his partner who have brought a claim for damages against MI5. Mr McGartland argues he is a former informer within the IRA and that MI5 failed in their duty of care towards him after he survived a shooting in 1999. Here the Home Secretary applied for a CMP to hear the case.[175] Both of these high profile cases involving the use of informants during the conflict have occurred in the first year of CMPs.

[170] See Lawrence McNamara and Daniella Lock 'Closed Material Procedures under The Justice And Security Act 2013 A Review of the First Report by the Secretary of State' Bingham Centre Working Paper 2014/03, August 2014.

[171] Keeley v Chief Constable of the PSNI and others (2008 No 133645).

[172] McDonald, Henry 'Stakeknife's world of doublespeak' *The Observer* 18 May 2003.

[173] Clarke, Liam 'Freddie Scappaticci was our most valuable spy in IRA during the Troubles: British Army chief' *Belfast Telegraph* 20 April 2012.

[174] 'Stakeknife: Secrecy bid in Freddie Scappaticci court case to be resisted' *BBC News Online* 16 June 2014

[175] 'Secret hearings in ex-IRA informer Martin McGartland case' *BBC News Online* 8 July 2014 and Lawrence McNamara and Daniella Lock 'Closed Material Procedures under The Justice And Security Act 2013 A Review of the First Report by the Secretary of State' Bingham Centre Working Paper 2014/03, August 2014. The third Northern Ireland case, which does not relate to matters before 1998, is *Terence McCafferty v Secretary of State for Northern Ireland* (2012 No 360) where the applicant was convicted and imprisoned for a Bombing in 2005, released on licence in 2008 but recalled to prison the following month, and is challenging the decision to return him to prison.

Interpretative denial:[176] redefining 'collusion' and 'miscarriages of justice'

The term 'collusion' is not found in human rights law. It is usually used to refer to collaboration between state and paramilitary groups, encompassing the supply of information, resources or weapons to paramilitaries, failing to investigate activities or enforce the law against paramilitaries, or the directing or facilitating of killings and other activities of paramilitaries. Contrary to the view that 'collusion' is an 'anti-state' term, from at least 1972 it was a term officially used by the British Army in relation to incidents of solider collusion with loyalist paramilitaries. In declassified Army documents unearthed by the Pat Finucane Centre, reference is routinely made to 'collusion' being suspected in the case of weapons 'lost', stolen or missing from UDR barracks or personnel.[177]

In the course of his Inquiries, Stevens stated that collusion is evidenced in many ways, ranging from "wilful failure to keep records, the absence of accountability, the withholding of intelligence and evidence, through to the extremes of agents being involved in murder." Judge Peter Cory who was appointed by the UK and Irish governments in 2002 to independently investigate a number of cases involving allegations of collusion, further developed the concept. Judge Cory noted that the verb 'to collude' is synonymous with:

> ...to conspire; to connive; to collaborate; to plot, and to scheme. ... The verb connive is defined as to deliberately ignore; to overlook; to disregard; to pass over; to take no notice of; to turn a blind eye; to wink; to excuse; to condone; to look the other way; to let something ride...

Judge Cory also noted the definition of the verb connive being, "to pretend ignorance or unawareness of something one ought morally, or officially or legally to oppose; to fail to take action against a known wrongdoing or misbehaviour – usually used with connive at the violation of a law."[178] Significantly, Judge Cory advocated a 'reasonably broad' definition specifically because of the negative impact of collusion on public confidence:

> At the outset it should be recognised that members of the public must have confidence in the actions of governmental agencies, particularly those of the police force. There cannot be public confidence in government agencies that are guilty of collusion or connivance in serious crimes. Because of the necessity for public confidence in the police, the definition of collusion must be reasonably broad when it is applied to actions of these agencies. This is to say that police forces must not act collusively by ignoring or turning a blind eye to the wrongful acts of their servants or agents or by supplying information to assist others in committing their wrongful acts or by encouraging them to commit wrongful acts. *Any lesser definition would have the effect of condoning, or even encouraging, state involvement in crimes, thereby shattering all public confidence in these important agencies.*[179]

---

[176] In sociologist Stan Cohen's classic text *States of Denial (*2001: Cambridge: Polity Press) he conceptualises three forms or stages of denial which States can go through, or concurrently articulate, in response to allegations of human rights violations. These are *literal denial* (a denial that the violations ever happened); *interpretive denial* (to deny the extent of culpability, that what did happen was not what you think the fault of some 'bad apples') and *implicatory denial* (to deny the victim by acknowledging that the violation happened but it was justified as the victims deserved it).

[177] 'Horrible Histories' Presentation given by PFC at 'Poisoned Legacies' conference 13-14 June 2013.

[178] Cory Collusion Inquiry Report: Rosemary Nelson, London: The Stationary Office (2004) paras 4.27 - 4.30.

[179] Cory Collusion Inquiry Report: Chief Superintendent Breen and Superintendent Buchanan, London: The Stationary Office (2003) para 2.59.

The first Police Ombudsman, Nuala O'Loan in her Operation Ballast report utilised the definition of collusion offered by Lord Stevens and Judge Cory and points to 32 areas where collusion had been identified.[180] There has however since then been some resistance and official pressure to water down this definition. The BBC reported that an acting PSNI Assistant Chief Constable had put pressure on the second Police Ombudsman, Al Hutchinson, not to use the term collusion. In correspondence reportedly sent with the full authority of the PSNI command team, the PSNI complained that the manner of the first Ombudsman's use of the term had "undermined the credibility of RUC special branch." The then Chief Executive of the Police Ombudsman's Office described the letter as 'outrageous' and an "attack on the independence of the Office".[181]

The second Police Ombudsman departed from the approach of his predecessor in relation to defining 'collusion'. A CAJ investigative report analysed a number of investigations of historic cases under the second Police Ombudsman, in which no explicit findings of 'collusion' were made, despite uncovering acts which would have met the Cory/Stevens definitions. CAJ raised concerns about the lack of any clear definition or consistent application of the term collusion in these reports, which included the Ombudsman's reports on the Claudy and McGurks bar bombings which stated collusion had 'yet to be defined'. In the case of the latter it nevertheless went on to find that there had been no 'collusion' merely 'investigative bias' and went on to note that collusion usually "involves an agreement between two or more parties." This would clearly be a more restrictive definition than that applied previously. The Ombudsman also stated he believed that there should be "a broader dialogue about what collusion is and what it is not." CAJ raised concerns that in the absence of a definition of collusion, "there was a propensity to isolate and consider individual actions or activities in the context of criminality or misconduct rather than their broader and total effect that could amount to collusion."[182] An RFJ report into the Loughinisland massacre states that families and survivors were alarmed that the Police Ombudsman in his report into the 1994 massacre had "sought to redefine collusion effectively setting a threshold way beyond that established previously" by Lord Stevens and Justice Cory, including by introducing 'the novel prerequisite of preventability' into the concept.[183] This report by the second Ombudsman was ultimately scrapped by his successor following legal action by relatives to quash the report.[184]

This has not been the only attempt to promote a much narrower definition of 'collusion' than that provided by Cory and Stevens. One of the public inquiries resultant from the Cory collusion reports, the Billy Wright Inquiry, adopted a much narrower definition. This was in the context of the Secretary of State having 'drawn attention' to the breadth of the Cory definition of collusion and not including the term 'collusion' in the inquiry terms of reference. Rejecting arguments of the family to adopt Cory's definition the panel decided that they could undertake their work "without having to resort to the words 'collusion' or 'collusive'. The Inquiry stated "For our part we consider that the essence of collusion is an agreement or arrangement between individuals or organisations, including government departments, to achieve an unlawful or improper purpose. The purpose may also be fraudulent or underhand." The Inquiry, having narrowed the definition, then found that they were not "persuaded that in any instance there was evidence of collusive acts or collusive conduct".[185]

---

[180] Operation Ballast Report, p132.

[181] Kearney, Vincent 'PSNI officer who protested use of term 'collusion' re-employed' *BBC News Online* 29 November 2011.

[182] For details see 'Human rights and dealing with historic cases – a review of the Office of the Police Ombudsman for Northern Ireland (CAJ, June 2011) pp18-24.

[183] RFJ 'Loughinisland Massacre: the untold stories of victims and survivors', p5.

[184] McCaffery, Barry 'Police Ombudsman opening new investigation into Loughinisland' *The Detail* 19 December 2012.

[185] Billy Wright Inquiry Report: September 2010, paragraphs 1.33-4 and 1.23.

The desktop review that was taken forward by Desmond de Silva into the death of Pat Finucane also narrowed the definition. De Silva stated:

> In analysing what is meant by collusion, I preferred to adopt the narrower definition used by Lord MacLean in the Billy Wright Inquiry Report, rather than the one adopted by Justice Cory in his Collusion Inquiry Report.[186]

Despite adopting a narrower definition De Silva still found collusion.[187] A broader definition was adopted for another post-Cory collusion inquiry report. The Smithwick Tribunal set up by the Irish Government to probe Garda/state collusion in the IRA killing of two senior RUC officers stated in its opening address on 6 March 2006:

> ...collusion will be examined in the broadest sense of the word. While it generally means the commission of an act, I am of the view that it should also be considered in terms of an omission or failure to act. In the active sense, collusion has amongst its meanings to conspire, connive or collaborate. In addition, I intend to examine whether anybody deliberately ignored a matter, or turned a blind eye to it, or to have pretended ignorance or unawareness of something one ought morally, legally or officially to oppose.[188]

Notably this definition received support from the PSNI who in its written submissions to the Smithwick Tribunal, which also drew attention to the Cory definition, stated "The tribunal's definition is a comprehensive definition, properly framed and considered." [189]

Miscarriage of Justice

Another area in which the official definition has been narrowed is the concept of 'miscarriage of justice' in law. The change did not relate to the ability to quash unsound convictions but rather the ability to have the case then officially recognised as a 'miscarriage of justice'. This affects entitlement to compensation but also risks facilitating impunity for malpractice within the criminal justice system as cases will no longer be classified as miscarriages of justice. If this is the case the implication is that such cases therefore do not require individual or structural remedies or redress.

In May 2013 the UK coalition Government included a controversial single clause in the *Anti-Social Behaviour, Crime and Policing Bill* introduced at Westminster. The clause was to have the effect of amending section 133 of the Criminal Justice Act 1988 (compensation for miscarriages of justice) to change the definition of a 'miscarriage of justice' to one to be determined "*if and only if the new or newly discovered fact shows beyond reasonable doubt that the person was innocent of the offence*". In effect the victim of the alleged miscarriage of justice would have to take on the roles usually undertaken by police and prosecutors and gather evidence to prove themselves innocent to the high threshold of a criminal law test. The London-based campaign group JUSTICE stated that the cases of the Birmingham Six, the Guildford Four, The Maguire Seven, The Cardiff Three and Judith Ward would not have been able to satisfy the proposed innocence test.[190]

---

[186] The Report of the Patrick Finucane Review, December 2012, paragraph 114.

[187] De Silva considered collusion to involve: "(i) agreements, arrangements or actions intended to achieve unlawful, improper, fraudulent or underhand objectives; and (ii) deliberately turning a blind eye or deliberately ignoring improper or unlawful activity." The de Silva Review, December 2012, paragraph 1.30.

[188] Report of the Tribunal of Inquiry into suggestions that members of An Garda Síochána or other employees of the state colluded in the fatal shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March 1989, (Smithwick Tribunal), paragraph 1.7.7.

[189] Smithwick Tribunal, Written Submissions on Behalf of the PSNI, p5.

[190] JUSTICE 'Written evidence to the Joint Committee on Human Rights and the Public Bill Committee' Anti-Social Behaviour, Crime and Policing Bill, June 2013, page 18.

The Westminster Joint Committee on Human Rights held that the clause was incompatible with Article 6(2) of the European Convention on Human Rights and the common law requirements of the presumption of innocence and recommended its removal from the Bill, which was supported by Liberal Democrats in the Commons.[191] Prior to this NGOs Justice, Liberty and CAJ promoted an amendment, supported by the Labour party and SDLP[192], to define 'miscarriage of justice' more consistently with international obligations.[193] The issue was deferred to the House of Lords for further discussion, which in a narrow vote defeated the Government clause with alternative wording recommended in a second report by the Joint Committee on Human Rights.[194] On return to the Commons the UK Government reinstated its definition, with a seemingly semantic amendment of replacing the word 'innocent' with the phrase 'did not commit'. When the Bill returned to the Lords, the Government had the numbers to push through the change, and redefined the term.

In Northern Ireland, given the devolution of justice, the new definition only applies to 'national security' cases.[195] The provision effectively overturns the UK Supreme Court judgment of 2010 which dealt with the appeals of Adams and two Northern Ireland Judicial Review cases (Eamonn MacDermott and Raymond McCartney).[196] The judgment held that a 'miscarriage of justice' occurred when the original evidence said to justify the conviction has been undermined to the extent whereby no conviction could possibly be based up on it. [197] CAJ had subsequent concerns about the restrictive manner in which Northern Ireland Courts had interpreted this test.[198] The new definition did not clarify an interpretation of the test, but significantly changed it from a position whereby the individual is to demonstrate that a Court could not have rightly found beyond reasonable doubt that they were guilty, to one whereby an individual is expected to prove their innocence. CAJ in evidence to Westminster stated that the motivation for the change in definition was questionable, drawing attention to upcoming claims being made in Northern Ireland into unresolved issues such as the ill treatment of detainees during the conflict and subsequent convictions in non-jury emergency courts, often based on 'confession' evidence.[199] CAJ argued "it would be a matter of concern if in part the motivation behind the current provision relates to preventing such practices from being further exposed."[200]

---

[191] *Joint Committee on Human Rights* 'Legislative Scrutiny: Anti–social Behaviour, Crime and Policing Bill' Fourth Report of Session 2013–14 HL Paper 56 HC 713, paragraph 157.

[192] Social Democratic and Labour Party (Northern Ireland).

[193] Namely leave out 'the person was innocent of the offence' in the Government clause and insert 'no reasonable court properly directed as to the law, could convict on the evidence now to be considered.'

[194] Namely when a 'new or newly discovered fact shows conclusively that the evidence against the person at trial is so undermined that no conviction could possibly be based on it'.

[195] In Northern Ireland the changes were to apply to compensation applications determined by the Secretary of State and not those determined by the Department of Justice. The Secretary of State determines Northern Ireland applications when she takes the view 'protected information' is relevant to an application (for example, because the court which quashed the original conviction did not make public, in whole or in part, the reasons why), and she is of the view that 'on the grounds of national security' the Department of Justice, or their assessor, is not to be given the protected information or a gist of it.

[196] R (Adams) V Secretary of State for Justice [2011] UKSC 18.

[197] This state of affairs must furthermore be shown by reference to a 'new or newly discovered fact/s' which was interpreted as including either facts the significance of which were not appreciated previously by the accused or his/her lawyers, or alternatively facts which were newly 'discovered' to the appeal court on appeal (with comparison with the fresh evidence principles on appeal).

[198] See in re applications for Judicial Review by Fitzpatrick and Shiels, [2013] NICA 66.

[199] See for example Cobain, Ian 'Inside Castlereagh: 'We got confessions by torture'' *The Guardian* Monday 11 October 2010.

[200] CAJ S412 'Written Evidence to the Public Bill Committee on the *Anti-Social Behaviour, Crime and Policing Bill*, introduced into the Commons on 9 May 2013', paragraph 13.

NCND and 'secrecy forever'

Whilst the general question of discontinuation of investigations or prosecutions in circumstances when agents of the state are involved is covered elsewhere in this report it is worth highlighting another doctrine advanced by the state to prevent accountability of its actions, that of 'NCND' – 'Neither Confirm Nor Deny'. The NCND doctrine is relied upon in a number of circumstances, including when there are questions of agents and informants being involved in incidents, or in instances when there are leaked documents whereby Government will not confirm their authenticity.

A contemporary reported example is that of the aforementioned case of Martin McGartland who has taken a civil claim alleging as an ex-IRA informer that his handlers have not provided sufficient after care. Despite the high-profile nature of McGartland's role, which has been widely reported in the past 20 years, the Home Secretary has sought to apply the NCND policy regarding whether Mr McGartland was ever an informant or not. His lawyer Nogah Ofer, has responded that this information was already in the public domain, contending "this attempt to keep secret what has already been openly admitted by the relevant Government agencies is profoundly shocking."[201] The Home Office argued however that the relationship between MI5 and its informants should be one of 'secrecy forever' as otherwise it would inhibit MI5's ability to run agents. Counsel for the Home Office argued:

> An assurance of 'secrecy forever' lies at the heart of the relationship between the security service and its agents. The strict maintenance of NCND principle is one of the most important means by which [MI5] makes good on that assurance. [202]

The NCND principle has also been applied by the Police Ombudsman, for example, on issuing his controversial report into the 1994 Loughinisland Massacre, the Ombudsman declined to confirm or deny any individual was an informant.[203] An alternative example of the doctrine is the 2003 case of Freddie Scappaticci who requested the NIO confirm he was *not* a security service informant in the IRA after widespread media coverage had stated that he was. The NIO, citing NCND declined to do so, a decision upheld in court.[204]

Notwithstanding the need to protect agents, the NCND doctrine does nevertheless give the state considerable power to deny culpability of actions undertaken by its agents, and thus cover up human rights violations. The legitimacy of the NCND doctrine has also been undermined both by selective use by the state itself and the surreal use of NCND in circumstances when information is already widely in the public domain.

[201] Gallagher, Philip 'IRA mole Martin McGartland's case against Home Office may be heard in secret' *The Independent* 19 June September 2014.

[202] Bowcott, Owen 'Home Office maintains secrecy stance in court battle with IRA informer' *The Guardian* 19 June 2014.

[203] Press Release by the Police Ombudsman for Northern Ireland, (24 June 2011), Loughinisland Investigation Lacked Diligence, But Insufficient Evidence of Collusion: Police Ombudsman. See also, for example, 2.5 Operation Ballast Report.

[204] In the matter of an application by Freddie Scappaticci for Judicial Review [2003] NIQB 56.

In this context, the NCND doctrine has been successfully challenged in the courts in some circumstances. This includes a circumstance whereby the UK Government sought to invoke NCND to avoid confirming that an official document was an official document. The document had been leaked, widely publicised in the press and exposed official deceit and wrongdoing.[205]

The court held:

> In the circumstances with which we have to deal, the interests of justice would override the [NCND] policy: the document has been in the public domain for many months, even if it got there as a result of an unlawful act. If it were necessary for us to take it into account evidentially ... we would not regard the NCND policy as a sufficient reason for refusing to do so. To refuse to do so could, in principle, permit Her Majesty's Government to conceal an improper and unlawful motive for an executive act...[206]

The UK Government, employing another device referenced in this report, also argued that s6 of the Official Secrets Act 1989, which prohibits the 'damaging disclosure' of confidential information, prohibited the court from disallowing the NCND. The Court however held that as the cable had already been published in the London *Times* and *Guardian* and further disclosure of it could not be damaging.[207]

A recent high profile civil case in London dealing specifically with the actions of agents (undercover police rather than informants) has also exposed the use of NCND to seek to cover up official abuses of power. In *Dill and others* five women, largely activists on environmental or social justice issues, were victim to undercover police officers from the now disbanded Metropolitan Police 'Special Demonstrations Squad' (SDS) who had infiltrated environmental campaign groups and had formed intimate yet deceptive relationships with the claimants. Despite this clearly being in the public domain[208] (including through some of the officers apologising on national television) being the subject of official reports and the Home Secretary

---

[205] R (*Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs [2013] EWHC 1502 (admin).* This relates to the Chagos islanders who were forcibly removed by the British authorities from their lands which the UK had colonised. This was undertaken in the late 1960s and early 1970s in order for a US military base to be sited on the main island of Diego Garcia. (The 'deportation or forcible transfer of population' is so serious that it is regarded as a crime against humanity under the Article 7 of the Rome Statute of the International Criminal Court (UN Doc. A/CONF.183/9)). In 2000 a successful challenge in the courts exposed the unlawfulness of their expulsion. However, since then the UK has continued to prevent the return of the Chagosians through a variety of actions (see Piliger, John 'Paradise Cleansed: our deportation of the people of Diego Garcia is a crime which cannot stand' *The Guardian* 2 October 2004). This included the designation of waters around the island as a 'Marine Protection Area' thus preventing fishing. Regardless of the official line, *Bancoult* argued that the motive for the designation was to make the islanders return impossible given their reliance on fishing. To prove this a Wikileaked cable was submitted which showed that a Foreign and Commonwealth Office (FCO) official asserted precisely that "establishing a marine park would, in effect, put paid to resettlement claims of the archipelago's former residents…" (David Hart QC, 'The Chagossian Wikileaks cable judgment, fishing rights and a dose of EU law' UK Human Rights Blog 11 June 2013). The FCO invoked NCND relating to the authenticity of the document and hence submitted that the document was inadmissible.

[206] R (*Bancoult) v Secretary of State for the Foreign and Commonwealth Affairs [2013] EWHC 1502 (admin).* paragraph 28.

[207] David Hart QC, 'The Chagossian Wikileaks cable judgment, fishing rights and a dose of EU law' UK Human Rights Blog 11 June 2013.

[208] Some officers apologised on national television or otherwise disclosed their activities in the media or disclosed their status to the claimants. There was general widespread media coverage of the issue and references to it in other court judgments and HM Inspectorate of Constabulary reports. The Home Secretary Teresa May MP announced a public inquiry into the actions of the SDS on the back of the Ellison Review covering undercover policing and the Stephen Lawrence Case (The Stephen Lawrence Independent Review , Possible corruption and the role of undercover policing in the Stephen Lawrence case Summary of Findings, Mark Ellison QC, HC 1038-I, March 2014) Other reports into the SDS were undertaken by Derbyshire Police's Operation Herne, which also dealt with the allegations of sexual relationships, including the fathering of children, by undercover officers; (Operation Herne, Reports 1-3, available at: http://www.derbyshire.police.uk/About-us/Operation-Herne/Operation-Herne.aspx [accessed September 2014].)

announcing a public inquiry, the Metropolitan Police nevertheless sought to apply 'NCND' to the undercover officers in question and even initially sought to have the whole civil claim struck out on the grounds that NCND prevented them from mounting a defence.[209] The Court, having detailed the case law on when it was permissible to use NCND in civil and criminal cases, did not accept that in 2014 there was "any legitimate public interest the entitling the [Metropolitan Police] Commissioner to maintain the stance of NCND in respect of this general allegation."[210] The judgment held that whilst one of the justifications for NCND is to keep covert operational methods secret, this was intended to apply to legitimate operational methods which continued to be used. Mr Justice Bean ruled the Metropolitan Police could not rely on NCND to avoid answering the allegations and in a ruling with significant implications for Northern Ireland stated:

> There can be no public policy reason to permit the police neither to confirm nor deny whether an illegitimate or arguably illegitimate operational method has been used as a tactic in the past.[211]

There have also been circumstances when the state has itself confirmed the existence and identities of even some of its most high profile informants. At the trial of Brian Nelson (an agent for the British Army's Force Research Unit (FRU) who was the UDA's most senior intelligence officer), his commanding officer Brigadier Gordon Kerr gave evidence which confirmed Nelson's role as a FRU agent.[212] Another prominent example is the informant Kevin Fulton (aka Peter Keely). Back in 2001 the then PSNI Chief Constable Ronnie Flanagan confirmed on *BBC Newsnight* and in other press interviews that Fulton was an informant.[213] The Smithwick Tribunal report also provided confirmation in open testimony from his RUC CID handlers of Fulton/Keeley's informant status, yet the PSNI in its written submission to the Smithwick Tribunal claimed NCND as to whether he was an informant.[214]

The doctrine of NCND is therefore applied selectively by state agencies, and can be used to cover up wrongdoing, including human rights violations, notwithstanding some welcome qualifications the courts have now placed on the doctrine.

[209] Dil & Ors v Commissioner of Police of the Metropolis [2014] EWHC 2184 (QB) (02 July 2014), paragraph 3.

[210] Paragraph 41.

[211] Paragraphs 42 and 43.

[212] McCaffery, Barry 'Brigadier Kerr's evidence called into question' *The Detail* 12 December 2012.

[213] Transcript of Interview with Ronnie Flanagan, then Chief Constable of the PSNI, on BBC 'Newsnight' Programme, 13 December 2001 available on CAIN at: http://cain.ulst.ac.uk/issues/police/docs/rf131201newsnight.htm and McDonald, Henry 'Flanagan apologises for 'suicide' outburst' *The Observer*, 16 Dec 2001.

[214] The Smithwick Report, paragraph 15.6.4 then Written Evidence of PSNI page 34, (p1616 of Report).

CHAPTER THREE:
Beyond the peace process agreements

The British and Irish Governments are not referees. They are players – needed at the same table as everybody else if the past is ever going to be addressed… There is a line in [Theresa Villiers MP the NIO Secretary of States'] speech: "This government does not believe in amnesties." Read further down and you find the words 'National Security' and the 'burden' of deciding what is safe to disclose publicly and what must remain secret. Surely there is an amnesty in that thought – protection for those 'agents' who played in the killing games of this place.

Security Journalist Brian Rowan[215]

The 2001 Belfast/Good Friday Agreement contained provision for the early release of conflict related prisoners. The subsequent 2001 Weston Park Agreement committed to measures to deal with the question of 'on the runs' (OTRs). The consequent draft legislation however provided for much broader immunities, including for state actors, and was ultimately abandoned. In addition to examining this process this chapter discusses whether the state has otherwise sought to protect other categories of persons from prosecution.

Beyond 'OTRs': the aborted Northern Ireland (Offences) Bill 2005

In early 2006 the UK Government withdrew the *Northern Ireland (Offences) Bill 2005* legislation which had it proceeded would have established a system whereby applicants would be protected from the standard prosecutorial process for pre-Agreement conflict related offences.

The Bill emerged from attempts to resolve the OTRs issue. OTRs are generally persons who were not in prison and hence unable to apply to the Early Release Scheme provided for under the Belfast/Good Friday Agreement, which led to the release of prisoners with conflict-related convictions after serving two more years of their sentences. OTRs were persons outside the jurisdiction (mainly in the Republic of Ireland) and either would, or feared they would, face arrest and prosecution if returning. This related to conflict-related offences OTRs had not been charged with, or had been charged with but had escaped or absconded whilst awaiting trial or from prison.

July 2000 saw the release of the last of those prisoners eligible for release under the Early Release Scheme. In September 2000, the UK Government announced, citing public interest grounds, that it would no longer pursue extradition requests of persons sentenced who otherwise would have qualified for the Scheme.[216] In 2001, the (UK-Ireland) Weston Park Agreement, the product of political negotiations designed to take forward the stalled peace process and implement the 1998 Agreement, stated that both governments would "take such steps as are necessary in their jurisdictions" in relation to those for whom there were outstanding prosecutions for pre-1998 offences "so that those concerned are no longer pursued."[217]

[215] Clueless, Clumsy, Claptrap – Brian Rowan on Theresa Villiers play on the past @EamonnMallie.com 16 April 2014.

[216] Statement by Secretary of State Peter Mandelson MP on Extradition of Convicted Fugitives 29 September 2000.

[217] Weston Park Agreement (UK-Ireland), August 2001, paragraph 20.

Parliament was similarly told that:

> We [the British Government] and the Irish Government have now accepted that it would be a natural development of the [Early Release] Scheme for outstanding prosecutions and extradition proceedings for offences committed before 10 April 1998 not to be pursued against supporters of organisations now on ceasefire.[218]

The NIO produced its blueprint for implementing its Weston Park commitments in 2003.[219]

The Northern Ireland (Offences) Bill was ultimately introduced in November 2005. This provided a mechanism whereby persons could apply for a certificate of eligibility from a Certification Commissioner. This would allow a trial, in absentia if requested, before a Special Tribunal. A Special Appeal Tribunal would hear any appeals of sentences or guilty verdicts passed by the Special Tribunal. In the event of a guilty verdict, there was no requirement to serve a prison sentence. Instead, immediate 'release' on licence would be provided for subject to conditions similar to the Early Release Scheme.[220] The Explanatory Notes to the Bill state that its purpose was to give effect to the 2003 proposals on OTRs but also make "comparable provision for those who might be charged in the future with terrorism-related offences" committed before the 1998 Belfast/Good Friday Agreement.[221] In essence the Bill went well beyond OTRs and provided the above scheme to any pre-Agreement offence in 'any part' of the UK committed 'in connection with terrorism and the affairs of Northern Ireland' adding the caveat that this applied regardless of whether the offence was 'committed for terrorist purposes or not.'[222] In effect the Bill was to provide same process, not just for OTRs but for any qualifying applicant, including agents of the state. In light of general political opposition to the provision, coupled with the retraction of support from Sinn Féin for the Bill in the context of it also applying to state actors, the Bill was withdrawn by Government.

Recently published correspondence sheds some light on the UK Governments thinking as to whether to include state actors within the scope of the legislation. Correspondence from 2001 between the NIO Secretary of State John Reid MP and Prime Minister Tony Blair discusses the proposed 'amnesty scheme' stating:

> The most difficult question will be what to do with the police and the army. There is unlikely to be a clever way of drafting this scheme so that it conveniently draws a line around soldiers and police officers. So if we want to exclude them we shall have to do so explicitly on the face of the bill.[223]

The above implies consideration was given to *excluding* state actors by stealth from the scheme. Later on however, it appears that there was an (unsuccessful) attempt to instead *include* state actors by stealth. At this stage the Secretary of State writes that he personally had 'great difficulty' excluding state actors on grounds of fairness and that it would involve setting aside government's "responsibility towards those who risked their lives to combat acts of terrorism." However, the Secretary of State writes that he had been persuaded

[218] In a Statement by the Secretary of State John Reid MP, primarily about IRA decommissioning, HC Deb, 24 October 2001, c302.

[219] Northern Ireland Office 'Proposals in relation to on the runs (Otrs)' April 2003 (Available on CAIN Website)

[220] Not supporting a paramilitary group which did not maintain a ceasefire, not becoming involved in terrorism or be a danger to the public.

[221] Explanatory Notes to Northern Ireland (Offences) Bill 81 – EN 2005-6 as at 9 November 2005 prepared by Northern Ireland Office, paragraph 3.

[222] Clause 1(a) of Bill. The Bill also explicitly provided for any related offence resultant from an escape from custody.

[223] Secretary of State, John Reid MP to Prime Minister, Tony Blair, correspondence 4 May 2001 entitled Northern Ireland: legislating on OTRs.

that state actors should be excluded as not to do so could in effect be perceived as a tacit acknowledgement that state actors had operated outside of the law and hence required the protection of an amnesty, thus inflicting reputational damage on the state. He was however concerned, and wrote in no uncertain terms, that lack of a parallel amnesty for state actors would face a backlash from Parliament and the UK press. By the time the Bill was produced however, this position had been reversed.[224]

In the absence of legislation, the OTRs issue then remained to be dealt with by what became known as the 'administrative scheme' which had begun in 2000 and hence predated the initiative to legislate. In 2000 the UK Government issued two letters to individuals stating a review had been conducted by the DPP in England and Wales (as the matter related to links to alleged offences in England). As the evidential test had not been satisfied an assurance was given that 'you would not face prosecution if you returned to the United Kingdom.'[225] This was subject to the caveat that should circumstances change the matter may have to be reconsidered, which in effect did not grant immunity from prosecution if new evidence emerged. Between 2000 and 2014 a total of 156 persons received similar letters stating they were not currently wanted for prosecution or indeed arrest or questioning by the police, again generally subject to a new evidence caveat. Another 31 were told they were 'not wanted' in some other way. A total of 23 persons who had been included in OTR lists were told they *were* wanted and another 18 did not receive a definite answer.[226]

In late February 2014 the High Court in London published its judgment in the John Downey abuse of process application. Mr Downey, who had received one of the above letters under the administrative scheme for OTRs, was arrested in Gatwick Airport on the 19 May 2013 in relation to alleged offences relating to the 1982 Hyde Park bombings, although he had travelled in Great Britain on at least seven previous occasions listed between 2010-2013 without arrest.[227] In February 2014 the court ruled that Mr Downey could not be prosecuted for the offences as he had received an OTR letter on behalf of the Secretary of State erroneously stating he was not wanted by any UK police force, when in fact he had been wanted for questioning by the Metropolitan Police. Government did not appeal the judgment and Mr Downey was released.[228]

The political outcry following the Downey judgment included the threatened resignation of the DUP First Minister, Peter Robinson MLA.[229] The Ulster Unionist Party leader Mike Nesbitt MLA also announced he was abandoning party leaders' discussions on the Haass proposals. The political fallout led to the UK Prime Minister establishing a judge-led review (the Hallett Review).[230]

---

[224] As above, the Secretary of State wrote that there was the "makings of a very difficult and dangerous press campaign and public perception here – 'our lads to stand trial while murdering bastards get off' We should not under estimate the parliamentary passion".

[225] Report of the Hallett Review p26.

[226] The Report of the Hallett Review An independent review into the On the Runs administrative scheme' *The Right Honourable Dame Heather Hallett DBE* July 2014 HC380, paragraph 2.24.

[227] His arrest came just a few days before the NI Executive, in publishing its '*Together: Building a United Communities*' strategy announced the multi-party talks on how to deal with the past, which ultimately became the Haass-O'Sullivan process.

[228] R v Downey [2014] EW MISC 7 (CCrimC) 21 February 2014.

[229] 'On the Runs' and What Might Really Not be Known *Just News* March 2014.

[230] 'The Report of the Hallett Review An independent review into the On the Runs administrative scheme' *The Right Honourable Dame Heather Hallett DBE* July 2014 (the Hallett Review)HC380.

The Northern Ireland Affairs Committee at Westminster also undertook an inquiry[231], others such as the Police Ombudsman and Northern Ireland Assembly Justice Committee also looked into the matter.[232]

Whilst questions have been raised about the transparency of the OTRs scheme it may be the practice or process for which, even prior to the Downey judgment, there was already the most detail in the public domain. What is less clear is how the UK Government's desire to protect state actors was addressed post the withdrawal of the 2005 Bill.

Are there secret amnesties?

A major question, raised by CAJ when the *Downey* judgment broke, is whether there have been *any guarantees given to other categories of persons that they will not face prosecution?* [233] Put simply have there been any 'secret de facto amnesties', in so far as particular groups may have been given assurances that they are not wanted, or will otherwise not face prosecution or investigation. The 'OTRs scheme' was not an amnesty per se and it is the case that no amnesty for any other category of person who may have been given assurances is provided for in legislation or policy. Police and prosecutors have duties to effectively investigate and prosecute in all cases where the test for prosecution is met. A clandestine scheme preventing certain groups from being prosecuted would therefore require a very complex set of arrangements, with systems and processes put in place to implement such assurances. It would also require the agreement of key persons in key institutions, to implement any private assurances given to any other category of persons. Whilst the existence of measures for OTRs was in the public domain, although further detail of the operation of the administrative scheme has only recently emerged, there have been no official statements that have formally declared any broader policy of 'assurances'. An obvious example is the regularly raised question about whether informants and their handlers have been afforded some protection from effective investigation and prosecution.

In June 2014 KRW Law wrote to both the Hallett Review and the Northern Ireland Affairs Committee seeking an extension of their terms of reference to examine the question of whether members of the security forces were also given letters or other assurances of immunity. KRW Law contend they had made this request in response to the PSNI declining to answer questions as to whether such assurances had been given in specific cases the firm is acting on.

[231] CAJ commented in the aftermath that the political outcry which followed the *Downey* judgment was reminiscent of the storm five years earlier which ultimately was used to kill off the previous 'official' attempt to deal with the past by the Eames-Bradley consultative group. On that occasion one of the group's recommendations, for a recognition payment of £12,000 to go to all families who lost a loved one in the conflict, was leaked in advance of the publication of the report with the purpose or effect of overshadowing the group's broader recommendations. The NIO Secretary of State moved to rule out the payments before the formal consultation exercise had begun.

[232] CAJ submitted written evidence to the Westminster inquiry including on the question of teasing out whether the OTR scheme was designated a 'national security' matter. This was raised in the context of the OTR scheme having remained within the NIO when many other policing and justice powers were transferred to Belfast in 2010. The devolution legislation, set out in amended schedules 2 & 3 of the Northern Ireland Act 1998, normally lists which matters have been retained by London, and made no explicit reference to the OTR scheme. There was an issue therefore as to whether the OTR scheme had been re- designated as a 'national security' matter. This question was put to Nick Perry the NIO 'Director General of Criminal Justice and Policing' at the time of the scheme by the Chairperson (Paul Girvan MLA) of the Northern Ireland Justice Committee. Mr Perry responded that he did not know whether the OTR scheme had been designated in such a way but that it might have been. (Committee for Justice Official Record (Hansard) On-the-runs Administrative Scheme and Letters: Mr Nick Perry, Department of Justice 25 March 2014, p4) The Hallett Review noted only that 'opinions vary' as to whether the administrative scheme should have been devolved and hence was not a 'national security' or otherwise excepted matter (paragraph 2.73). In practice the NIO continued to administer the scheme after devolution, and the matter further demonstrates the 'flexibility' to which the concept of 'national security' can be applied.

[233] CAJ Statement CAJ repeats call for legislation on dealing with the past 26 February 2014.

The Hallett Review did not look into this matter, and there is no indication to date that the Northern Ireland Affairs Committee will do so. One witness giving evidence to the Committee who had been involved in the scheme stated that not all persons received letters but were given assurances verbally or through other methods. It is not clear if this relates only to the known OTR lists or other categories of persons.[234] A question as to whether state actors, informants or other paramilitaries had been given undertakings was recently asked at a meeting of the Justice Committee of the Northern Ireland Assembly. Patsy McGlone MLA asked the Permanent Secretary of the Department of Justice:

> are you aware or have you since been made aware of any undertakings of an amnesty, immunity or implied immunity from prosecution having been given to any former or serving member of the security forces, any person who has acted as an agent of the security forces or British Government intelligence services or any other member of any other paramilitary organisation? [235]

The Permanent Secretary responded he was not aware. However, given as this Department had not been involved in the OTR scheme, there would be merit in further exploring such a question with Government and a broader range of agencies.

In relation to the views of other groups, there have been statements from loyalists indicating assurances were given that the 'past' would not be pursued. For example, William 'Plum' Smyth the former chairman of the Progressive Unionist Party, has stated that loyalists were offered assurances they would not be pursued for pre-Good Friday Agreement offences by the secretary of state Mo Mowlam at the time of the 1998 Agreement.[236] There has also been speculation that republicans who support the peace process, including leading members of Sinn Féin, have been given assurances they will not be pursued.[237] This theory was challenged in 2014 by the arrest and four-day questioning of Sinn Féin President Gerry Adams TD, in relation to IRA membership and the 1972 murder of Jean McConville.[238]

The Early Release Scheme

The Belfast/Good Friday Agreement did not provide an amnesty but did provide for early release, on conditional licence[239] *of existing prisoners* convicted for pre-Agreement conflict related offences, with the stated intention that such prisoners would serve a maximum of a further two years before release. The subsequent legislation, the Northern Ireland (Sentences) Act 1998 established the Sentence Review Commissioners to process requests for early release. The legislation also went further than the Agreement to provide for 'accelerated release' after a period of two years, for persons who had *not yet been convicted* of conflict

[234] Evidence of former PSNI ACC Peter Sheridan, in response to a question from Lady Hermon, , stated *"*as I understand now, not everybody got letters; some people were told by word of mouth or other ways of telling them." (Oral evidence: Administrative scheme for 'on-the-runs', HC 1194, 2 April 2014, q167.)

[235] Committee for Justice Official Record (Hansard) On-the-runs Administrative Scheme and Letters: Mr Nick Perry, Department of Justice 25 March 2014, p12.

[236] See 'Families want panel for UVF probe' *BBC News Online* 23 March 2014, and R v McGeough No. [2013] NICA 22 para 21.

[237] See for example 'DUP MP Jeffrey Donaldson's anger over IRA 'amnesty' claim' *Newsletter* 20 July 2014. This covered claims from former Progressive Democrat Tanaiste, Justice Minister and Attoreny General, Michael McDowell that such a de facto amnesty had existed in the Irish Republic since at least 2000 that conflict related prosecutions would not proceed and that he had proposed the UK use pardons at a time when 'both governments were trying to bring senior republicans "in from the cold" during a critical stage in the fledgling peace process.'

[238] 'Gerry Adams freed in Jean McConville murder inquiry' *BBC News Online* 4 May 2014.

[239] The conditions of licence were that the prisoner did not support a paramilitary group not maintaining a ceasefire, did not get involved in 'acts of terrorism connected with the affairs in Northern Ireland' and in the case of life prisoners did not become a danger to the public.

related offences and hence were not in prison at the time of the Agreement.[240] One recent Judicial Review has pointed out that persons convicted post-Agreement (including persons who had been released under the early release scheme for another offence) could serve another two years, and then in theory, serve a further two years after that if convicted of another offence after that, and so on.[241]

There has been debate as to whether the Early Release Scheme, which includes the provision affording a maximum two-year imprisonment for new conflict related convictions, would also apply to state actors. Given the small number of state actors imprisoned there has been little to test the question against. At the time of the Agreement two British Soldiers, Fisher and Wright, were serving sentences for murder of Peter McBride in north Belfast. CAJ understands the UK authorities did expect and seek for them to be dealt with by the Sentence Review Commission for early release under the terms of the Agreement. However, rather than await this process the Government sought to fast track their release through a 'review' conducted by the Secretary of State, who released both soldiers on licence. Other soldiers convicted of murder were also released by executive intervention having served only part of their sentences.

Other limitations on prosecutions

There have been some executive decisions which have limited, in certain circumstances, the potential for prosecutions. As alluded to earlier, in September 2000 the UK Government announced, citing public interest grounds, that it would no longer pursue extradition requests of persons sentenced who otherwise would have qualified for the Scheme.[242] The legislative provisions made for decommissioning of weapons and for the location of the disappeared also provided that proceedings could not be brought for example against persons for moving weapons if they were doing so for the purpose of the decommissioning scheme, or those providing information to the Commission seeking to locate the remains of the disappeared.[243]

Public inquiries into collusion and Bloody Sunday have also used immunities for witnesses giving evidence to them in order to prevent a situation where witnesses would not cooperate on the grounds they might incriminate themselves. This does not rule out such witnesses subsequently being prosecuted, but does mean that their evidence to the inquiry could not be used against them.[244]

The Royal Prerogative of Mercy

Another option by which the state can grant immunity from prosecution for particular offences is through use of the Royal Prerogative of Mercy (RPM), often referred to as a 'Royal Pardon'. There has been speculation that this measure has been used for agents of the state. It was recently revealed by the NIO, in response to a Parliamentary Question from Kate Hoey MP, that over 365 RPMs had been granted in Northern Ireland from 1979 to 2002, but that "this total does not include the period from 1987 and 1997 for which records cannot be found".[245] The official position is that records spanning over a decade have been 'lost'. Ms Hoey

[240] Northern Ireland (Sentences) Act 1998, section 10(6).

[241] Stephens J in Rodger's (Robert James Shaw) Application [2014] NIQB 79, para 12.

[242] Statement by Secretary of State Peter Mandelson MP on Extradition of Convicted Fugitives 29 September 2000.

[243] See s4 Northern Ireland Arms Decommissioning Act 1997, Northern Ireland (Location of Victims' Remains) Act 1999.

[244] 'Dealing with the Past in Northern Ireland: Amnesties, Prosecutions and the Public Interest' Written Submission to Dr Richard Haass, Dr Meghan O'Sullivan and the Panel of Parties in the NI Executive Professor Kieran McEvoy, Dr Louise Mallinder, Professor Gordon Anthony, and Dr Luke Moffett School of Law, Queen's University Belfast, and Transitional Justice Institute, University of Ulster, p8-9.

[245] Written Answer, Teresa Villiers MP, HC Deb, 1 May 2014, c762W.

described this as 'clearly a cover-up'.[246] In one other high profile case where an individual returned to prison had sought to rely on a RPM it was also officially maintained that this document and all copies of it had gone missing.[247] In a subsequent parliamentary response to Ms Hoey and Ian Paisley Jnr MP the Secretary of State did concede that the RPM had been used in cases of persons who assist police and prosecutors, but emphasised it was also used for other non-conflict related cases and reasons.[248] There continues to be a lack of clarity therefore as to the full range of categories of persons who received RPMs.

The Hallett Review and a recent Judicial Review have shed some light on a small number of cases in relation to 13 OTRs. The Review finds that in all of these cases the persons in question were prisoners who had escaped from custody and whose position was considered to be analogous to prisoners released under Early Release Scheme, but who could not in practice apply for release under that scheme as they fell outside it due to factors such as having served time in a jail overseas. Hallett states she did not identify any OTR cases whereby the RPM was used as a 'pre-conviction' pardon, but does cite a case where this matter was explored with consideration given to pardoning one individual, against whom there was sufficient evidence to justify prosecution, on the basis of their contribution to the peace process. Ultimately the RPM was not used in this case.[249]

A recent Judicial Review in the High Court in Belfast provides further details in relation to such cases, detailing the circumstances whereby 14 RPMs were granted from 2000-2002.[250] The RPM was used in these cases for republican OTRs considered to have fallen outside the Early Release Scheme on technicalities. The applicant to the judicial review, a loyalist convicted following a HET review, argued that he should also be considered for an RPM to ensure a fair and equal approach to its usage. The Court rejected this argument stating that the applicant's case was not comparable and that the Government had not exercised the RPM in other comparable republican and loyalist cases relating to post-Agreement convictions.[251]

CAJ has only been able to locate four cases whereby persons have been convicted of pre-1998 conflict related attacks following the Agreement. None is a state actor. Two are republicans and two are loyalists. The cases are as follows:[252]

- Gerard McGeough, republican, convicted on the 18 February 2011 of 1981 attempted murder of Samuel Brush then a postman and part-time UDR member.
- Robert Clarke, loyalist, convicted on 28 February 2011, of sectarian murder of Alfredo Fusco in 1973, following an HET investigation using fingerprint technology.
- Robert Rogers, loyalist, convicted on 14 February 2013 of sectarian murder of Eileen Doherty in 1973, following a HET review and palm print technology.

[246] '365 royal pardons in Northern Ireland since 1979' *Belfast Newsletter* 2 May 2014.

[247] Holder, Daniel 'The growth of secret 'evidence' and the case of Marian Price' *The Detail* 13 May 2012.

[248] Written Answer, Teresa Villiers MP, HC Deb, 14 May 2014: Column 590W.

[249] Hallett Review, paragraphs 2.56-2.59.

[250] Rodger's (Robert James Shaw) Application [2014] NIQB 79, paragraphs 41-70. These cases are grouped into four categories, the first relating to James McArdle, who was first convicted in England then Northern Ireland and would have been treated differently under the Early Release Scheme than co-offenders who were convicted in Northern Ireland. The second category relating to two persons who were convicted in the Republic of Ireland but who served sentences in Northern Ireland, the third category relates to seven persons who were, in addition to other factors, convicted of scheduled offences before they were scheduled, and the fourth category were four persons who had escaped from the Crumlin Road Prison, but for a number of reasons were not eligible for the early release scheme.

[251] Rodger's (Robert James Shaw) Application [2014] NIQB 79, paragraphs 41-70.

[252] Rodger's (Robert James Shaw) Application [2014] NIQB 79 and Court Service summary of judgment, 28 November 2013.

- Seamus Kearney, republican, convicted 28 November 2013, of murder of RUC officer John Proctor as he left the maternity unit mid-Ulster hospital in September 1981, following a HET investigation which used DNA technology.

None of the above cases resulted in an RPM being granted. The convictions led to imprisonment with the potential for early release after two years under the terms of the Agreement. All cases involved the HET except the McGeough case.[253]

The HET has faced accusations of bias from loyalists, in particular that the rate of arrests had been greater for loyalists.[254] Figures released in 2011 by the PSNI show that of 72 arrests resultant from HET enquiries 70 were 'loyalist' and 2 were 'republican'. However, it does go on to note that 65 of these arrests relate to one sole enquiry, presumably the follow up to the Police Ombudsman's Operation Ballast.[255] The former head of the HET, Dave Cox, in giving evidence to a Westminster Committee in June 2014 stated that of 63 cases referred from the HET to the rest of the PSNI he recalled 40% were republican and 60% were loyalists, but that the 60% "were largely around one operation conducted by the HET, which was Operation Ballast, where a small number of loyalists were arrested on multiple occasions or were suspected of many, many offences."[256] In 2009 and 2010 the PSNI released details of those "arrested and charged by the HET following appropriate authority from the PPS." These again are linked to Operation Ballast (later renamed Stafford).[257]

Regardless of the ratios within figures, there are alternative factors, other than allegations of bias towards republicans, which may contribute to HET investigations being more likely to lead to the arrests of loyalists. A significant factor may be that the original RUC investigations against loyalists were less rigorous and effective than those against republicans. This would make it more likely that there is unexploited evidence in police files that can now form the basis of HET investigations. What is notable, as observed by the HMIC, is that 0% of the HET referrals and 0% of the arrests given in the above figures relate to members of the security forces.

Notwithstanding these specific limitations on prosecution and imprisonment it remains the case that there is no official amnesty for conflict related offences and that any unofficial amnesty would require the clandestine buy-in of a number of agencies and groups. It is the case however that there have been very few Post-Agreement convictions for conflict related offences, and that none of them have been members of the security forces or their agents.

[253] As an attempted murder this case was outside of the HET's remit of re-examining conflict related deaths.

[254] See for example views of community worker in 'Flags were straw that broke camel's back - Jim Wilson' *Belfast Newsletter*, 9 January 2013.

[255] PSNI FoI F-2011-00829.

[256] Dave Cox, Oral evidence: Northern Ireland Affairs Committee, HC 177 Wednesday 4 June 2014.

[257] The Operation Ballast investigation was taken out of sequence as it was referred to the PSNI by the Police Ombudsman, and initially dealt with by the HET before being removed from them. Charges cover the murder of Tommy English in 2000 and related matters, which ultimately led to the *R v Haddock and others* 'supergrass' trial of 2012, and often do not relate to pre-1998 offences, save there is some overlap with charges of UVF membership. The two assisting offenders pleaded guilty to 100 charges for many serious offences between 1994-2005, and had a further 120 'taken into consideration'. (PSNI FoI request F-2009-00016 and F-2010-02628.)

CHAPTER FOUR:
Inquires

> **[The Inquiries Act 2005]...makes it impossible to set up truly independent inquiries into deaths (and other serious issues) by virtue of an unprecedented subordination of the inquiry process to the control of Government ministers at every stage, even though the actions of the executive may, more often than not, be the very subject of investigation.[258]**
>
> **Northern Ireland Human Rights Commission correspondence to the United Nations Human Rights Committee**

Public inquiries are a powerful vehicle to investigate the broader circumstances of how the state and its institutions have been operating. Truly independent inquiries with adequate powers have the potential, in shining a light on one or more particular incidents, to uncover and hold to account how a whole system has operated. It is CAJ's belief that it is in this context that the UK has refused to hold an inquiry into the killing of Pat Finucane. The Secretary of State, Theresa Villiers MP also recently announced it would not permit an inquiry into the circumstances of the Omagh Bombing, the largest single loss of life in the conflict.[259]

Inquires were held into the circumstances of Bloody Sunday along with a number of other cases involving security force collusion. The narrative of post-conflict public inquiries has however been very much one of the UK Government seeking to reduce the independence of inquiries and obstruct their realisation to varying degrees. Delaying an inquiry or other judicial procedure by withholding the disclosure of documents or other mechanisms of preventing cooperation are a major factor in significantly increasing the costs of such inquiries. This in itself then provides the state with a basis for arguing inquiries are 'too costly' and refusing requests for further inquiries. It is notable that official outcry over the costs of the past does tend to focus on investigations into the state itself.[260]

A report by the Criminal Justice Inspection for Northern Ireland in relation to the costs of dealing with the past whilst collating a range of costs incurred by criminal justice agencies into historic investigations is also limited in not analysing the proportion of these costs which could be attributed to delay and obstruction by state agencies themselves.[261]

---

[258] Northern Ireland Human Rights Commission correspondence to Professor Yuji Iwasawa Chairperson, UN Human Rights Committee, 24 August 2009.

[259] This announcement was made on the same day that Amnesty International launched a major report calling on the UK Government to properly investigate the past (Northern Ireland: Time to deal with the past Amnesty International, 12 September 2013.)

[260] One victims' NGO, Relatives for Justice, which represents victims of the state, has contrasted the drive to reduce legal costs of past investigations into state crime to the recently revealed figure of £135 million paid to former police officers for hearing loss claims, which included £65 million in legal fees, which led to no official outcry. The figures themselves were only revealed following freedom of information requests by the group. (see 'Police hearing loss: £135m paid in compensation' BBC News Online 23 January 2013.)

[261] A Review of the Cost and Impact of Dealing with the Past on Criminal Justice Organisations In Northern Ireland, Criminal Justice Inspection Nov 2013.

The most significant development in recent years was the UK Government's decision to replace other statutory bases for inquiries with an entirely new framework for public inquiries. This was introduced in irregular circumstances under the Inquiries Act 2005, which provides for unprecedented interference at practically every stage of the inquiry by a Government Minister despite the very actions of the Executive tending to be the focus of the inquiries.

This chapter examines the advent of this act and the way in which it has been put to use, particularly in relation to the Cory Collusion Inquiries. This chapter then discusses the outworking of the Bloody Sunday Inquiry.

The Cory Collusion Inquiries and the 'Alice in Wonderland' Inquiries Act 2005

The Weston Park Agreement 2001 committed the UK to holding public inquiries into 'serious allegations of collusion by the security forces.' The commitment was made in relation to a number of cases should such inquiries be recommended by a judge of international standing appointed to investigate them.[262] Accordingly Mr Justice Cory , a retired Canadian supreme court judge, produced his Collusion Inquiry Reports and recommended UK inquiries into the deaths of Pat Finucane, Billy Wright, Robert Hamill and Rosemary Nelson.[263]

Following this in 2004 the Inquiries Bill was hurriedly introduced. It is reasonable to conclude that the Act was introduced in response to concerns about where the collusion inquiries might lead. The Act was rushed in before a Select Committee of Parliament who had been separately examining the public inquiries framework, even delivered its report.[264]

Independence of inquiries under the Act

It is CAJ's view that the Act can prevent truly independent inquiries taking place which conflicts with ECHR requirements.[265] The Northern Ireland Human Rights Commission also regarded the 2005 Act as incompatible with the ECHR and wrote to the UN Human Rights Committee stating that the legislation:

> ...makes it impossible to set up truly independent inquiries into deaths (and other serious issues) by virtue of an unprecedented subordination of the inquiry process to the control of Government ministers at every stage, even though the actions of the executive may, more often than not, be the very subject of investigation.[266]

The United Nations Human Rights Committee also expressed its own concerns at both delays to holding inquiries and the use of the Act.[267] Senior judicial figures have also articulated

[262] Weston Park Agreement (UK-Ireland) 1 August 2001, paragraphs 18-19.

[263] Cory Collusion Inquiry Report: Pat Finucane HC470, 2004; Cory Collusion Inquiry Report: Robert Hamill, HC471, 2004; Cory Collusion Inquiry Report: Billy Wright, HC472, 2004; Cory Collusion Inquiry Report: Rosemary Nelson, HC473, 2004; The Irish Government also took forward an inquiry, known as the Smithwick, tribunal into collusion by the Garda Síochána in the killing of two RUC officers in 1989 by IRA.

[264] The Select Committee on the Inquiries Act 2005, *Evidence Session No. 1* 25 June 2013.

[265] CAJ Preliminary Commentary on Proposals in the Inquiries Bill 2004 and press release 'End of Public Inquiries as we know them' 9 December 2004.

[266] Northern Ireland Human Rights Commission correspondence to Professor Yuji Iwasawa Chairperson, UN Human Rights Committee, 24 August 2009.

[267] "...the Committee is concerned that instead of being under the control of an independent judge, several of these [Cory Collusion] inquiries are conducted under the Inquiries Act 2005 which allows the Government minister who established an inquiry to control important aspects of that inquiry." UNHRC (Committee Concluding observations on the UK) CCPR/C/GBR/CO/6/CRP.1 21 July 2008, paragraph 9.

similar concerns including Mr Justice Deeny[268] and Lord Saville (who chaired the Bloody Sunday Inquiry).[269] Mr Justice Cory argued that the Act would create an intolerable 'Alice in Wonderland' situation:

> ...it seems to me that the proposed new [Inquiries] Act would make a meaningful inquiry impossible. The commissions would be working in an impossible situation. For example, the Minister, the actions of whose ministry was to be reviewed by the public inquiry would have the authority to thwart the efforts of the inquiry at every step. It really creates an intolerable Alice in Wonderland situation... [270]

A 2014 House of Lords Select Committee report into the operation of the Inquiries Act 2005 did recommend circumscribing some of the ministerial powers to intervene in the inquiry but not any major overhaul of the Act per se.[271]

Decisions to hold inquiries under the Act

The decision to hold or not hold an inquiry, currently vested in the relevant Minister, is a matter of significant controversy, as demonstrated by the aforementioned decision not to hold an inquiry into the Omagh bombing.[272] There have also been long standing calls for an inquiry into the Ballymurphy massacre in West Belfast. Eleven civilians were killed in Ballymurphy between 9-11 August 1971 by the British Army's Parachute Regiment after the introduction of internment. This was around six months before the Bloody Sunday massacre by the same regiment.[273] There has been no commitment from the UK Government to hold an inquiry. In 2012 the then Secretary of State for Northern Ireland, Owen Patterson, turned down a request for an independent investigation arguing it would not be in the 'public interest' to investigate the matter.[274] In 2014 the Secretary of State Theresa Villiers ruled out a review into the Ballymurphy massacre and La Mon bombings. In May 2014 there was a call from family members and former First Minister David Trimble for a public inquiry into the deaths of Judge Maurice Gibson and his wife Cecily, who were killed by an IRA car bomb in 1987, with which there was suspected Garda collusion.[275]

---

[268] "…one has to ask whether an inquiry conducted under a sword of this nature, which was perhaps not Damoclean but still rested in the scabbard of the Minister, would or could be perceived to be truly independent." In the matter of an application by David Wright for Judicial Review of a decision of the Secretary of State for Northern Ireland, High Court of Justice in Northern Ireland, Queen's Bench Division, 22 December 2006 NIQB 90 [41].

[269] "...This provision makes a very serious inroad into the independence of any inquiry; and is likely to damage or destroy public confidence in the inquiry and its findings, especially in any case where the conduct of the authorities may be in question. As a judge, I must tell you that I would not be prepared to be appointed as a member of an inquiry that was subject to a provision of this kind." Lord Saville in correspondence to lead Minister Baroness Ashton reported in 'Finucane widow urges judges to shun inquiry' *The Guardian* 14 April 2005.

[270] Justice Cory correspondence to US Congressional Committee 15 March 2005. [Available at: http://www.patfinucanecentre.org/cory/pr050315.html accessed September 2013.]

[271] Select Committee on the Inquiries Act 2005 Report of Session 2013–14 'The Inquiries Act 2005: post-legislative scrutiny' HL Paper 143, chapter six.

[272] It is the view of CAJ that rather than leaving the matter to political decision by the department which has the greatest interest in the matter, clearer guidelines to the circumstances requiring the establishment of inquiries including addressing the question of who is best placed to take the decision to open an inquiry, should be compiled by a group of international legal experts. The predecessor Tribunals of Inquiry Evidence Act 1921 vested the decision in Parliament. See: http://www.legislation.gov.uk/ukpga/1921/7/pdfs/ukpga_19210007_en.pdf accessed October 2013.

[273] In 2014 the Taoiseach Edna Kenny supported the relatives call for an inquiry in the form of an independent panel inquiry, similar to that which examined the Hillsborough stadium disaster in England. (See Taoiseach agrees to support call for Ballymurphy Massacre independent inquiry *RTE News Online* 30 January 2014).

[274] 'Ballymurphy massacre families are told probe not in public interest' *Belfast Telegraph* 20 June 2012.

[275] 'Family of Lord and Lady Gibson demand an inquiry' *Newsletter* 28 May 2014. This case was originally examined by Justice Cory but no public inquiry was recommended, fresh evidence in the Smithwick Tribunal however which has questioned this conclusion.

In relation to the Cory Collusion Inquiries it is also notable that, rather than give undertakings not to use its powers under the Act, the Government ultimately reneged on the commitment to hold the Pat Finucane Inquiry.London was from the outset unwilling to hold the Finucane inquiry under other legislation.[276] The UN Human Rights Committee in 2008 in raising its concerns about the Inquiries Act 2005 had called for an "independent and impartial" inquiry be conducted "as a matter of particular urgency" in order "to ensure a full, transparent and credible account of the circumstances surrounding violations of the right to life in Northern Ireland."[277] With specific reference to Pat Finucane and Rosemary Nelson the UN Committee alluded to the promised inquiries including investigation into the murders of human rights defenders.

The UK Government subsequently engaged in discussions with the Finucane family. One of the options put forward by Government officials was that of holding a statutory public inquiry under the Inquiries Act 2005 but with binding undertakings that ministers would not use their powers to intervene in the inquiry through issuing Restriction Notices under the Act. Such an arrangement had been reached through a Protocol in the Baha Mousa Inquiry.[278] The Finucane family had indicated they would accept this approach.[279] Despite this, in October 2011 the British Prime Minister David Cameron informed the Finucane family that his administration would not deliver on the commitment to conduct a public inquiry into the 1989 killing. The family and their representatives have publicly stated that they were told by Mr Cameron that "There are people in buildings all around here who won't let it happen."[280] It is hard to see how this statement can be interpreted otherwise than that those who may have been implicated in the murder had, in effect, blocked the inquiry. The Prime Minister apologised for the collusion in the murder of Pat Finucane (although did not disclose what this was) and instead of the public inquiry ordered a further review of the papers by Sir Desmond de Silva QC who reported in December 2012.[281] The family were subsequently granted leave to judicially review the decision not to hold a public inquiry. The UK Government sought to prevent documents being disclosed to inform the proceedings; this was successfully challenged in a judicial review in April 2013.[282] The broader proceedings are ongoing.

Cory Collusion inquiries

The other Cory Collusion inquiries have taken place and produced reports (save that of Robert Hamill which still awaits the conclusion of legal proceedings). The Hamill and Wright Inquiries (but not the Nelson Inquiry) were both converted to the Inquiries Act 2005.[283] The decision to convert the Wright inquiry into one under the Inquiries Act was subject to a judicial review taken by Billy Wright's father David Wright in 2006 in which CAJ, along with Amnesty International, British Irish Rights Watch and the Northern Ireland Human Rights Commission intervened highlighting issues of independence and ECHR compliance.

[276] 'Habits of Mind and "Truth Telling": Article 2 ECHR in Post-Conflict Northern Ireland', G. Anthony, and Paul Mageean in Morrison et al (eds) *Judges, Transition and Human Rights* (Oxford University Press, 2007)

[277] ICCPR Concluding Observations on the UK, 2008, para 9.

[278] An Iraqi civilian who died following torture in British Army custody in Iraq. See http://www.bahamousainquiry.org/ and *Al-Skeini and Others v the United Kingdom (2011)* 53 EHRR 18 judgment of 7 July 2011.

[279] See 'Statement by Geraldine Finucane on behalf of the Finucane Family' 14th October 2011 and NIO 'Notes for a meeting with Madden and Finucane' January 2011, which references the 'Protocol for the Production of Documents and Other Evidence to the Inquiry by the Ministry of Defence produced by counsel to the Baha Mousa Inquiry'. [Available at: http://www.madden-finucane.com/pat/archive/pat_finucane/2011-10-14.aspx accessed October 2013].

[280] See for example: 'Finucanes' bid to question PM blocked' *UTV News Online*, 24 April 2012.

[281] De Silva Review, 2012.

[282] Finucane's (Geraldine) Application [2013] NIQB 45.

[283] The Rosemary Nelson Inquiry remained under the Police (Northern Ireland Act) 1998. The respective schedule applying to the inquiry has been repealed by the Inquiries Act 2005.

The ruling by Mr Justice Deeny was promulgated on 2 February 2007. It found the decision to convert the Billy Wright Inquiry from one under the Prisons Act (Northern Ireland) 1953 to the Inquiries Act 2005 was unlawful. Deeny J held the Secretary of State had:

> failed to take into account the important and relevant consideration that the independence of such an inquiry was compromised by the existence of Section 14 of the 2005 Act but was wrongly advised that an equivalent power existed under the Prisons Act.[284]

A further Cory Collusion Inquiry which has now reported in the Republic was the Smithwick Tribunal into Garda collusion in the IRA murders of two senior RUC officers, Chief Superintendent Harry Breen and Superintendent Bob Buchanan. In December 2013 the tribunal, set up under Ireland's Tribunals of Inquiry (Evidence) Act 1921 – 2004, reported, finding there had been collusion in the killings. Among its recommendations, with clear relevance to the Omagh Bombing, Dublin and Monaghan Bombings or other incidents embracing both states is that if any future legacy inquiry with a cross-border element is established:

> consideration ought to be given to establishing same on the basis that is has the power to hear evidence, compel the attendance of witnesses and make orders for the discovery of documents in both jurisdictions.[285]

This recommendation can be viewed in the context that a tribunal established in one jurisdiction under its legislation will not have the same powers to compel the witnesses or documents in the other. There was considerable controversy in the closing phases of the Tribunal's public hearings in relation to the introduction by the PSNI, at a late stage, in a closed session of the Tribunal, of MI5 intelligence material.[286]

This subject of cross-jurisdictional disclosure has also proved controversial in relation to the Dublin and Monaghan Bombings, as the Barron Inquiry, which reported in 2003 had not received full disclosure of documents from the British authorities in relation to the attacks. Two Dáil motions passed unanimously in 2008 and 2011 have since urged the UK to make available all the relevant original documents in its possession.[287] In May 2014 family members initiated legal proceedings to sue the UK Government in relation to collusion allegations that the UVF bombers were assisted by the British security and intelligence services.[288]

Like many of the other processes documented in this report, the issue of unreasonable practices regarding the disclosure of official documents has also impacted on inquiries.

The Billy Wright Inquiry chaired by Lord MacLean provides some evidence of difficulties, resistance and delays in obtaining intelligence documents from the PSNI. This includes the inquiry facing the unacceptable request that the police service would only supply intelligence

---

[284] In the matter of an Application by David Wright for Judicial Review of a Decision of the Secretary of State for Northern Ireland [2007] NIQB 6. The Secretary of State appealed the ruling and David Wright (father of the murdered Billy Wright), was elderly and desirous of movement in the Inquiry. Accordingly, he and the family were willing to forego the remedy of nullifying the Inquiry, and instead were willing to accept that it continue its work under the Inquiries Act, albeit with its credibility undermined.

[285] Report of the Tribunal of Inquiry into Suggestions that members of An Garda Síochána or other employees of the state colluded in the fatal shootings of RUC Chief Superintendent Harry Breen and RUC Superintendent Robert Buchanan on the 20th March 1989, p434.

[286] See: 'Smithwick Tribunal: Last-minute intelligence had key role in findings' *Belfast Telegraph* 5 December 2013.

[287] 'Justice for the Forgotten Meets the Taoiseach' *Pat Finucane Centre Newsletter* Issue 11 Winter 2013.

[288] Dublin-Monaghan bombs: victims sue British government *BBC News Online* 14 May 2014.

documents to a judicial inquiry after "the Inquiry had signed a Memorandum of Understanding (MoU) that the PSNI had drafted." The Inquiry considered "that the conditions suggested [in the MoU] by the PSNI could be seen as interfering with the independence of the Inquiry."[289] It was also only when the Inquiry opened formal hearings that CAJ and others were made aware that the security services had sought (and been granted) party status to the Inquiry. This meant they had full legal representation and participation in the proceedings, including access to the materials. The lawyer representing the family was only made aware of this several days before and then only incidentally (when being told the seating arrangements that the Inquiry had determined upon). CAJ questioned at the time when this status was accorded to the security services, why the family and others were not invited to make legal representations on the matter, and why other parties to the Inquiry were not even formally informed of the Inquiry's decision in the matter.

It is also worth considering the extent to which the very existence and risk of the use of wide ministerial powers of intervention is a chill factor over the independence of inquiries. From the outside it is difficult to determine any level of contact by the Secretary of State or their representatives with an inquiry team. As well as the concern that a Minister may 'lean on' inquiries there is also a potential conflict of interest created by the Minister appointing the inquiry chair and panel members. This can lead to perceptions, heightened by previous experience in Northern Ireland, that a Minister will appoint persons who effectively do not require 'leaning on' as they are already unduly sympathetic to the Executive.

Under the Act, Restriction Notices (Secretary of State) and Restriction Orders (Chairperson) can be issued. CAJ is aware of six Restriction Orders during the Hamill and Wright Inquiries, mainly to prevent the publication or disclosure of particular evidence given to the Inquiry and one in the Hamill Inquiry relating to closed parts of the proceedings.

A number of significant issues have arisen in relation to Ministers' use of powers to set the terms of reference of an inquiry. In the Robert Hamill Inquiry the Secretary of State excluded analysis of the role the Director of Public Prosecutions (DPP) from the Terms of Reference. The Inquiry requested this be added but the Secretary of State rejected the request on the basis of the DPP's decisions having been reasonable.[290] The Hamill family sought a judicial review seeking scrutiny of the decisions.[291] The family claimed that there was potential bias in the decision of the Minister.[292] Justice Weatherup upheld the family's complaint that the test applied "did not correspond to the test of public interest" under s15(6) of the Act.

The Secretary of State still declined to extend the Terms of Reference but now stated they could be interpreted as allowing limited scrutiny of DPP decisions insofar as they shaped the RUC investigation, but precluding the Inquiry from examining the merits of the prosecutorial decisions themselves.[293]

---

[289] The Billy Wright Inquiry – Report, HC431 2010 (Billy Wright Inquiry), para 6.65.

[290] "[My independent Counsel's] advice was that the decisions taken by the DPP and his staff were reasonable; that there was no basis for suggesting there were additional steps that should have been taken; and that the case was assessed both objectively and professionally. I have, therefore, concluded that in all the circumstances there are no justifiable grounds to extend the terms of reference." 'Woodward decides against extending Hamill inquest terms of reference,' *NIO Latest News* (20 March 2008).

[291] An Application for Judicial Review by Jessica Hamill [2008] NIQB 73.

[292] One of the advisors to the Secretary of State, David Perry QC, had also been involved in the original prosecution decision. 'Inquiries Update', *Just News*, CAJ (July/August 2008) p4.

[293] 'Terms of Reference Decision by the Secretary of State for Northern Ireland,' *Robert Hamill Inquiry Press Notice 013* (5 November 2008): http://www.roberthamillInquiry.org/press/13/.

In the Rosemary Nelson Inquiry, which was not conducted under the Inquiries Act 2005, the Secretary of State did amend the Terms of Reference to include 'the Army or other state agency' in its list of possible actors.[294]

One of the most significant issues in relation to the Cory Collusion Inquiries, was the decision of the Secretary of State not to include 'collusion' in the Terms of Reference of any of the Inquiries. The Billy Wright Inquiry Report indicates the Inquiry Panel was conscious of the 'significance' of the Secretary of State for Northern Ireland having emphasised his view that Judge Cory's definition of collusion was 'very wide'.[295] The Panel subsequently adopted a much narrower definition of collusion, which required an 'agreement or arrangement' between state and non-state actors, and which would exclude matters such as the state 'turning a blind eye' from the definition of collusion. Representations from the family that the Inquiry follow the Cory definition of collusion were considered but rejected by the Inquiry Panel who justified the decision by stating that "we must have primary regard to our Terms of Reference" as well as indicating such matters could still be covered by the inquiry without consideration of them being 'collusion'.[296] Having narrowed the definition of the term the Inquiry subsequently concluded that there had not been 'collusion.'[297]

A further outworking of the above approach is also seen in the Secretary of State, rather than the panel or Parliament, being able to deliver and give first reaction to the final report of an Inquiry. In relation to the Rosemary Nelson Inquiry the Secretary of State in delivering the report was able to, in effect, emphasise a finding of no collusion despite on further examination the report containing detail of a broad range of collusive acts.[298] Whilst the Rosemary Nelson Inquiry was conducted under other legislation, the Inquiries Act 2005 legislates for such an approach providing that the Inquiry must deliver their report to the Minister and that it is the Minister, unless he or she decide otherwise, who is to publish the report.

The Bloody Sunday Inquiry

Often the democratic state (here the British Government in Northern Ireland) persists with the self-promoting myth of neutrality, and is unable to 'see' its own liability for human rights violations. Bloody Sunday is a classic illustration of the failure of the democratic state, unable and unwilling to see itself as perpetrator and reluctant to fully apply its rule of law maxims to its own agents.[299]

The biggest inquiry which has been established as part of the peace settlement was the Saville inquiry into the Bloody Sunday massacre of 14 civil rights demonstrators, six of whom were children, by the British Army's parachute regiment. As CAJ recalled in the special 40th anniversary issue of our *Just News* bulletin these events 30th of January 1972 uniquely shaped the Northern Ireland conflict.[300]

[294] 'Secretary of State Announces Changes to the Terms of Reference for the Rosemary Nelson Inquiry' *Rosemary Nelson Inquiry Press Notice 05/02*(24 March 2005): http://www.rosemarynelsonInquiry.org/press-notices/2/.

[295] Billy Wright Inquiry Report, paragraphs 1.23-4.

[296] As above, paragraphs 1.33-1.34.

[297] As above 16.4.

[298] For commentary see McCaffrey, Barry 'Why did the Nelson Inquiry not mention collusion?' *The Detail* 29 May 2011.

[299] CAJ 'Bloody Sunday the Costs of Truth', *Just News*, February 2012, p1.

[300] CAJ 'Bloody Sunday the Costs of Truth', *Just News*, February 2012.

The Saville or Bloody Sunday Inquiry published its report on 15th June 2010, having commenced in 1998. The Report, which overturned the verdict of the earlier Widgery Tribunal widely regarded as a whitewash, was unequivocal that all those shot were innocent unarmed civilians who were posing no danger to soldiers and that soldiers had knowingly given false accounts. In Parliament David Cameron duly apologised for the 'unjustified and unjustifiable' killings. The long fought acknowledgement of the innocence of the victims had been achieved. Whilst this was significant progress on part of the state CAJ did say that a more cynical reading of the inquiry:

> ...is the conclusion that the state fully acknowledged the harms that took place in Derry on January 30th because it had no choice. The level of international scrutiny and the internal political costs in a conflict-negotiation context were too high to sustain on this one egregious set of violations.[301]

There were limitations to the Saville model too as the Pat Finucane Centre and Bloody Sunday Trust put it on the first anniversary:

> Saville convicts the lower ranks of the Parachute Regiment while exculpating the higher military command and dismissing any suggestion of political leaders having been complicit in the events...The report's conclusion is that one undisciplined middle-rank officer and a small squad of kill-crazy foot-soldiers did it all. In this respect, the report, brilliant for the families, is not a bad result for the British military and political elite either.[302]

CAJ also drew attention to the strengths and weaknesses of the Inquiry's approach. This related to whether the Tribunal actually provided an effective remedy or accountability. CAJ questioned why the Tribunal was limited, despite its resourcing and depth, to examining the actions on the day rather than related incidents which could have highlighted the extent to which the massacre was linked to policy decisions and counter insurgency models decided much higher up the command chain. On the positives, CAJ concludes:

> The strengths of the Saville example are clear. In the face of intense institutional and establishment resistance it took a complex and long process to unravel decades of official lies about the events of Bloody Sunday. The result of the Inquiry was the re-writing of the official record to concede that what happened on the ground was indeed what the thousands of people who witnessed the massacre already knew, the shootings were unjustified and unjustifiable; the victims were innocent. The truth was officially acknowledged.[303]

In relation to limitations CAJ noted the Inquiry has "not yet led to significant sanctions against the state. To date barely a medal has been unpinned, let alone institutions or practice overhauled."

Whilst noting the possibility of prosecutions it was argued that the outworking of the inquiry could be seen as fitting a pattern of allowing the UK to review and apologise for individual actions rather than holding the state to 'account'.

This was contrasted with the approach in international justice that, whilst still evolving and with its own limitations, provides some indications of what accountability or an effective remedy should look like. It is difficult to see how 'review and apologise' would fit with such an approach.

---

[301] CAJ 'Bloody Sunday the Costs of Truth', *Just News*, February 2012, p1.

[302] Joint statement PFC and BST on the first anniversary of the Saville Report.

[303] CAJ 'The Bloody Sunday Inquiry: a model to be followed or superseded? *Just News*, February 2012, p4.

The approach of the International Criminal Court (ICC) is summarised as holding individuals at the top of the chain criminally accountable.[304] The approach of the UN's International Court of Justice (ICJ) provides an inter-state civil-law type model awarding reparations for violations of international law.[305] The model provided by the European Court of Human Rights in Strasbourg involves states being held to account through judgments which oblige individual measures (e.g. remedies and reparations to individual victims) and general measures obliging legal reforms and changes in practice, that seek to make repetition untenable. All of these differ from any model limited to 'review and apologise'.

Also contrasted was the approach of limiting examination to 'actions on the day' rather than the related policy framework:

> There are competing arguments as to whether individual cases are either limited in their capacity to tackle systemic violations or conversely at times have significant capacity to shine a light on how a whole system has worked. A related matter is the extent to which proceedings go beyond the immediate incidents under examination to assess the background context of state actions. It is notable that a number of Chechen Judgments by the Strasbourg Court have found substantive 'right to life' violations even with serious problems of non-disclosure of evidence from the Russian authorities. This is in part from apparent inference from, for example, the pattern of individuals being 'disappeared' by unidentifiable officials in the context of the Chechen conflict. By contrast inquiries which only look at the 'events on the day', or indeed only allow space for an official background narrative, will be limited by not being able to independently contextualise the *modus operandi* of the perpetrators and determine whether their actions were, to paraphrase the Rome Statute in relation to war crimes, part of a 'plan or policy' rather than an aberration of individual military personnel. Contextualisation allows the system, not just its individual actors, to be put under the spotlight.
>
> In response to submissions that the events needed to be contextualised to the *modus operandi* of the authorities the Bloody Sunday Inquiry did not restrict itself to examination of events on the day. Rather the Inquiry Report sets out that it did look "in detail at what the authorities were planning and doing in the weeks and months preceding Bloody Sunday." This examination and an accompanying local historical narrative did not however extend to examining other army shootings, which could have included those in Ballymurphy, which had taken place in the same weeks and months. The Inquiry argued "this would have been a wholly impracticable course for us to take, adding immeasurably to what was already a very long and complex inquiry" and then concludes "In these circumstances, we are not in a position to express a view either as to whether or not such a culture existed among soldiers before Bloody Sunday or, if it did, whether it had any influence on those who fired unjustifiably on that day" (paragraphs 4.4-4.7 of Volume 1).
>
> An approach affording accountability could not only have done this but looked much

[304] The International Criminal Court (ICC) in The Hague is a permanent international court whose jurisdiction is limited to the "most serious crimes of concern to the international community as a whole". The Rome Statute sets out the ICC's jurisdiction with respect to genocide, crimes against humanity, war crimes and the crime of aggression. The ICC is to compliment national criminal jurisdictions and cannot examine breaches which occurred before 2002 when the Rome Statute came into force. The ICC's first conviction was of Thomas Lubanga Dyilo for using child soldiers in the Democratic Republic of Congo.

[305] This was the case in the 1980s emblematic *The Republic of Nicaragua v the United States of America [1986] ICJ 1 (27 June 1986)* case where the latter was found guilty for "training, arming, equipping, financing and supplying the contra forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua."

> further afield. Bloody Sunday took place in 1972. Many of the soldiers and their commanders may well have been fresh from Kenya, Cyprus, Aden, Malaya and other colonial 'theatres' in the years and decades before. An examination of policy and practice in these countries could help contextualise whether Bloody Sunday was limited, in the words of the Coroner Major Hubert O'Neill, to "sheer unadulterated murder" in which soldiers ran "amok and shot without thinking what they were doing" or was it in fact part of 'counter-insurgency' policy which permitted or encouraged the massacre of civilian demonstrators with a view to terrorising dissenting peoples into submission.[306]

Around two years on from the Bloody Sunday Inquiry the PSNI did launch a murder investigation. In September 2013 victims families were critical that 14 months into this investigation the Bloody Sunday soldiers had still not been interviewed.[307] In October 2013 news leaked to the UK press that there would now be movement against the soldiers, including arrests, which the *Daily Mail* described as 'imminent'.[308] The *Telegraph,* cited news as emerging from a 'source close to the police' (although the PSNI formally stated the timescales would be longer) and noted there was criticism from some in the military at the news.[309] In a measure of the likely resistance ITV cited a former army commander whose service personnel were involved in the day of the Bloody Sunday shootings denouncing the move as 'ridiculous', 'politically motivated', 'despicable' and 'disgraceful.'[310]

A year on no arrests or interviews had taken place. A Policing Board question from Dolores Kelly MLA to the Chief Constable in November 2014 indicated that interviews of soldiers were scheduled to have taken place on the 6 October 2014.[311] Just a couple days before this however, the PSNI announced that in the context of budget cuts it would scale down the investigation and let go most of the investigations team. The long awaited questioning of the soldiers was consequently postponed. The Bloody Sunday families voiced concerns that in effect the investigation had been ended and lodged judicial review proceedings. Solicitor Peter Madden stated that the decision to end the investigation had been made on the eve of the process of the soldiers being interviewed under caution and contrasted the approach to the statutory duty to investigate with the PSNI's pursuit of the 'Boston College Tapes' relating to IRA disappeared victims six months earlier, stating "it appears that this statutory duty does not extend to members of the British Army."[312] In December 2014 the PSNI announced the establishment of the new Legacy Investigations Branch to supersede the HET, and indicated that it would pick up the Bloody Sunday investigation.

[306] CAJ 'The Bloody Sunday Inquiry: a model to be followed or superseded? *Just News*, February 2012, p4-5.

[307] 'Bloody Sunday troops not yet questioned in murder investigation' *BBC News Online* 25 September 2013.

[308] 'End of Immunity for Para One: Bloody Sunday Troops Face Murder Arrests 41 Years After Massacre' *Daily Mail* 20 October 2013.

[309] 'Bloody Sunday soldiers could face arrest for murder' *The Telegraph* 20 October 2013.

[310] 'Bloody Sunday 'murder arrests politically motivated' ITV News Online 20 October 2013.

[311] NI Policing Board, Questions to Chief Constable, Bloody Sunday Investigation (Dolores Kelly) 6 November 2014.

[312] McKinney, Seamus 'Curtailed Bloody Sunday Probe Challenge' *Irish News* 11 November 2014.

CHAPTER FIVE:
PSNI Historical Enquiries Team (HET)

We consider that the HET's approach to state involvement cases in this regard is inconsistent with the UK's obligations under Article 2 ECHR. As well as undermining the effectiveness of the review in Article 2 terms, the inconsistency in the way the state involvement cases and non-state involvement cases are treated easily gives rise, to the view that the processes lack independence.

HM Inspectorate of Constabulary 2013[313]

The PSNI Historical Enquiries Team (HET) closed its doors at the end of 2014, its work having been to a large extent suspended following a damning report by HM Inspectorate of Constabulary (HMIC) in July 2013. The HMIC concluded that the HET's work on 'state involvement' cases had given such preferential treatment to the suspects that the HET had been operating unlawfully. Following the HMIC report the Policing Board took the view that the HET could not finalise any of its cases until reforms were completed, and that all military cases be suspended. In June 2014 the Policing Board confirmed that the implementing of the HMIC recommendations far from being concluded was an 'ongoing process.'[314] In October 2014 the PSNI announced the HET would close and be superseded by a smaller Legacy Investigations Branch (LIB).

The role of the HET has been controversial. On the one hand the HET has uncovered considerable and substantive information which would otherwise, in the absence of any other mechanism, not yet have come to light and some victims' families have found a measure of resolution from HET reports. At the same time, and whilst not questioning the integrity of many individual HET investigators, there is evidence of a consistent pattern of official interventions in the work of the HET with the purpose or effect of limiting its role, impact and independence. This has been facilitated by the lack of any statutory basis for the HET and hence the lack of any independent powers, or clear written processes.

This chapter charts the evolution of the HET to the time it was stood down. It covers significant changes in the operation of the HET made by the PSNI after it was set up, summarises the key findings of the HMIC report and further questions the report brings to light. This chapter will then examine the related question as to whether the PSNI can meet Article 2 independence requirements when investigating state involvement cases.

The evolution of the HET

In 2003 a Serious Crime Review Team (SCRT) was established within the PSNI, with a remit of reviewing unresolved major crimes. The HET was established as a specialist unit of the SCRT, with a remit of examining conflict-related deaths occurring between 1968 and 1998. The HET were referenced as forming part of the 'package of measures' the UK was compelled to introduce in response to the 'right to life' case judgments at the European Court of Human Rights. In 2006 a Memorandum prepared by the Secretariat to the Council of Europe Committee of Ministers, which oversees the implementation of judgments of the Strasbourg court: indicated that the establishment of the HET "*seems encouraging*", and its work in identifying evidential opportunities appeared to be a *"valuable complement"* to investigation.

[313] HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' (HMIC 2013), p25.

[314] Correspondence of Jonathon Craig MLA, Chair of Performance Committee NI Policing Board, 19 June 2014.

It did caution that *"It is clear however, that it will not provide full effective investigation in conformity with Article 2 in 'historic cases' but only identify if further 'evidentiary opportunities' exist."*[315] In 2007 the UK told the Committee of Ministers:

> [the] Historical Enquiries Team (HET) has been designed to provide a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist. The HET is operationally independent and reports directly from its Head of Branch to the Chief Constable.
>
> If evidential opportunities are identified during the review process by the HET, the investigation of the death will proceed and where there is credible evidence available reports will be forwarded to the Public Prosecution Service with a view to prosecution. The investigation process will be undertaken 'in-house' by the HET, and will be focused on the evidential opportunities that the review process identifies.[316]

In 2009 the Committee of Ministers in a further resolution recalled the establishment of the HET and reiterated the above remit of:

> providing a thorough and independent reappraisal of unresolved cases, with the aim of identifying and exploring any evidential opportunities that exist, and, if evidential opportunities are identified, to proceed with the investigation of the crime.[317]

The Committee of Ministers did note that the HET process was taking longer than originally anticipated as a result of a high caseload but despite this the HET could bring '*a measure of resolution'* to affected persons; that the HET structure consisted of different teams and was staffed by retired and serving police officers including those from outside Northern Ireland. The Committee of Ministers therefore decided to close specific regular scrutiny of the HET on the grounds that it had 'the structure and capacities to allow it to finalise its work'.[318] However, in a subsequent submission to the Committee of Ministers, CAJ and Pat Finucane Centre expressed deep concerns that since this assessment there had been significant developments that had undermined the HETs capacity to discharge its remit.[319]

Academic research initiated in 2005 by Dr Patricia Lundy of the University of Ulster, who was granted access to conduct research on the HET, brought to light in particular serious concerns about the HET's ability to investigate independently what the HMIC subsequently termed 'state involvement' cases.[320] These cases were those in which state agents may be implicated in a death. The terms of the Police Act (Northern Ireland) 1998 preclude the PSNI, and hence the HET, from directly investigating police officers who may be responsible for a death. Such cases were referred under a protocol to the Police Ombudsman, as are complaints against the PSNI.[321]

---

[315] CM/Inf/DH(2006)4, paragraph 65.

[316] Appendix I to Interim Resolution ResDH(2007)73 Additional information provided by the Government of the United Kingdom to the Committee of Ministers since the first Interim Resolution in these cases (Res/DH(2005)20) on general measures taken so far or envisaged to comply with the European Court's judgments.

[317] Interim Resolution CM/ResDH(2009)44.

[318] Interim Resolution CM/ResDH(2009)44.

[319] Joint submission (no. 376) by the Committee on the Administration of Justice and the Pat Finucane Centre in relation to the supervision of cases concerning the action of the security forces in Northern Ireland, February 2012.

[320] Subsequently published as: *Can the Past be Policed? Lessons from the Historical Enquiries Team Northern Ireland, Dr P Lundy,* Journal of Law and Social Challenges, Vol. 11, 2009, paragraphs 109-156; *Assessment of HET Review Processes and Procedures in Royal Military Police Investigation Cases*, Dr P Lundy, (Research report (external)), 2012; *Prerequisites for Progress in Northern Ireland*, a research brief to the Commission of Security and Co-operation in Europe, US Helsinki Commission, Dr P Lundy, 2012.

[321] s55(2) and s52.

However, the HET was permitted to investigate other state involvement cases, including deaths at the hands of the British Army and collusion cases. In 2007 the HET, in meeting NGOs and legal representatives acknowledged flaws in state involvement cases and agreed to reassess 157 completed cases, relating to the killings by soldiers in the period up until 1973, referred to in the research.[322] In part many of the problems faced by the HET had intensified since its commencement.

Changes in HET since establishment

A significant number of changes were made to the HET which, coupled with its absence of powers and emerging information about its composition, limited both its independence and ability to carry out its original remit. These issues included:

- ***Significant alterations to the structural relationship of the HET with the PSNI***

  In 2005, at the time of the establishment of the HET an internal policy document referred to the unit as the PSNI Crime Operations Historical Enquiries Team.[323] The PSNI Crime Operations department is responsible for counter-terrorism investigations and contains the Intelligence branch of the PSNI ('C3') and the serious crimes branch ('C2'). The Department replaced the former RUC 'Special Branch' and Criminal Investigations Departments. PSNI Crime Operations is likely to contain considerable numbers of former RUC detectives and Special Branch officers who remained within the PSNI, playing a significant role in its operations including pivotal positions with respect to intelligence and security policing. This could have compromised the practical independence of the HET.[324]

  In 2007 the Committee of Ministers had been told that "The HET is operationally independent and reports directly from its Head of Branch to the Chief Constable." By 2011 however the PSNI Organisational Chart submitted by the PSNI to HM Inspectorate of Constabulary clearly showed the HET was now located within the PSNI Crime Operations Department reporting to the Assistant Chief Constable (ACC) for Crime Operations.[325] By 2013 the HMIC investigation into the PSNI stated that a more recent PSNI Organisational Chart did show the HET Director's line of accountability reverting to the Chief Constable, but that the Chief Constable had delegated the considerable role of 'resourcing and financing' the HET to the ACC for Crime Operations.[326]

- ***The 2009 transfer protocol to Crime Operations and the ACC veto over HET reviews***

  Before 2009 the HET did not refer any cases back to the PSNI. However from 2009 the HET started to refer cases to the 'C2' Serious Crime branch of the Crime Operations Department. The PSNI has stated that "*once the HET has carried out a review and identifies evidence that a person may have committed a serious offence then the case is referred to C2 (Crime Operations) and it is then a decision for C2 to take further action*."[327]

[322] HMIC 2013, p49.

[323] Administrative Memorandum of Understanding OPONI and PSNI, dated 29 November 2005, signed off by the Head of the HET and OPONI Director of Investigations.

[324] In 2011 CAJ submitted Freedom of Information requests to the PSNI to ascertain numbers and roles of such officers, but the PSNI declined to disclose this. PSNI Freedom of Information Requests by CAJ, reference F-2011-03101, F-2011-03496.

[325] HMIC 'Police Service of Northern Ireland Inspection findings' February 2011, p9.

[326] HMIC 2013, p50.

[327] PSNI Freedom of Information Request by CAJ, reference F-2010-03028 (Emphasis added).

Despite the Committee of Ministers being told in 2007 that the HET would conduct investigations 'in-house', by 2009 any role it had in such investigations had been transferred to C2 who themselves make the decision as to whether to act or not.

HET and C2 completed a Memorandum of Understanding which set out the hand over process for transferred cases. This provided for: referrals moving cases to C2 in their entirety; the 'majority' of cases where realistic evidential opportunities exist being investigated by C2; a power for the ACC of Crime Operations to direct that historic cases be directly passed to C2 by-passing the HET process 'in exceptional circumstances' (e.g. new information passed to police or an 'investigative opportunity' emerging from Police Ombudsman reports); the ACC of Crime Operations was also given a power to direct in relation to borderline cases.[328]

The above policy change occurred subsequent to the Police Ombudsman's 2007 'Operation Ballast' investigative report concerning police collusion with a unit of a loyalist paramilitary group.[329] The report found that police intelligence reports and other documents, most of which were rated as "*reliable and probably true*" linked police agents and one informant in particular to ten murders.[330] The key findings of the Operation Ballast Report included that: a police informant was a suspect in the murder which had triggered the Ombudsman's investigation, but that police had failed to carry out a thorough investigation into the murder and had continued to use the agent despite extensive intelligence indicating his alleged serious criminality; and that following a further murder, in which the agent was implicated, the subsequent Special Branch written assessments of the agent made no reference to his alleged involvement in the murder. Shortly after it became operational in 2006 the HET was assigned to re-investigate the linked series of Operation Ballast cases. However in 2009 these investigations, now known as 'Operation Stafford', were transferred to C2 in PSNI Crime Operations department. Some commentators have stated that this decision may have been taken as the HET were about to move in on the Special Branch handlers.[331]

- ***Structural and compositional conflicts of Interest***

Whilst some efforts were made to ensure HET investigating officers had no connection with those potentially implicated in cases there were ongoing concerns regarding how this is worked in practice across the full spectrum of the investigative chain. Dr Lundy's research into the HET noted that originally the HET established some teams exclusively staffed by officers from outside Northern Ireland. However she found that even when these teams were in place that "*each phase of the HET process included the involvement of former long-serving local RUC officers, some of whom have from its inception held key positions in senior management*."[332]

Of particular concern was control over HET's access to intelligence data. The same researcher concluded that "*all aspects of intelligence are managed by former RUC and*

[328] Memorandum of Understanding between HET and C2 Serious Crime.

[329] 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters', Nuala O'Loan (Mrs) Police Ombudsman For Northern Ireland, 22nd January 2007.

[330] Paragraph 9, there was also less reliable intelligence information implicating an informant to five other murders, and other intelligence information linking informants to 10 attempted murders and a significant number of others in a significant number of crimes "in respect of which no action or insufficient action was taken."

[331] See Moore, Chris 'The state and Northern Ireland's past', *The Detail,* 19 December 2011.

[332] Lundy, Patricia 'Exploring Home-Grown Transitional Justice and Its Dilemmas: A Case Study of the Historical Enquiries Team, Northern Ireland' *International Journal of Transitional Justice*, Vol. 3, 2009, 321–340 p 335.

Special Branch officers" and further noted that "*intelligence is more often available for incidents carried out by paramilitary groups than for incidents attributed to the Security Forces*."[333] CAJ and the Pat Finucane Centre jointly raised subsequent concerns to the Committee of Ministers that 'gatekeepers' could be limiting access to intelligence.[334]

The concerns over the independence of the HET from those potentially implicated in the incidents under examination was compounded by the PSNI practice of re-contracting former RUC officers as 'civilian staff' to carry out key police roles, in a practice referred to earlier as the 'rehiring scandal'. This relates to former RUC police officers who had 'retired' as a direct result of the reforms to policing contained in the peace settlement now being re-contracted outside standard police recruitment processes as 'civilian' staff within the PSNI (the 'civilian' status puts rehired staff beyond the scrutiny of the Police Ombudsman).

At the time the PSNI would not disclose numbers of rehired staff to CAJ under freedom of information. However some details were eventually given to the oversight body, the Policing Board, which were then published by the BBC. Further details were then uncovered in an investigation by the Northern Ireland Audit Office which published its report in October 2012.[335] Referring to 'conflicts of interest' of rehired officers in relation to the HET the Audit Office recommended that further measures be introduced, including that all members of an investigative team should be required to formally 'declare their independence' at the outset of an investigation.[336] The Audit Office indicated that procedures were limited to former RUC officers declaring if they had previously been involved in the RUC *investigation* into the same case. This does not extend into examining any conflicts of interest in relation to otherwise being able to influence investigations through control of the intelligence and other records on which they rely.[337]

- ***The handling of British Army killings – the 'RMP' cases***

  There were particular concerns about specific aspects of the HET process in relation to cases where the deaths involved actions by British Army personnel. No effective investigations were carried out at the time of these killings.[338] The original discharge of weapons that resulted in deaths was originally dealt with, not by the RUC, but by the Royal Military Police (RMP). This occurred under an agreement whereby cases involving army personnel suspected of involvement in unlawful killings of civilians were interviewed by the latter and not the former, even where other witnesses' statements were at variance with the accounts given by the soldiers.

  Initially the HET was unable to trace British soldiers involved in incidents through the UK Ministry of Defence. Subsequently in light of pressure from NGOs, the HET recalled and/or reconsidered 157 of these cases. The HET subsequently developed new ways of tracing army personnel. However, exploring evidentiary opportunities appeared to be

[333] Lundy, Patricia 'Can The Past Be Policed?: Lessons from the Historical Enquiries Team Northern Ireland', *Law and Social Challenges*, Vol.11, Spring/Summer, 2009. pp30-31.

[334] Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) and the Pat Finucane Centre (PFC) in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland, August 2011, p4.

[335] '*The Police Service of Northern Ireland: Use of Agency Staff'* Report by the Comptroller and Auditor General, 3 October 2012.

[336] As above, paragraph 3.18.

[337] As above, figure 7; p23, figure 14; p35.

[338] A domestic Court noted in 2003 that the 'RMP' process did not meet the requirements of Article 2.See *In the Matter of an Application by Mary Louise Thompson for Judicial Review* [2003] NIQB 80

> largely dependent on the 'voluntary' cooperation of military personnel and was governed by a protocol with the Ministry of Defence.[339]

Other issues in relation to the HET sitting within the PSNI relate to hierarchical control over the unit, which could be used for example, to prevent the issuing of thematic reports which link cases together. Such reports are often an essential element in accountability as linking cases in this way can identify systemic patterns of violations. This issue was particularly relevant to the series of killings by a UVF unit which the HET held contained police and security force members and which it linked to over 120 murders in the 1970s ('the Glenanne Gang').

The HET had planned and committed to issuing a thematic report linking the killings. An HET report issued to a family in 2010 stated:

> Much has been written elsewhere about the activities of the so-called Glenanne Gang, a loose mixture of paramilitary members and serving and former members of the RUC and UDR… The HET is currently working on a number of other cases involving this paramilitary gang, and clear linkages are emerging. The HET intends to report the findings of this further work in an overarching report concerning the 'Glenanne Series.'[340]

The HET report reiterated that in the context of wider concerns about collusion in this case that it "will be further examining these issues in a future report on the overall Glenanne series" and intended to provide this report to the Police Ombudsman to take appropriate action.[341] Another family was subsequently told by the HET that the Glenanne thematic report was 80% complete.[342] However, following this somewhere within the PSNI a decision was taken to reverse this and the HET produced no thematic report. A number of victims' families have subsequently taken legal action against state agencies over the Glenanne killings, including against the PSNI for the failure to produce the thematic HET report linking the atrocities together.[343]

These and other limitations on the HET led to serious concerns about its ability to fulfil its remit. CAJ gave evidence to the Northern Ireland Policing Board Human Rights and Professional Standards Committee on the 8 March 2012 in relation to our concerns about changes affecting the HET's capacity to undertake effective independent investigations. The Policing Board also heard from Dr Patricia Lundy at this meeting in relation to new research she had conducted in to the HET's processes and procedures for dealing with the RMP cases. The research found apparent anomalies and inconsistencies in the investigation process where the military was involved, compared to historic cases where non-state or paramilitary suspects were involved.[344] As a result a decision was taken to call in HM Inspectorate of Constabulary (HMIC) to conduct an independent review of the HET's investigative practices in relation to the RMP cases.[345]

---

[339] Lundy, Patricia (2011) 'Paradoxes and Challenges of Transitional Justice at the 'Local' Level: Historical Enquiries in Northern Ireland'. *Contemporary Social Science*, 6 (1). pp. 89-106.

[340] HET Review Summary Report concerning the deaths on 19 December 1975 of Trevor Brecknell, Michael Francis Donnelly and Patrick Joseph Donnelly, April 2010.

[341] As above.

[342] Telephone discussion with Eugene Reavey, January 2015.

[343] 'Government sued over UVF Glenanne gang collusion claims' *BBC News Online* 11 April 2014

[344] Lundy, Patricia (2012) *Research Brief: Assessment of the Historical Enquiries Team (HET) Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases.* None. 12 pp.

[345] Northern Ireland Policing Board, Minutes April 2012, item 2.

The HM Inspectorate of Constabulary investigation into the HET

Whilst it took some time for the Terms of Reference for the HMIC investigation to be completed between the Policing Board and PSNI, the investigation eventually took place and reported in July 2013. The PSNI Chief Constable had originally put together the terms of reference, but this provided a limited focus for the inspection. This was subsequently 'clarified' by the Policing Board who effectively extended the Terms of Reference to ensure the investigation would address many of the concerns which had been raised about the HET.[346]

The HMIC report identified and verified many of the concerns that had been raised by CAJ, Dr (now Professor) Lundy and other NGOs about the HET and provided detailed further evidence on how the HET had been operating. This in itself raised questions as to why the PSNI did not address these well documented concerns about HET much earlier, as in effect the HMIC was only officially reiterating serious problems which had been already identified for several years. One of the main conclusions of the HMIC Inspection report is that its approach to the RMP cases was unlawful due to non-compliance with the ECHR:

> Our conclusions lead us to consider that the HET's approach to state involvement cases is inconsistent with the UK's obligations under Article 2 EHCR. The inconsistency in the way that state involvement and non-state involvement cases are dealt with undermines the effectiveness of the review process in Article 2 terms. In addition, the deployment of former RUC and PSNI officers in state involvement cases easily gives rise, to the view that the process lacks independence.[347]

The HMIC Report adds:

> ...Since 2010 it is striking that not one state involvement case relating to the British Army has to date been referred to the PSNI for further investigation or for prosecution. [348]

HET's Operational Guide, in the section entitled 'Organisational and Structural Independence' states the following:

> HET maintains it is not appropriate to compare the review processes in military cases with reviews of murders committed by terrorists. Soldiers were deployed on the streets of Northern Ireland in an official and lawful capacity, bound by the laws of the UK and military Standard Operating Procedures of that time.[349]

This document states that it was only finalised in October 2012, just before the HMIC inspection took place.

Following the publication of the HMIC report the Northern Ireland Policing Board announced its view that HET involvement in military cases should be suspended and that all other cases should not be finalised until necessary reforms had taken place. The Chief Constable subsequently instructed the HET to suspend military cases. The Policing Board Chairperson Anne Connolly also stated that the Policing Board had no confidence in the leadership of the HET and the Chief Constable had been asked to review and action the management of HET with immediate effect.[350]

[346] HMIC 2013, Annex A.

[347] HMIC '*Inspection of the Police Service of Northern Ireland Historical Enquiries Team'* 2013, p28.

[348] As above. p83.

[349] In Lundy, P. (forthcoming), 'Impunity in the Age of Accountability' and Freedom of Information F-2013-03991, August 2013.

[350] Northern Ireland Policing Board 'HMIC Report on the Inspection of the PSNI Historical Enquiries Team' Statement of Chair Anne Connolly 4 July 2013.

The HET Director and the HET director of military cases stood down shortly afterwards in September 2013.[351]

The Policing Board established a working group to oversee the implementation of the HMIC recommendations as well as to "*review PSNI failures to respond promptly to issues raised in relation to the work of the HET*."[352] Following the publication of the HMIC report families of 20 persons killed by the British Army whose cases had been handled by the HET initiated civil proceedings against the PSNI on the grounds the HET had failed to investigate the killings properly.[353]

The HMIC Report, recalling that the Committee of Ministers had not envisaged that the HET could satisfy Article 2 requirements alone, questioned whether the HET is capable of playing *any* role satisfying Article 2 requirements.[354] The HMIC found the legal position of the HET, that state involvement cases should be treated differently to non-state cases, as 'entirely wrong' and states that:

> It concerns us greatly that such an important organisation in Northern Ireland should adopt an approach to such a key area of its work based upon a view of the law that, even if it were ever correct, was manifestly and provably not correct by the time such policy came to be drafted.
>
> This substantial legal error was perpetuated by the fact that the HET did not seem to seek the views of others regarding the accuracy of its Operational Guide. At the very least, we would have expected the HET to seek the views of the Director of Public Prosecution (DPP) for Northern Ireland and Her Majesty' s Attorney General for Northern Ireland, given that they were then responsible for prosecution policy.[355]

The HMIC found that the HET process of 'pre-interview' disclosure, where the representatives of suspected military personnel were essentially given details of the case before interview, was 'illegal and untenable' in light of Article 2.[356] Among a range of concerns in relation to the due independence of HET operations the HMIC recommended an 'independent procedure' to guarantee that all relevant intelligence documents would be provided in every case to ensure compliance with Article 2.[357]

Also highlighted was the fact that whilst the Committee of Ministers in 2008 had given a qualified endorsement of the limited role HET could play it transpired that, to an extent at least, this was based on misleading information. In relation to the HMIC's finding that HET's approach to state involvement cases were not consistent with the ECHR the HMIC states:

> These conclusions raise an important issue in relation to the CM's closure of its examination of the issue of the investigation of historical cases in Northern Ireland. Information submitted to the CM by the UK Government in 2008 in advance of the CM's decision to close its examination, was a presentation: 'Policing the Past: Introducing the Work of the Historical Enquiries Team' which stated that the HET applied a consistent standard in each case.

[351] 'HET chief Dave Cox to stand down' *Belfast Telegraph* 7 September 2013.

[352] Northern Ireland Policing Board 'HMIC Report on the Inspection of the PSNI Historical Enquiries Team' Statement of Chair Anne Connolly 4 July 2013.

[353] 'Families of people killed by soldiers sue NI's chief constable' BBC News Online 5 August 2013.

[354] HMIC 2013, p90.

[355] HMIC 2013, p17.

[356] HMIC 2013, p85.

[357] HMIC 2013, p23.

> Regrettably, we have not been able to conclude that the HET's approach is consistent across all types of case.[358]

The HET itself did point out that surveys it that had commissioned in 2009 and 2011 which had identified a 'high level of satisfaction' with its performance, the methodology for this was criticised by HMIC, who did however state that there was a desire for the HET to be retained if improvements were made. However, this was against a small sample, and broader subsequent research by Professor Bill Rolston found that that almost three quarters of respondents wished for the HET to be disbanded.[359]

CAJ welcomed the HMIC report as having rightly identified and verified many of the concerns about HET which had been articulated for some time, in particular the unlawfulness of its approach to British Army killings (in relation to duties under Article 2 ECHR). CAJ was concerned that the recommendations in the HMIC report, which in part reflected the area of focus of the inspection, would not be sufficient to make the HET fit for purpose. In summary the main points made by CAJ in a submission to the Policing Board working group dealing with the outworking of the report were:

- Even with significant reform CAJ does not believe it is possible for the HET to meet the necessary requirements of independence and impartiality in relation to state involvement cases;
- This would not preclude the HET continuing its role in cases where it is independently verified that there is no state involvement, notwithstanding the need for reform to improve effectiveness in this area;
- In addition to the army cases and cases exclusively involving the actions of RUC officers (which are referred to OPONI), the other main area of state involvement cases are those which involved informants, and potential collusion, which are still handled by the HET;
- It would take an independent mechanism to determine whether there was state involvement in a case, as well as independent safeguards over the control and disclosure of intelligence to investigators, to ensure HET is not involved in state involvement cases. Rather than creating a complex multi-tiered system CAJ's preferred option would be for a Single Mechanism for all cases to be introduced, along the lines of our submission.[360] Having no mechanism is clearly not an option given the legal duties to investigate under Article 2.[361]

It is notable that it was the most independent team of the HET which actually conducted the unlawful RMP reviews. The HMIC Inspection raised serious concerns about independence

[358] HMIC 2013, p28.

[359] The HET surveys stated only 3% of families expressing dissatisfaction in the latter survey, and 64% expressing satisfaction. The HMIC however, stated it had 'some concerns' about how families were selected to participate in such surveys and urged changes to the survey methodology (HMIC, p15). The HMIC also did its own limited survey which found some families were 'extremely satisfied' with their engagement with the HET and others 'less so.' The HMIC subsequently concluded that although many of the people they had met would prefer the HET to be independent from the PSNI they argued there was an 'almost universal desire' for the HET to be retained as long as improvements were made to it. (HMIC, 2013 p29) The independent researcher, Professor Bill Rolston, noting HMIC had only spoken to 13 families whose views were sought *before* the inspectorate had published their highly critical report, undertook a more extensive piece of research in late 2013 across a cross community sample of 82 persons. The main findings of the research were: only 12% of those interviewed were unequivocally glad that they had engaged with the HET; 41% said they were definitely not glad that they had done so; 74% agreed that the HET should be disbanded. (Rolston, Bill 'Satisfaction with the HET: Relatives' Views' January 2014).

[360] In reference to S419- CAJ's submission to the Haass talks on a mechanism to deal with the past.

[361] S420 'CAJ Submission to Historical Enquiries Team Working Group NI Policing Board', September 2013.

such as the lack of any system beyond 'self-declaration' to exclude PSNI and RUC officers from state involvement cases and the staffing of the HET and PSNI intelligence units by former RUC officers. The Inspection Report states:

> We did not find any evidence that these declarations were subject to any formal checks and validation. We consider that, without a policy that requires the thorough vetting of the HET staff involved in each case, this situation could be repeated. This is of grave concern. We consider that the independence necessary to satisfy Article 2 can only be guaranteed if former RUC officers are not involved in investigating state involvement cases, and if processes designed to ensure this are, in fact, effective.[362]

A second area of concern was the specific issue of control of intelligence material by persons who may have conflicts of interests:

> ...as we have detailed, the HET's intelligence unit is staffed largely by former employees of either the RUC or the PSNI. Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are the gatekeepers for intelligence being passed to the HET. The assembling of relevant intelligence material plays a central role in the review process and in any subsequent investigation.
>
> Staff in the HET intelligence unit and the PSNI intelligence branch process intelligence requests originating from the HET reviews. Given the sensitivity of intelligence matters in the context of Northern Ireland, the HET needs to do everything it can to make sure its independence is safeguarded.[363]

The Report goes on to advocate that it would be preferable "to institute some independent procedure for guaranteeing that all relevant intelligence *in every case* is made available for the purposes of review, to ensure compliance with the Article 2 standard".[364] However this is not reflected in the respective formal Recommendation – number 11 – which reads "The HET should implement an independent audit process to verify that HET staff have the benefit of all appropriate intelligence material held by the PSNI."[365] Whilst a process potentially consisting of sampling files as part of an audit may assist in ensuring compliance the original formulation of ensuring an independent procedure for relevant intelligence to be provided *in every case*, would have been much stronger.

In relation to independence in general the HMIC only recommended that a policy was introduced to vet individual staff deployed in state involvement cases to ensure they were not previously involved in cases.[366] While this was important it did not guarantee the future independence of HET investigations because it failed to deal with the structural issues around accountability. There is a level of contradiction within the recommendations insofar as they were geared to seeking further independence from the PSNI. Recommendation number 15 actually sought to ensure all HET cases requiring investigation were referred to the PSNI.[367] This was set in the context of addressing the fact that not a single one of the 39 cases

[362] HMIC 2013, p92.

[363] HMIC 2013, p92.

[364] HMIC 2013, p92, emphasis added.

[365] HMIC 2013, p70.

[366] HMIC 2013, Recommendation 20. A further recommendation, number 10, does advocate the setting up of an independent oversight panel but this is posited in terms that refer to quality and performance control, not independent governance.

[367] HMIC 2013, p83.

(119 victims – with 26 cases for which republicans were responsible and 13 for loyalists[368]) which had been referred to the PSNI since the system began was a state involvement case. However, it did presuppose that the PSNI themselves would then be sufficiently independent to undertake the investigation of state involvement cases. One NGO, the Pat Finucane Centre, raised concerns that such HMIC recommendations "would completely eradicate whatever remaining independence the HET has from the PSNI."[369]

The HMIC inspection determined that of the cases referred to C2 from the HET none were state involvement cases. Beyond the MoU there was little clarity in relation to the detail of the referrals process and the HMIC was critical that the MoU was not explicit as regards the precise stage at which cases should be referred which, it stated, may have contributed to the HETs inconsistent approach to cases. The report, in noting investigators rarely consulted lawyers about "any previous legal decisions, or about new evidence, or the status of a potential suspect" stated that:

> Perhaps most worryingly, HET staff take the decision whether there is a case to answer at the conclusion of a review. In effect, in cases of state involvement, the HET acts as investigator and prosecutorial decision-taker – a state of affairs that has not existed in England and Wales since 1986 and in Scotland for hundreds of years.[370]

The examination through a judicial review and then a judge-led inquiry of one high profile non-state case, that of the OTR John Downey, did provide an opportunity to shed some light on the internal PSNI referral process. As well as receiving HET referrals, the same C2 branch of the PSNI was also involved in the OTR Administrative Scheme. C2 itself received the list of individuals for OTR review. [371] The Downey judgment states that in 2008 an HET review had sought Mr Downey to again be placed on the PSNI wanted list, in relation to a bombing in Enniskillen in 1972. The judgment subsequently indicates however that Downey was *not* on the PSNI wanted list in October 2009.[372] It is not clear from the judgment what happened and the Hallett Review further examined the issue and provides further narrative which runs up until mid-2008.[373] What happened after this is not clear from the review as it states there is 'a gap in the written records.' This gap continued up until July 2010 when the head of C2 having considered the HET report and Operation Rapid[374] papers, decided that there was insufficient evidence to prosecute and hence Downey was not wanted.[375] The paper trail in this instance therefore does not provide clarification of the process.

---

[368] Republican/ loyalist breakdown in Bradfield, Philip 'Why did HET not probe Sinn Fein, asks Ulster Unionist' *Newsletter* 7 September 2013.

[369] PFC Newsletter 11 Winter 2013.

[370] HMIC 2013, paragraph 4.8.6.

[371] R v Downey [2014] EW MISC 7 (CCrimC) 21 February 2014, paragraphs 72 &75.

[372] R v Downey [2014] EW MISC 7 (CCrimC) 21 February 2014, paragraphs 125-136.

[373] This stated that in 2007 the PSNI had entered into PSNI records that Mr Downey was not currently wanted by the PSNI. In May 2008 the HET enquired as to whether this meant that when any other evidence became available this could change. The PSNI confirmed this position as correct stating that the decision was by the head of C2 that Downey was not currently wanted, but if further evidence came to light this would be reviewed. The HET then in July 2008 told the C2 Operation Rapid team that they had uncovered evidence linking Downey to a 1972 bombing in Enniskillen. The HET also expressed concern that Downey was not considered as wanted and a subsequent record stated that it was probable that a new wanted alert would be created. It was noted however that a letter sent to the PPS in 2007 indicating Downey was not wanted had not contained a caveat regarding new evidence. There was no procedure within Operation Rapid (or before it) as to how a change of circumstances be handled. At this stage HET were indicating that they would create a new wanted alert but at the end of July 2008 the Operation Rapid team recommended a Senior Investigating Officer be appointed to review the relevant material and liaise with the PPS before Downey was circulated as being wanted (Hallett Review, paragraphs 6.73-87).

[374] The PSNI operation designed to complete OTR reviews.

[375] Hallett Review, paragraphs 6.73-87.

The Police Ombudsman also examined this question in his investigation relating to Operation Rapid. The report noted some limitations in that the Ombudsman has no standing over HET officers given their civilian status, and that a relevant senior retired officer 'instrumental' in aspects of the scheme would not cooperate with the Ombudsman. The Ombudsman did find there was a 'clear discrepancy' between what was found by the HET in 2008 and what was communicated in 2010.[376]

New military cases taken on during suspension

A year on from the HMIC report and the consequent position taken by the NI Policing Board that work on all military cases be suspended, in July 2014 the Chief Constable told the Policing board, in response to a question from the Board's Performance Committee, that:

> In recent weeks the HET have been asked to begin initial inquiries in relation to allegations of serious criminality made against the MRF and the enquiries relating to the correspondence recently disclosed touching on the use of torture being allegedly sanctioned by Government ministers.[377]

Both of these matters primarily related to 'military cases' and appeared to be an extension of the HET's remit. The latter moved the HET's role beyond its previous focus on deaths. The Military Reaction Force (MRF) inquiry followed revelations in a BBC Panorama documentary in November 2013 by former members of this undercover unit of the British Army, operational from 1971-73, about MRF killings, including of civilians.

The PSNI response to these revelations provides a broader insight into how seriously the service is likely to investigate allegations about the military. The Panorama programme was broadcast in November 2013. During the programme former MRF members, whilst not directly incriminating themselves or naming others, did reveal the unit conducted extrajudicial assassinations and admitted to shooting and killing unarmed civilians, with Panorama having indentified "10 unarmed civilians shot, according to witnesses, by the MRF".[378] Amnesty International called for an inquiry into the 'death squad' and shortly after the documentary the DPP Barra McGrory formally requested the PSNI investigate stating:

> Former members of this unit appear to have claimed on camera that they considered themselves to have been authorised to operate outside the law of Northern Ireland. This raises the clear possibility, if not probability, that serious criminal offences were committed.[379]

Remarkably however this PSNI 'investigation' appears to have consisted of little more than detectives being tasked to 'study the contents' (i.e. watch) the Panorama programme. Having taken six months to do this the PSNI then made the announcement that, in effect, there was no case to answer as "none of the men featured have admitted to any criminal act or to having been involved in any of the incidents portrayed in this programme."[380] The decision sparked an outcry from human rights groups. Amnesty International denounced the police failure to investigate the MRF 'death squads' with NI Director Patrick Corrigan stating that the PSNI "assertion that 'no crime has been committed' will seem completely incredible to anyone

[376] Police Ombudsman Public Statement on PSNI Operation Rapid, Matters arising from the ruling in R V John Anthony Downey, 2014, paragraph 5.83.

[377] Board Members Questions to Chief Constable – July 2014 Meeting, available at: http://www.nipolicingboard.org.uk/index/meetings/submitting-a-question.htm [accessed September 2014]

[378] 'Undercover soldiers 'killed unarmed civilians in Belfast'' *BBC News Online* 21 November 2013.

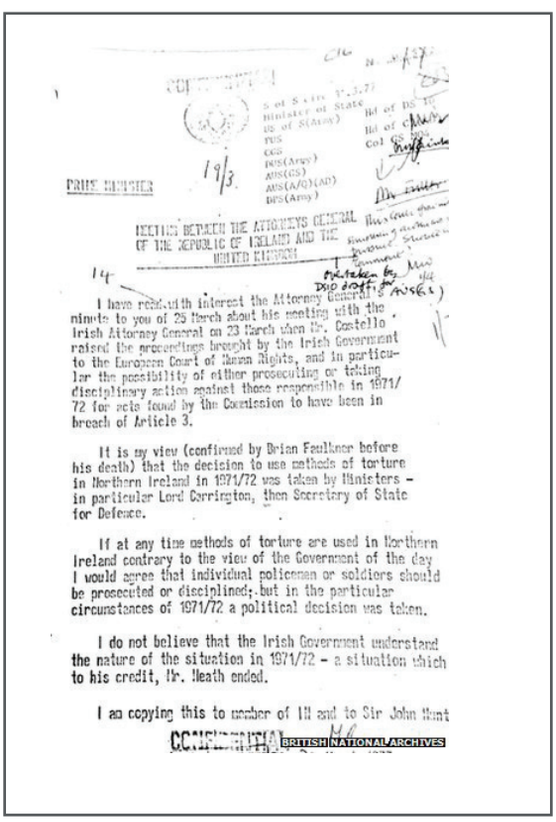
[379] Young, David 'PSNI to probe British Army's 'death squad' Military Reaction Force' *Belfast Telegraph* 23 November 2013.

[380] PSNI decision on MRF shootings 'travesty of justice' – Pat Finucane Centre Press Release 13 May 2014.

who watched the Panorama programme." He questioned the thoroughness of the PSNI investigation, pointing out that the DPP had tasked the PSNI to 'investigate' not watch the programme:

> We can reveal that at no point have the programme makers been contacted by the PSNI for any further information about the activities of the MRF or any information that would help identify those soldiers who appeared in the programme, or the four others who were interviewed off camera. Surely this would have been a normal line of enquiry for the police in any thorough investigation?[381]

The Pat Finucane Centre, who along with Justice for the Forgotten had supplied declassified documents from the national archives (Kew) to Panorama denounced the decision as a 'travesty of justice', with solicitor Padraig O'Muirigh acting for families of two MRF victims also stating it did not appear the PSNI had even interviewed the soldiers featured in the programme. The Pat Finucane Centre stated that the "PSNI decision reinforces our long held view that the PSNI cannot under any circumstances be trusted to carry out impartial, independent investigations into so-called 'legacy or historic' cases.'[382] Following this outcry the PSNI in June announced that it would now re-investigate the matter. This task was referred, for 'initial inquires' at least, to the HET.[383]



PRIME MINISTER

19/3

MEETING BETWEEN THE ATTORNEYS GENERAL OF THE REPUBLIC OF IRELAND AND THE UNITED KINGDOM

I have read with interest the Attorney General's minute to you of 25 March about his meeting with the Irish Attorney General on 23 March when Mr. Costello raised the proceedings brought by the Irish Government to the European Court of Human Rights, and in particular the possibility of either prosecuting or taking disciplinary action against those responsible in 1971/72 for acts found by the Commission to have been in breach of Article 3.

It is my view (confirmed by Brian Faulkner before his death) that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by Ministers - in particular Lord Carrington, then Secretary of State for Defence.

If at any time methods of torture are used in Northern Ireland contrary to the view of the Government of the day I would agree that individual policemen or soldiers should be prosecuted or disciplined; but in the particular circumstances of 1971/72 a political decision was taken.

I do not believe that the Irish Government understand the nature of the situation in 1971/72 - a situation which to his credit, Mr. Heath ended.

I am copying this to member of HM and to Sir John Hunt

[381] Amnesty International Panorama Northern Ireland 'death squads' - Amnesty reveals police failure to investigate Press Release, 13 May 2014.

[382] PSNI decision on MRF shootings 'travesty of justice' – Pat Finucane Centre Press Release 13 May 2014

[383] Amnesty Press Release 'Northern Ireland: Police u-turn over 1970s 'death squads' revelations in Panorama programme welcomed ' 11 June 2014.

The second enquiry tasked to the HET related to the correspondence recently disclosed touching on the use of torture being allegedly sanctioned by government ministers." This referred to documents, uncovered by the Pat Finucane Centre in the Kew archives and included in an RTÉ documentary 'The Torture Files' broadcast in June 2014.

The documents relate to the practice of torture on internees, including the 'five techniques' which were subsequently subject of the *Ireland v UK* interstate case in the European Court of Human Rights in 1978. Documents revealed that not only had the UK given false information to the Strasbourg institutions but they also contained evidence of apparent ministerial sign off on the policy of using torture. The above 1977 correspondence, from Home Secretary Merlyn Rees to Prime Minister James Callaghan, singles out Peter Carrington, then Secretary of State for Defence, and currently a member of the House of Lords, as having taken a political decision to use torture. It states that:

> It is my view (confirmed by Brian Falkner before his death) that the decision to use methods of torture in Northern Ireland in 1971/72 was taken by Ministers – in particular Lord Carrington, then Secretary of State for Defence.
>
> If at any time methods of torture are used in Northern Ireland contrary to the view of the Government of the day I would agree that individual policemen or soldiers should be prosecuted or disciplined; but in the particular circumstances of 1971/72 a political decision was taken.

As pointed out by CAJ solicitor Gemma McKeown, in the aftermath of the programme, there is "no statute of limitations in respect of torture. In international law it is quite rightly regarded as one of the most serious abuses of human rights possible. That a memo should surface suggesting ministerial involvement in the decision to torture is a matter of deep concern."[384] The HET was tasked to inquire into the actions of a UK Government minister, as well as the military. In December 2014 a member of the Policing Board, Gerry Kelly MLA, asked the Chief Constable for an update on the investigation and an assurance it had followed all standard procedures for investigating serious crime. The official response avoided addressing the latter part of the question but revealed:

> This matter has been investigated by members of the Historical Enquiries Team. The available papers have been examined and reviewed and have not identified any evidence to support the allegation that the British government authorised the use of torture in Northern Ireland.[385]

Can the PSNI be independent in state involvement cases?

The PSNI itself has sought to maintain the position that it is sufficiently independent from its predecessor force to investigate its activities, as well as other state involvement cases. This is despite the PSNI having set up the HET in a manner which it argued was operationally independent, presumably precisely because the PSNI itself could not have undertaken such work. This was also highlighted, in a move some human rights NGOs interpreted as the state defiantly regrouping following the damning HMIC findings, by the PSNI announcing that it would itself take up a review of 13 military killings cases the HET had previously examined, and been criticised for by HMIC.[386]

[384] 'Call on British Govt to release 'torture' files' PFC Newsletter 12 Summer 2014.

[385] NI Policing Board, Questions to Chief Constable (PSNI action following assertions in official documents- Gerry Kelly) 4 December 2014.

[386] 'PSNI to review 13 military killings in Northern Ireland' *BBC News Online* 19 September 2013.

The *Jordan* case alluded to earlier in this report set out the essential requirements of independence for an effective investigation into a killing allegedly involving state agents:

> For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events (see e.g. the Güleç v. Turkey judgment of 27 July 1998, Reports 1998-IV, §§ 81-82; Öğur v. Turkey, [GC] no. 21954/93, ECHR 1999-III, §§ 91-92). This means not only a lack of hierarchical or institutional connection but also a practical independence (see for example the Ergı v. Turkey judgment of 28 July 1998, Reports 1998-IV, §§ 83-84, where the public prosecutor investigating the death of a girl during an alleged clash showed a lack of independence through his heavy reliance on the information provided by the gendarmes implicated in the incident). [387]

This refers to the 'persons *responsible for* and carrying out the investigation' (emphasis added) which can be interpreted as those managing, commanding or in some other way being 'responsible' for the investigation and those actually, physically carrying it out must be 'independent from those implicated in the events.' The next element of the standard is 'a lack of hierarchical or institutional connection.' 'Hierarchical' connection can clearly refer to the relevant individuals being either in command of, or commanded by those implicated in the events being investigated. It might very well also mean being answerable to the same commander– separate and distinct branches but part of the same hierarchical tree. It would presumably have an impact on an investigation if the investigators have to report to a commander or command team which is also accountable for the actions of the people under investigation. 'Institutional' connection is perhaps less clear. Perhaps the safest way to approach this element of the standard is by looking at legal responsibility – does the head (whether individual or corporate) of one grouping of people have legal responsibility both for them and the comparator group (distinguished, for example, by function, geography or time)? If so, it seems fair comment that there is an institutional connection. Third, the investigating persons must demonstrate 'a practical independence.' This is not further defined but the example given in Jordan is significant. If we assume that the public prosecutor had theoretical hierarchical or institutional independence, his *practical* lack of independence was demonstrated by his actual behaviour: "his heavy reliance on the information provided by the gendarmes implicated in the incident." So, if we had a hypothetical investigator, who was as organisationally distinct and independent from any group allegedly involved in the incident as could be, but who accepted their view of events uncritically, or 'relied on their local knowledge', or failed to pursue evidential lines of enquiry that might implicate them, it is clear that his or her investigation should fail the *Jordan* independence test.

The PSNI's assertion that it meets the test of independence to investigate the actions of its predecessor force is based on a questionable interpretation of the *Brecknell* judgment. In correspondence with CAJ in March 2012 the PSNI specifically stated that its ability to pass HET investigations to the PSNI Crime Operations Department was because:

> The independence of the PSNI to undertake such an investigation has been tested in court. In Brecknell v. United Kingdom (27 November 2007), the European Court of Human Rights stated explicitly that the PSNI (including the HET) is institutionally distinct from the RUC.[388]

The *Brecknell* case, taken by the widow of a victim of a loyalist attack on a bar in 1975 with alleged RUC involvement, found that the RUC investigation had not met the procedural

[387] *Jordan v UK* [2001] (Application no 24746/94) 4 August 2001.

[388] PSNI Command Secretariat response to CAJ March 2012 ref COM SEC 12/1791.

requirements of independence required by Article 2 on the grounds that the RUC "cannot be regarded as disclosing the requisite independence," and "for a considerable period the case lay under the responsibility and control of the RUC."[389]

The court also commented that it was "satisfied that the PSNI was institutionally distinct from its predecessor even if, necessarily, it inherited officers and resources." It is this sentence in essence that has been interpreted to justify the above PSNI position. However the finding may be regarded as *obiter* in that the finding was not necessary, on the facts of the case, for the Court's conclusion. It is also questionable that such an interpretation can be sustained, particularly in light of revelations of a lack of independence in investigations which have happened since. There have also been developments in domestic case law which imply that the independence of an investigatory process can be compromised if those providing the evidence on which it relies do not have requisite independence.[390] This is significant in its implications for the HET, in relation to intelligence filtering but also in relation to the involvement of former RUC and Special Branch officers in the HETs original 'collection phase' when files and exhibits were collected from police stations.[391]

In our view the PSNI cannot be itself inherently Article 2 compliant. This is in part due to the question of personnel who may have some responsibility for an investigation. In relation to institutional independence, there is some ambiguity as to the extent the PSNI was intended to be independent of its predecessor force.[392] What is clearer is that there is institutional continuity insofar as the PSNI is held legally responsible for past RUC actions. For example, in civil proceedings for damages for the wrong actions of the RUC the PSNI Chief Constable is the respondent.[393] This was also seen in the controversial response to the Police Ombudsman report on the McGurk's Bar bombing when the PSNI Chief Constable effectively dismissed the report and criticism of the RUC. This indicated a potential institutional interest in defending not only the reputation of the predecessor force but also in the context of the clear financial interest the PSNI may have in relation to liability for any arising claims.[394] The PSNI's own position on the HET also contradicts the official line that the PSNI is in itself sufficiently independent to conduct Article 2 compliant investigations into state involvement cases. The HMIC report states

[389] *Brecknell v UK* (Application no. 32457/04) Judgment of 27 November 2007, final 27 February 2008, paragraph 76.

[390] In 2011 the Court of Appeal in England found that the Ministry of Defences' 'Iraq Historic Allegations Team (IHAT), set up to examine allegations of unlawful killings, torture and ill-treatment of Iraqi civilians by British troops in Iraq, did not meet the ECHR test of being sufficiently independent. In part this was due to the IHAT being substantially comprised of Royal Military Police (RMP), and the RMP themselves had been involved in detention operations in Iraq. One issue dealt with by the judgment was the establishment of a panel separate from IHAT – the Iraqi Historic Allegations Panel – IHAP. The Court considered whether the existence of IHAP diluted or mitigated its concerns about IHAT, but concluded 'it did not' and went on to specifically cite that "*If, as we have found, IHAT suffers from a lack of practical independence and the raw material destined for consideration by IHAP is the product of IHAT, IHAP's independence is itself compromised."* R (*Ali Zaki Mousa) v Secretary of State for Defence* [2011] EWCA Civ 1334, paragraph 39.

[391] A further judicial review of IHAT in 2013, whilst rejecting claims that reforms had been insufficient to meet independence requirements nevertheless found the approach did not fulfil ECHR Article 2 requirements see 'High court orders new approach to Iraq abuse inquiry' *the Guardian* 24 May 2013.

[392] s1(1) Police (Northern Ireland) Act 2000 states: "*The body of constables known as the Royal Ulster Constabulary shall continue in being as the Police Service of Northern Ireland (incorporating the Royal Ulster Constabulary)"* further evidence of institutional continuity was provided by the then Secretary of State Peter Mandelson MP who stated: "the sensible way forward was to provide in the Bill a legal description that incorporates the Royal Ulster Constabulary--effectively the title deeds, as I put it, of the new service--making it clear that disbandment is not taking place, while at the same time introducing a new name, the Police Service of Northern Ireland, which will be used for all working and operational purposes." (Hansard 6 Jun 2000: Column 184).

[393] For example: *McClurg v Chief Constable* [2009] NICA 37 An appeal on a class action by some 5,500 former and serving members of the Royal Ulster Constabulary and Police Service of Northern Ireland who had claimed to have sustained a psychological/psychiatric disorder. The defendant was the Chief Constable of the PSNI.

[394] 'McGurk's bomb ombudsman report: Baggott criticised' *BBC News Online* 22 February 2011.

that "The Director of the HET stated that cases of state involvement are assigned to the red and white teams, which are in principle staffed by people not previously associated with the RUC or the PSNI." The inescapable implication is that independence in these cases would be undermined if some of those involved *were* people previously associated with the RUC or the PSNI. If the PSNI were itself independent, this would clearly not matter.

The question of requisite *practical independence* again returns to the question of the roles of former or potentially rehired officers in key positions, in particular in relation to controlling intelligence. The HMIC concluded that "...the HET's ability to demonstrate independence in the intelligence process is undermined by the involvement of former RUC and PSNI officers working for the HET in managing the information from the PSNI C3 intelligence branch." This reflects HMIC's concern that the HET may not be, or appear not to be, independent of the PSNI but it also reflects a flawed structural element set up and managed by the PSNI, and as referenced above advocates that instead an independent procedure is needed to ensure Article 2 compliance.[395]

Whilst the above makes direct reference to the RUC-PSNI relationship, at one level it would appear easier to sustain an argument that the PSNI is clearly a separate institution from the British Army or MI5. However, notwithstanding institutional rivalries, it is also the case that such agencies worked in close cooperation and under a common direction. From 1976 under the doctrine of police primacy all military operations, in theory at least, were to be under RUC direction, with RUC Special Branch-led 'Tasking and Coordinating Groups', responsible for joint operations. It is also the case that for the past eight years the PSNI ran a unit, the HET, which operated a policy in relation to cases involving the British Army unlawfully under Article 2. It promulgated a false view of the law of murder as related to the actions of a soldier on duty, even though the law had been decisively settled 10 years before it was established, in versions of its Operating Procedures in 2005 and 2012.[396] The other area of state involvement cases where police involvement is particularly controversial are investigations into the actions of informants employed by the police and other agencies.

The HET and cases involving informants

It is notable that whilst the HET was not deemed fit for purpose for investigating police officers per se it *was* permitted to investigate informants (now officially termed Covert Human Intelligences Sources –CHIS) who were operating for the police and other state agencies. In 2007 the HETs 'view' was that cases 'that allegedly involve the actions of police officers exclusively' would be dealt with by the Police Ombudsman alone and that a 'parallel investigation' would take place by both HET and the Police Ombudsman when both 'police and external collusion was alleged'.[397] By 2008 the Committee of Ministers had been informed that a total number of 63 cases had been transferred to the Ombudsman.[398]

An appendix to the *Memorandum of Understanding* between the Ombudsman and 'PSNI Crime Operations HET' sets out a flow chart as how 'mandatory or discretionary referrals from C8' to the Ombudsman were to be handled.[399] In so far as can be determined from this document the PSNI/HET, rather than any independent process, would make the referral but only when there was 'an allegation of police collusion' present. It is not clear how this was

[395] HMIC 2013, p92.

[396] HMIC 2013, pp. 74-79.

[397] UK Position to Committee of Ministers, Interim Resolution CM/ResDH(2007)73.

[398] Ministers Deputies Information documents CM/ResDH(2007)73 paragraphs 47-57.

[399] Dated 11 May 2005, still in force as of August 2013, [available at http://www.psni.police.uk/policies_procedures_het.pdf], appendix issued under PSNI FOI F-2013-03386.

determined. Many families would have no idea whether there was potentially collusion in their case. Furthermore as highlighted by HMIC, and earlier by the Criminal Justice Inspection in relation to the Police Ombudsman, there is the general issue relating to the control of intelligence documents by former Special Branch officers who may have conflicts of interest.

CAJ knows little further about the HET referral mechanism in cases involving informants or other allegations of collusion as the PSNI have declined (on grounds of both 'national security' in general and the involvement of the Security Service specifically) to confirm or deny whether they hold any further information on the matter. Whilst the number of cases the HET has referred to the Ombudsman under their exclusive remit to August 2013, had been published as 44 cases (53 victims) the PSNI have declined to provide overall statistics for both the number of cases referred for parallel investigation and the overall number of cases which have involved CHIS.[400] The Office of the Police Ombudsman did however release information to CAJ that it has had a total of 59 cases referred to it by the HET, but were unable to break these down into 'parallel' and 'exclusive' cases.[401] Should the numbers tally this would only mean a total of 15 cases involving potential RUC collusion, had been referred to the Ombudsman. This would be a remarkably small proportion of the over 2000 cases opened by the HET, 1,700 of which have been completed. There is some lack of clarity over the figures though as in 2008, the UK had stated a higher number of 63 cases had then been referred to the Ombudsman.[402]

Nevertheless the then head of the HET speaking at a conference in mid-2013 did confirm the HET had undertaken cases involving informants, some but not all of which had been referred to the Police Ombudsman for parallel investigation. The head of the HET also clearly stated the position that Special Branch informants had in any case been operating within Home Office Guidelines.[403] The guidelines in question, issued in 1986 and an earlier version from 1969, heavily restrict permitted informant involvement in criminal offences.[404] However this HET position was not correct. As is made clear by the de Silva Review, and declassified documents within it, "the RUC did not apply either circular in Northern Ireland."[405] This had been public knowledge for some time - the Police Ombudsman's Operation Ballast report also makes reference to Special Branch not having adopted the guidelines and the inquiries by Lord Stevens and Justice Cory also make reference to practices of informants being operated outside of the law. Given this it is not clear why the HET had been operating under this premise but it does have clear implications for how the HET will have handled, and referred on cases involving informants and by extension collusion.

The Dissolution of the HET, and birth of LIB

In September 2014 the PSNI announced the standing down of the HET which closed at the end of December 2014. Whilst much of the public justification for this has related to budget cuts the move appears to acknowledge that confidence in the HET, and its ability to conduct its work, had become irretrievable. At the time the PSNI stated it anticipated a 'much smaller' Legacy Investigations Branch to take on investigations in areas the PSNI had legislative

[400] PSNI FOI reference F-2013-03386.

[401] E-correspondence 19 September 2013.

[402] CM/Inf/DH(2008)2 revised, 18 November 2008 §38.

[403] Queen's University, UU Transitional Justice Institute and Healing Through Remembering *Dealing with the Past in Northern Ireland: Law, Prosecutions and Truth Recovery* Europa Hotel, 21 May 2013 [see http://www.transitionaljustice.ulster.ac.uk/documents/ConferenceInvitation.pdf].

[404] Home Office Circular *Informants who Take Part in Crime,* 97/1969 Home Office Circular 35/1986 Consolidated Circular to the Police on Crime and Kindred Matters.'

[405] De Silva Review, paragraph 4.15.

obligations relating to past investigations.[406] The UK Government set out that it regarded the legislative obligations as including investigations where there is 'new or compelling' evidence as well as duties to the coroner, and stated that the new unit would be Article 2 compliant.[407]

The establishment of the new 'Legacy Investigations Branch' (LIB) was officially announced in December 2014. Whilst some unnamed legacy investigations at an advanced stage would stay with the PSNI Serious Crime Branch the announcement made clear that the LIB would actually 'assume responsibility' for the outstanding HET caseload and effectively continue the work of the HET 'albeit at a slower pace.'[408] This appeared to be a much broader role for the LIB than had been initially indicated. It is not clear how the Legacy Investigations Branch, insofar as it deals with state involvement cases, will not simply encounter the same incompatibility issues in relation to Article 2 independence requirements that ultimately led to the demise of the HET. Amnesty International, whilst acknowledging limitations on what the PSNI can do, dubbed the LIB as 'essentially a re-branded and pared down HET', noted that the HET had failed on the independence requirement for human rights compliance and stated that Amnesty remained "unpersuaded about how the LIB would, as it stands, meet the test of independence."[409] The LIB commenced its work on the 1 January 2015.

[406] Moriarty, Gerry 'Cutbacks lead to 'effective closure' of Historical Enquiries Team' *Irish Times* 30 September 2014.

[407] Northern Ireland Office correspondence to the Department for the Execution of Judgments of the European Court of Human Rights, 10 October 2014.

[408] PSNI Press Release Police announce new unit to investigate the past 4 December 2014.

[409] Amnesty International Press Release Northern Ireland: Re-branded HET is not the solution to investigating past abuses 4 December 2014.

CHAPTER SIX:
The Police Ombudsman's Office

> **The ombudsman's office was initially popular with the public because it took a robust stance against instances of state abuse. However, it was quickly politically sidelined through apparently malicious directorial appointments.[410]**
>
> **Commentary on the Ombudsman's office (PDDHH) in El Salvador**

As the above citation shows there is always a risk that once a powerful, independent institution is established there will be moves within the political and policing establishment to 'neutralise' it.

In relation to the Office of the Police Ombudsman for Northern Ireland (OPONI) during the term of office of the first Ombudsman, Nuala O'Loan, a number of hard hitting reports were produced leading to significant changes in policing practice, although there was at times virulent official resistance. Under the second ombudsman, Al Hutchinson however, in a crisis over the handling of conflict related legacy cases which ultimately led to his resignation, the Office had become severely undermined following political and police interference in its work. The resignation of the Chief Executive and critical reports first from CAJ and subsequently from the Criminal Justice Inspector, which among other matters found that reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation, led to the suspension of the offices' historic caseload. A programme of reform under the third Ombudsman, Michael Maguire, has re-established the credentials of the Office which, following a favourable report from the Criminal Justice Inspection, has been able to resume historic investigations. Following the restoration of historic cases the Ombudsman's Office has faced a number of external challenges, namely an attempt to judicially review the Office's powers by the NIRPOA, having to initiate its own judicial challenge against the PSNI over failure to disclose documents, and having seen off both of the former, a devastating budget cut from the Department of Justice impacting particularly on the historic cases function. Legislative amendments to address gaps in the powers of the Ombudsman's Office also remain unimplemented.

This chapter covers the advent of the Office of the Police Ombudsman for Northern Ireland, its 'lowering of independence' during the term of the second Police Ombudsman, and the process of reform put in place following the appointment of a successor, and additional challenges the Office has then faced.

The beginning and the 'Gold Standard of Police Investigations'

In 1995 a senior civil servant Dr Maurice Hayes was appointed by the NIO to undertake a review of the Northern Ireland police complaints system. The consequent report in 1997 "A Police Ombudsman for Northern Ireland" (The Hayes Review) set out a blueprint for a new independent police complaints system to replace the Independent Commission for Police Complaints (ICPC), which CAJ regarded as containing carefully crafted recommendations drawn from international best practice.

[410] Collins, Cath 'State Terror and the Law: The (Re)judicialization of Human Rights Accountability in Chile and El Salvador' *Latin American Perspectives* 2008; 35; 20 citing Uggla, Frederick 2004 "The ombudsman in Latin America." *Journal of Latin American Studies* 36: 423–450.

Whilst key powers contained within the Hayes Review were either diluted or missing from the initial draft legislation in 1998, significant pressure, including a call by the Patten Commission for the *full* implementation of the Hayes Review, led to the Police Ombudsman's Office having its powers strengthened.[411] The Office opened its doors in November 2000, although it took the (UK-Ireland) Weston Park Agreement in 2001 and the 2003 Police Act to bring the Office's powers closer to what Hayes had envisaged.[412] Unlike its predecessor body,[413] the Office of the Police Ombudsman for Northern Ireland (OPONI) was fully independent from the police and has its own investigators, powers of disclosure and even powers to arrest police officers. It was consequently held up internationally as a 'gold standard' model of independent police complaints investigation.[414] As such the Ombudsman's legislation, structure and powers, notwithstanding some limitations, can be seen as a base model, if extended beyond police complaints, for mechanisms such as the HIU tasked with independent investigations into the past.

Under normal circumstances the legislation provides a general time limit of 12 months for complaints to the Police Ombudsman of alleged police misconduct or criminality. The secondary legislation, the RUC (Complaints etc) Regulations 2001 does provide an exemption to this time limit either in circumstances whereby new evidence comes to light or relates to a grave or exceptional matter not previously investigated.[415] This permits the Police Ombudsman to investigate conflict-related 'legacy' cases where police officers may be implicated. This power took new impetus following the right to life judgments in the European Court of Human Rights. The powers of the Police Ombudsman were cited as part of the UK 'package of measures' which could remedy the defects in independently investigating deaths at the hands of the state. In addition the establishment of the Historical Enquiries Team (HET) as part of the PSNI meant that deaths police officers were responsible for had to be referred to the Police Ombudsman. This is because the HET, as part of the PSNI, was debarred from investigating deaths resultant from the conduct of Police Officers, or complaints against the police.[416] Following these developments the 'historic' caseload of the Ombudsman's Office has steadily grown.

The Police Ombudsman's Office established itself as a robust independent mechanism during the term of the first Police Ombudsman, which helped improve confidence in the police as well as the complaints mechanism. This was not however without considerable police and political resistance, best illustrated by the reaction to the Ombudsman's 2001 report into the Omagh bombing which found very serious shortcomings in the RUC's handling of intelligence information prior to the Omagh bombing, as well as the investigation of the incident by the RUC and later, the PSNI.[417]

---

[411] See CAJ 'Commentary on the Office of the Police Ombudsman for Northern Ireland' 2005, chapter 2.

[412] See CAJ 'Commentary on the Office of the Police Ombudsman for Northern Ireland' 2005, chapter 2.

[413] The Independent Commission for Police Complaints (ICPC).

[414] An official report during the tenure of the first Police Ombudsman sets out that the "Office was the first fully-funded and completely independent police complaints organisation in the world. It had been described as the international 'gold standard' for police complaints and similar organisations have since been set up in a number of countries." OPONI 'The Police Complaints System in Northern Ireland' (2007) p5.

[415] RUC (Complaints etc) Regulations 2001, Regulation 6. There is also a legal duty on the PSNI Chief Constable to refer any instance when it appears the conduct of a police officer may have resulted in a death to the Police Ombudsman under s 55(2) of the Police (Northern Ireland) Act 1998.

[416] For discussion on the HET-OPONI referral process see the previous chapter.

[417] Office of the Police Ombudsman for Northern Ireland, 'Statement by the Police Ombudsman for Northern Ireland on her investigation of matters relating to the Omagh Bombing on August 15 1998' (Police Ombudsman Omagh Bomb Report 2001), para 3.4.

The Police Ombudsman found that intelligence indicating an attack would take place in Omagh on the date of the explosion was not adequately analysed or acted upon, that this intelligence was not passed on to the police in Omagh and that Special Branch did not share most of its intelligence with the police team investigating the bombing. In her conclusions the Police Ombudsman noted that notwithstanding the cooperation of some police officers, "At senior management level the response to this enquiry has been defensive and at times uncooperative."[418]

There was strong reaction to the Ombudsman's report from the political and policing establishment. In December 2001, having received an advanced draft of the report, the RUC Chief Constable Ronnie Flanagan (himself a former head of Special Branch) asked for additional time before publication to respond to the report alleging it contained "many significant factual inaccuracies, unwarranted assumptions, misunderstandings and material omissions." In an indication of how upset the Chief Constable was in response to the Police Ombudsman's findings, he insensitively went as far as saying he would "commit suicide in public" if the conclusions in the report were correct.[419] He also raised the prospect of suing the Police Ombudsman for libel. The Police Association for Northern Ireland did take a judicial review in response to the report, but it was eventually withdrawn, a decision the Police Ombudsman welcomed as vindication of the report.[420] Of particular concern to many observers was the fact that after the Police Ombudsman's report was released Prime Minister Tony Blair came to the immediate defence of the Chief Constable when his spokesperson stated, 'Sir Ronnie has the Prime Minister's full support.' In contrast, despite the highly personalised nature of the dispute, the spokesperson did not simultaneously offer full support to the Police Ombudsman or welcome the report, but merely noted the Police Ombudsman had done her job.[421] Then Northern Ireland Secretary of State Peter Mandelson went much further describing the report as a "very poor piece of work indeed" arguing that it fell "below the quality and standards of objectivity and rigour required in a report of this kind."[422] Some local politicians also criticised the Police Ombudsman. John Taylor (Lord Kilclooney, then a member of the Policing Board) stated the Police Ombudsman had overstepped her responsibilities and called for her resignation.[423] More shocking was the response of (Lord) Ken Maginnis who likened Ms O'Loan to a suicide bomber and claimed she had "outlived her usefulness."[424] The Police Federation also called on her to "consider her position."[425] The Police Ombudsman stood behind her report and ultimately the key recommendations were accepted by the Policing Board.[426]

Although the taboo against an official institution criticising the police had been broken the first Police Ombudsman at an early stage did highlight limitations in her powers. Among 'serious concerns' raised in the Police Ombudsman's first Annual Report, were the circumstances 'in which there is alleged wrongdoing involving a police officer and a non-police officer' citing cases of joint police operations with the Army, who were still deployed at the time, where the

[418] Police Ombudsman Omagh Bomb Report 2001, para 7.2.

[419] 'Emotional Flanagan in "suicide" outburst' *The Guardian* 13 December 2001.

[420] The Office of the Police Ombudsman for Northern Ireland, 'Police Ombudsman statement following the withdrawal of a judicial review brought by the Police Association for Northern Ireland to quash her report into the events surrounding the Omagh Bombing' 23 January 2003.

[421] 'PM backs Ulster Police Chief' *The Guardian*, 14 December 2001.

[422] 'Mandelson attacks O'Loan' *Belfast Telegraph*, 15 December 2001.

[423] 'Policing Board attempts to end Omagh Impasse' *The Irish Times*, 6 February 2002.

[424] 'Maginnis accused of putting O'Loan in danger' *The Irish Times*, 17 December 2001.

[425] 'Row rages over tip-off given to Special Branch' *Belfast Telegraph*, 7 December 2001.

[426] Northern Ireland Policing Board, 'Specially Convened Meetings to Discuss the Omagh Reports', 5 & 7 February 2002 [available at: http://cain.ulst.ac.uk/issues/police/policingboard/nipb050202omagh.htm accessed 15 June 2012].

Ombudsman could investigate the police officer but not the solider, who even if technically acting under police direction could then only be investigated by the police themselves.[427] The Council of Europe, in the context that the "Police Ombudsman has no investigative powers as regards complaints against army officers, even in situations where the army is deployed under the authority of the police" also sought clarification as to how complaints against soldiers could be independently investigated.[428] A further matter raised by the Police Ombudsman was the inability to investigate police informants. In her first annual report she cited the situation whereby a police officer is alleged to be 'turning a blind eye' to drug crime involving informants, to maintain the informant, and that the Office can investigate the police officer, but not the other parties involved. In cases of collusion the Ombudsman stated that "The only viable option at the present time would be a joint investigation with the police which would not be independent and which would therefore fail to secure the confidence of aggrieved parties. I believe this impacts adversely on my independence."[429] Towards the end of her term of office this concern continued to be expressed the Ombudsman stating "I continue to have concerns about those cases in which non-police officers are alleged to have committed offences together with police officers. My inability to investigate anything other than a police officer means that in those cases we cannot conduct a fully compliant Article 2 investigation."[430] Notably in 2003 legislation provided for Police Ombudsman's powers to conduct thematic investigations into police practices and policies, repealing a previous general power to report on such matters, but actually explicitly excluded covert policing matters from this power, including the running of informants.[431]

Notwithstanding these limitations in relation to informants the Police Ombudsman was nevertheless able to deliver a landmark report in 2007 into serious malpractice in covert policing which led to an overhaul of the running of informants across the PSNI. The Ombudsman's 'Operation Ballast' investigation into the death of Raymond McCord Jr. uncovered collusion between RUC Special Branch officers and a unit of a loyalist paramilitary group. It revealed that police intelligence reports and other documents, mostly rated as 'reliable and probably true' linked police agents and one informant in particular to ten murders. Among other matters Ballast reported:

- failure to arrest informants for crimes to which those informants had allegedly confessed, or to treat such persons as suspects for crime;
- concealment of intelligence indicating that on a number of occasions up to three informants had been involved in a murder and other serious crime;
- arresting informants suspected of murder, then subjecting them to lengthy sham interviews at which they were not challenged about their alleged crime, and releasing them without charge;
- creating interview notes which were deliberately misleading; failing to record and maintain original interview notes and failing to record notes of meetings with informants;

[427] OPONI Annual Report 2000-2002, p10.

[428] Cases concerning the action of security forces in Northern Ireland – Outstanding issues Memorandum prepared by the Secretariat CM/Inf/DH(2006)4 Addendum 27 January 2006, section A and K.

[429] OPONI Annual Report 2000-2002, p11.

[430] OPONI Annual Report 2005-2006, p4.

[431] Under S60A Police Act (Northern Ireland) 1998 (as amended by Police (Northern Ireland) Act 2003 which ended the power under s61A to report on 'policies and practices' of the police. This excludes matters referenced under s65(5) of the Regulation of Investigatory Powers Act 2000, which include, under part II of RIPA, the running of informants (CHIS).

Whilst Operation Ballast only analysed a small part of the informant handling of RUC/PSNI Special Branch the report emphasised there was no reason to believe that the findings were isolated but rather were highly likely to be systemic. Operation Ballast reports that in October 2003 the PSNI instigated a 'major review' (the CRAG review) of all their informants, which resulted in around a quarter of them being let go, half of them as they were deemed 'too deeply involved in criminal activity.'[432] The first Police Ombudsman's term of office ended after the publication of the Ballast report. This was followed by irregularities in the process of recruitment of the second Police Ombudsman, the responsibility for which fell to the NIO. What subsequently followed was a crisis over delay and bias in historic cases and, what was referred to as a 'lowering of independence' of the Office.

The 'lowering of independence' during the second Ombudsman

The second Police Ombudsman, Al Hutchinson, was appointed in 2007. It subsequently transpired that there were significant irregularities in the appointment process by the NIO. Fuller details of this did not emerge until a significant victory for CAJ under freedom of information legislation provided further evidence.[433] Both the evidence provided through the release of the materials and evidence provided by key witnesses – namely the former Police Ombudsman and former Chief Executive, Sam Pollock, and an unsuccessful applicant to the post in 2007 illustrated what had happened. The irregularities related to the addition of a new criterion of 'previous Northern Ireland experience' for the job after the post had been advertised, which led to two well qualified candidates not being short listed, and the circumventing of the normal processes of security vetting. In correspondence with the NIO on the matter CAJ set out that the whole episode had raised serious concerns about the independence and transparency of the appointments process and its susceptibility to political interference.[434] Before his appointment Mr Hutchinson's views on dealing with the past and the role of the Ombudsman's Office in the same were known. In his predecessor role as Oversight Commissioner for the implementation of the Patten Commission reforms he had addressed the issue in his final report stating:

> I believe that there is a choice to be made for the future of policing in Northern Ireland, and it is a difficult one. The dilemma is this: Is there going to be a continual debilitating drip-feed of speculation, inquires and investigations into past police practice, or is the majority of the Northern Ireland society willing to move on, in some yet-to-be-defined manner, and regard the Police Service of Northern Ireland as a new organisation...
>
> ...organisations such as the Historical Enquires Team and the Ombudsman's Office are blunt instruments too narrowly focused to use in a search for truth and justice for societal challenges. While they are simply doing what is required by mandate and law, they raise expectations that cannot be met, and distract from the task of finding a societal resolution to the past.
>
> ... my plea is that Government, political and community leaders re-double efforts to establish the architecture and the mechanisms that can deal with these difficult, seemingly intractable issues of the past, from a more global vista. I do believe that all

[432] 'Statement by the Police Ombudsman for Northern Ireland into her investigation into the circumstances surrounding the death of Raymond McCord Jr and related matters' (Operation Ballast Report), Nuala O'Loan, Police Ombudsman for Northern Ireland, 22nd January 2007.

[433] The Ombudsman's Office settled with CAJ providing the information we had sought before an appeal was held in the First Tier Tribunal (Freedom of Information) in March 2012.

[434] For full details see CAJ correspondence 29 May 2012 to Director General of NIO, published as an appendix to CAJ s386 to the Department of Justice consultation on the Future Operation of the Office of the Police Ombudsman for Northern Ireland, June 2012.

> the pieces are in place to deliver the new beginning to policing in Northern Ireland, but that issues of the past have established a barrier in the road toward re-establishing the trust necessary for fully achieving that goal.
>
> As long as the Ombudsman is engaged, as required by law, in expending so many resources on determining accountability for past policing issues, the Office cannot properly focus on the present and future. The resources are finite and the time, energy and money simply do not exist.[435]

During Mr Hutchinson's tenure CAJ began to raise the issue of ongoing delays in historic investigations and lack of transparency and information for families about the processes. Over 100 historic investigations were awaiting completion yet from 2007-2011 the Office managed to complete an average of only one case a year, meaning the case load would not have been cleared in a century. CAJ raised concerns that there appeared to be no justification for the agonisingly slow progress.

CAJ questioned the Ombudsman's argument that he did not have the capacity or resources to deal with historic cases, and suggested the Committee of Ministers ask the UK if the Ombudsman had actually made a business case for additional resources. By April 2011 a crisis had arisen in the Office following the resignation of its Chief Executive Sam Pollock on matters of principle. Mr Pollock in his resignation letter strongly criticised the relationship between the Ombudsman's Office and police and senior civil servants suggesting the independence of the Office had been compromised and complaining of malicious personal attacks since he raised his concerns.[436]

In June 2011 CAJ issued a report into the Police Ombudsman's handling of historic cases identifying, in addition to the issue of irregularities in the appointment, a number of other issues that impacted upon the independence of the Office. These include concerns surrounding independence from the PSNI in relation to the provision of intelligence for investigations, raising concerns in particular as to whether 'gatekeepers' can significantly limit and control OPONI's access to intelligence without detection, and in particular the potential conflicts of interest relating to former RUC Special Branch officers. Concerns and perceptions of bias in historic cases were also raised, in particular in relation to senior persons from a policing background in the Office at that time.[437]

In response to the CAJ report and Chief Executives allegations two further official investigations were launched, one by the Department of Justice,[438] and one by the Criminal Justice Inspection (CJI) Northern Ireland in September 2011. The Chief Inspector of Criminal Justice in Northern Ireland Dr. Michael Maguire stated:

> The way in which the OPONI deals with the investigations of historic cases has led to a lowering of its operational independence. The investigation of historic cases has the capacity to undermine the entire work of the OPONI and serve to decrease public confidence in the work that it undertakes.[439]

---

[435] Office of the Oversight Commissioner, Report 19 - May 2007 pp 215-216.

[436] Kearney, Vincent 'NI Police Ombudsman chief quits post over 'meddling'' *BBC News Online*, 14 April 2014.

[437] Human Rights and Dealing with Historic Cases: A Review of the Office of the Police Ombudsman for Northern Ireland, CAJ, June 2011.

[438] Police Ombudsman Investigation Report, Office of the Minister of Justice (McCusker Report), June 2011.

[439] Criminal Justice Inspection for Northern Ireland Report "An Inspection into the independence of the Office of the Police Ombudsman for Northern Ireland" published on 6 September 2011.

In recommending that the Police Ombudsman's Office should be suspended from conducting historic investigations due to the 'lowering of independence' the CJI Report highlighted a number of significant concerns namely: an inconsistent investigation process; a varied approach to communication with stakeholders and differences in quality assurance; a senior management team divided around the production of reports in this area and a fractured approach to governance and decision making and the handling of sensitive material. The Criminal Justice Inspection further determined that:

- Reports into historic cases were altered or rewritten to exclude criticism of the RUC with no explanation;
- Senior officials in the Office requested to be disassociated from reports into historic matters after original findings were dramatically altered without reason;
- Staff investigating some of the worst atrocities of the conflict believe police have acted as 'gatekeepers' to withhold key intelligence from them; and,
- There were major "inconsistencies" in the Police Ombudsman's investigations of Loughinisland, McGurk's Bar and Claudy.[440]

It is notable also that one of the cases not progressed under the second Police Ombudsman was the follow up case to Operation Ballast into the possible criminal activities of police officers. In a BBC documentary broadcast on 14 March 2012, Nuala O'Loan commented that if she had still been Ombudsman she would have investigated fully. In a submission to the Council of Europe CAJ and PFC called for the immediate resignation of the second Ombudsman in light of the findings of the CJI report and expressed concern that on 8 September 2011 the Ombudsman advised the Justice Committee of the Northern Ireland Assembly that he intended to remain in office until 1 June 2012 to oversee the implementation of the reforms recommended in the CJI Report. CAJ and PFC expressed deep concerns about his capacity to carry this out given that he had stated to the Justice Committee that he did not accept all of the findings made by the CJI. The Ombudsman's Office did suspend historic investigations and ultimately the second Police Ombudsman effectively left the Office in January 2012, albeit nominally holding on to the title. The third Police Ombudsman, Dr Michael Maguire, was subsequently recruited in spring 2012.

Prior to this in late November 2011 news reports indicated that the Office had decided to interpret its legislation in a manner which means the Office reportedly argued it can no longer conduct investigations into nearly 50 cases where RUC officers were responsible for deaths.[441]

Reform by and challenges faced by the Third Police Ombudsman

Internal reform took place within the Police Ombudsman's Office under tenure of the third Police Ombudsman and following a positive appraisal by the Criminal Justice Inspection early in 2013 the Office was again been deemed fit-for-purpose to undertake historic investigations.[442]

Gaps in the Ombudsman's powers

Notwithstanding this however there are a number of legislative changes needed to remedy recognised gaps in powers in the Police Ombudsman's Office which have yet to be addressed.

[440] Criminal Justice Inspection Northern Ireland Report 'An Inspection into the independence of the Office of the Police Ombudsman for Northern Ireland' published on 6 September 2011.

[441] Kearney, Vincent 'RUC Troubles killings 'caught in legal limbo' *BBC News Online*, 24 November 2001.

[442] Kearney, Vincent 'Police Ombudsman to resume investigating historical events' *BBC News Online*, 23 January 2013.

Under statute the Police Ombudsman is to conduct a 'Five Year Review of Powers' and report to the Minister.[443] The first Police Ombudsman completed the first review in 2007, this was noted by the Council of Europe Committee of Ministers who in 2009 asked the UK to confirm its position on the review, in particular the recommendation on powers to compel retired police officers to appear as witnesses.[444] What is now known is that very few of the reviews' recommendations were ever implemented and the rejection of the majority of them occurred in controversial circumstances due to what an investigation described as an 'agreement' between the Ombudsman's then senior Director of Investigations and "a middle ranking official of the NIO without either the imprimatur of the Ombudsman or the knowledge of the Chief Executive." This led to a very small number of recommendations, which would have strengthened the powers of the Ombudsman's Office, being accepted.[445]

Following the crisis resultant from the second Police Ombudsman's tenure the Department of Justice ran a consultation on reforms to the Office from March-June 2012 on two matters. The first was a consultation paper which floated a number of (ultimately disregarded) suggestions (e.g. merging the Police and Prisoner Ombudsman's offices), which seemed far removed from the reforms required to address the issues facing the Office.[446] The second was an updated Police Ombudsman's 'Statutory Five Year Review' of powers report.[447] The Review addresses matters crucial to being able to conduct effective conflict-related investigations. Among its recommendations were:

- Extending the Police Ombudsman's remit to deal with 'all civilians operating with police in a policing capacity';
- OPONI empowered to compel former or retired officers to submit to witness interview and provide documentation, in grave or exceptional matters; [448]
- Review and amendment of RUC conduct regulations to enable investigation of deaths directly or indirectly attributable to police, regardless if there was a previous police investigation;

However, it was striking at the time of this consultation, despite the importance of the powers recommended in the Five Year Review and the controversy over their previous lack of implementation, that the Minister of Justice was still to take a position on whether he proposed to implement the review's recommendations, rather they were effectively appendaged to the consultation.

[443] Section 61(4) Police (Northern Ireland) Act 1998.

[444] Interim Resolution CM/ResDH(2009)44.

[445] McCusker Report (2011), conclusions, p25.

[446] Department of Justice "*Future Operation of the Office of the Police Ombudsman for Northern Ireland*" March 2012.

[447] Police Ombudsman for Northern Ireland 'Statutory Report: Review under Section 61(4) of the Police (Northern Ireland) Act 1998' 2012.

[448] The above document outlines "The Police Ombudsman regularly wishes to interview, as witnesses, officers who have retired, in relation to evidence which they may have relating to an ongoing criminal investigation by the Police Ombudsman, or even in relation to the investigation of the circumstances of serious disciplinary matters. The Police Ombudsman has no power to compel those officers to assist his investigation or provide him with documentation compiled by them during their service and retained by them upon retirement. Most retired officers do assist but some with crucial information do not cooperate. This requirement has been highlighted in a significant way with recent investigations of very serious historic matters where the refusal of retired officers to cooperate damages confidence in the oversight process and policing in general terms." paragraph 10.9.

In September 2012 the Department of Justice published a summary of responses to the consultation, yet still did not set out its position on implementing the recommendations of the review. Instead the document stated that there would be further work by the Minister of Justice with the Justice Committee of the Northern Ireland Assembly and Police Ombudsman's Office in relation to considering changes to the Office with the 'detailed policy and legislative proposals' to follow for another consultation 'probably in the first half of 2013.'[449] It was not until June 2013 that the Department of Justice issued a position paper setting out its views setting its position on the Five Year Review.[450] The document outlined a Package of Reforms the Department intends to implement which included eleven recommendations from the Five Year Review, seven of which will require legislation. Among these were the above provision to extend the Police Ombudsman's remit to include oversight of civilian staff operating with the PSNI in a policing capacity. The Department however did state that it would not currently be taking forward eleven of the recommendations from the Five Year Review, including the powers in relation to compelling former or retired officers to cooperate with the Office. Another provision referenced above, the review and amendment of RUC conduct regulations to ensure they cannot be interpreted in a manner which prevents Ombudsman investigations in deaths attributable to police, was also not to be taken forward. The reason given was there was not presently 'consensus' on them among the political parties in the power-sharing Northern Ireland Assembly. CAJ argued however that if the reforms were being blocked in the Assembly, given as they engaged the international obligations to ensure effective independent investigations under Article 2 ECHR, the UK Government should ensure they were implemented.[451]

In October 2013 the Department of Justice issued a further 'targeted consultation' with four further recommendations, which CAJ regarded as all assisting with furthering human rights compliance and remedying gaps in the Police Ombudsman's powers and overall accountability. The first proposal was that the 'Police Ombudsman's Recommendations are binding on the Chief Constable.' CAJ responded that this recommendation would remedy the situation of the McGurk's Bar bombing when the Chief Constable rejected the Police Ombudsman's report and would not implement its recommendations.[452] The second recommendation was that "the PSNI should not interview/debrief officers who are witnesses/suspects in a Police Ombudsman investigation."[453]

[449] Department of Justice Northern Ireland 'Future operation of the Office of the Police Ombudsman for Northern Ireland: Summary of consultation responses' September 2012, paragraphs 1.12-13.

[450] 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), July 2013.

[451] CAJ submission S415 to the CAJ's Submission to the Department of Justice's Consultation on the 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), July 2013. The Belfast/Good Friday Agreement provided that Westminster ("whose power to make legislation for Northern Ireland would remain unaffected") "will... legislate as necessary to ensure the United Kingdom's international obligations are met in respect of Northern Ireland". s26-27 of Northern Act 1998 provides a power for the Secretary of State to direct action (including legislation) should or should not be taken in order to fulfil international obligations (defined as 'any international obligation of UK' other than EU law or ECHR rights, which are provided for separately in the Act).

[452] See 'Chief Constable again rejects Mc Gurk's Report' Press Release from the Mc Gurk's Bar Bombing Relatives, British Irish Rights Watch & Pat Finucane Centre — 1 September 2011.

[453] CAJ responded that: This recommendation would merit further clarity as to its detail, to ensure the rights of accused persons and victims are given due regard. It would appear to be designed, however, to prevent the scenario whereby state actors are given undue cover for their alleged actions. This type of situation was found in the recent HM Inspectorate of Constabulary (HMIC) report into the PSNI Historical Enquiries Team (HET) in relation to the issue of what was commonly referred to as pre-interview disclosure. This involved preferential treatment of state actors who were given "all existing evidential documentation and other material" relevant to the case by the HET prior to interview. This approach went well beyond the right to be informed of the nature of the offence in which a person is a suspect and be furnished with sufficient information about the case against them. There is no obligation to reveal the entire prosecution case against a suspect before questioning begins and the HMIC held that the HET process for state actors was 'illegal and untenable.' (HMIC 'Inspection of the Police Service of Northern Ireland Historical Enquiries Team' 2013 Section 4.48).

The third dealt with the issue, raised by the first Police Ombudsman, that the Ombudsman be empowered to arrest and interview informants and agents as part of an investigation. The fourth stated that protocols and MoUs on disclosure by the PSNI and other agencies be scrutinised by the Justice Committee or Policing Board.[454] In February 2014 the UK told the Council of Europe legislation would be introduced to the Assembly in 'autumn 2014'.[455] In a further response in October 2014 the UK states it had now "put together a package of measures for the reform of OPONI, to which the Minister is currently seeking the agreement of the Northern Ireland Executive." [456] CAJ understands that since this time the NI Executive has rejected this package of measures, but no further details have been made public.[457]

Challenges from retired RUC officers

The issue of the retired officers not cooperating with Police Ombudsman's investigations came back into the news at around the same time as a result of non-cooperation over the investigation into the 'Good Samaritan Bomb'. This incident was one of those investigated under the second Police Ombudsman in 2010 where, *the Detail* reports key facts were "dramatically altered by senior members of the previous administration without any valid explanation."[458] In July 2013 the third Police Ombudsman issued a new report. The incident is described as follows:

> On the morning of Wednesday 31 August 1988 an IRA booby trap device, intended for security forces exploded at 38 Kildrum Gardens in the residential area of Creggan in the City of Derry/Londonderry. The explosion killed Eugene Dalton and Sheila Lewis instantly. A third person, Gerard Curran, sustained injuries. He died seven months later. The three people had gone to the flat over concern for the welfare of a neighbour who had not been seen for a week. The occupant of the flat had been abducted by the Provisional Irish Republican Army (IRA) who then boobytrapped the flat in anticipation of killing members of the security forces. The bomb was triggered as Eugene Dalton entered the flat. The incident was described variously in the media as the 'Good Samaritan Bomb' and 'the Good Neighbours Bomb'. To date no-one has been charged or convicted in connection with the murders. [459]

In summary the Ombudsman's report related to complaints from families that the RUC:

- were aware the bomb was there but did not intervene to warn civilians;
- did not intervene in order to protect an informant; and
- failed to properly investigate the incident.

---

[454] See CAJ's Submission (S423) to the supplementary proposals from the Department of Justice's Consultation on their 'New Powers Package Policy Paper' for Office of the Police Ombudsman for Northern Ireland (OPONI), October 2013.

[455] Communication from the United Kingdom concerning the McKerr group of cases against United Kingdom (Application No. 28883/95) 13 February 2014, p5.

[456] Communication from the United Kingdom concerning the McKerr group of cases against United Kingdom (Application No. 28883/95), DH-DD(2014)1242, 21 October /10/2013, p8.

[457] CAJ's submission no. S.438 Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland (November 2014.)

[458] McCaffery, Barry 'Police failed to warn Good Samaritans of booby trap bomb' *The Detail* 10 July 2013.

[459] Public Statement by the Police Ombudsman under Section 62 of the Police (Northern Ireland) Act 1998
Relating to the complaints by the relatives of a victim in respect of the events surrounding the bombing and murders at 38 Kildrum Gardens on 31 August 1988.

The investigation upheld a number of these complaints. The investigation concludes that the RUC were aware the booby-trap bomb was very likely to have been planted at the house in question and whilst declaring the area 'out of bounds' to RUC officers to protect them had done nothing to warn local residents of the bomb. The RUC had therefore failed to take reasonable steps to protect civilian life in accordance with duties under the Article 2 ECHR. The Ombudsman also found that the subsequent RUC investigation into the killings had been 'flawed and incomplete.' The Ombudsman however found 'no evidence' to substantiate the complaint that the police failed to act to protect an informant. The Ombudsman's report did however note that his:

> ...investigation was hampered by both the refusal of a number of retired police officers, some formerly of senior rank, to co-operate and by the loss of investigation documentation.[460]

On the publication of the report the Deputy Chief Constable of the PSNI expressed regret that a number of retired officers had refused to cooperate with a Police Ombudsman investigation in the high profile historic investigation.[461]

In an astonishing intervention several months later the Northern Ireland Retired Police Officers Association (NIRPOA) issued a 32 page rebuttal to the Police Ombudsman's report.[462] The Pat Finucane Centre have reported that the NIRPOA Chairperson at the time of the report was the local divisional RUC Commander at the time of the bombing who himself had refused to co-operate with the Ombudsman.[463] One of the startling aspects of the counter-report is that it does confirm that an informant was involved and appears to claim that the RUC did not intervene in order to protect them:

> It has to be assumed that to have publicly made any disclosure as to police awareness of PIRA's plans at this stage could have had fatal repercussions for the agent providing the intelligence on the booby trap device and that agent's active attempts to pin down its location.[464]

[460] As above, paragraphs 1.1-1.21.

[461] RUC 'failed to warn' over 1988 bomb' *UTV News Online*, 10 July 2013.

[462] NIRPOA 'The Good Neighbour Bombing: A response to the determination by the Office of the Police Ombudsman for Northern Ireland that a breach of Article 2 of the European Convention on Human Rights by the Police occurred.' October 2013.

[463] PFC 'Retired RUC confirm 3 died in order to protect agent' Newsletter Issue 11/Winter 2013.

[464] NIRPOA 'The Good Neighbour Bombing: A response to the determination by the Office of the Police Ombudsman for Northern Ireland that a breach of Article 2 of the European Convention on Human Rights by the Police occurred.' October 2013, p15.

Another astonishing assertion by NIRPOA is that the RUC did not have such a duty to protect civilian lives anyway at the time given the incident predated the Human Rights Act 1998 and *Osman* judgment.[465] NIRPOA then argued that the Police Ombudsman should be stripped of powers to determine that the police have breached ECHR Article 2. Furthermore, without a hint of irony given the refusals to cooperate with the above investigation, NIRPOA stated that unless this is done it will "no longer encourage its members to engage with OPONI in the investigation of historical incidents where breaches of the articles of the ECHR are alleged."[466] In February 2014 NIRPOA were granted leave to seek Judicial Review of the Ombudsman's report arguing the report contained inaccuracies and that the Ombudsman had overstepped his powers.[467] In the same month victims families launched their own legal proceedings against NIRPOA to seek access to the material withheld from the Police Ombudsman.[468] In May 2014 the NIRPOA legal challenge was dismissed on grounds it had not been made within the statutory timescales.[469] The judgment also details other retired officers level of cooperation with the Ombudsman, in addition to the NIRPOA chairperson:

- The Investigation Team wrote to a former Detective Superintendent who was initially responsible for the RUC murder investigation by the PSNI in March 2008. This officer telephoned the Ombudsman's Office advising he had no recollection of the incident, and did not wish to assist the matter... This is the retired former Detective Superintendent that was initially responsible for the entire investigation - had no recollection of the incident and wasn't prepared to assist: Although he did subsequently meet with the Investigation Team, this officer did not provide any meaningful assistance.
- The third key officer was a former Detective Inspector, who performed a leading role in the murder enquiry. He wouldn't co-operate.
- Officer number (4), a former Detective Chief Superintendent who had performed the role of Regional Head of Special Branch, with a responsibility for the Derry/Londonderry area. This officer did not co-operate.
- Officer number (5), a former Detective Superintendent who had been the Deputy Regional Head of Special Branch. This officer was ill. He said he had no recollection of the incident.
- Officers number (6) and (7) were contacted. These were two former Special Branch detectives. No response from them.

[465] The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction ... It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual ...such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities...In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person (see paragraph 115 above), it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. *Osman v. The UK (87/1997/871/1083) judgment of 28 October 1998, [115-6]*

[466] NIRPOA 2013, p24.

[467] 'Former officers challenge Derry bomb findings' *BBC News Online* 12 February 2014.

[468] 'Bomb victim's family take legal action against retired cops' *Derry Journal* 21 February 2014.

[469] 'Judge dismisses retired RUC Officers challenge to critical "Good Samaritan" Bomb Report' *Derry Journal* 6 May 2014.

- Officer number (8), a Detective Sergeant who had performed a liaison role between Special Branch and the detectives. He declined to accept the correspondence from the police officer delivering the correspondence.[470]

Lawyers for a family member of a victim who had intervened in the case argued that the conduct of the retired officers in question was 'shocking, disgraceful and scandalous' and argued their actions were "a deliberate and co-ordinated closing of ranks to stymie this investigation in order to prevent the truth from emerging, it is an affront to the rule of law, and it's a concerted attempt by retired police officers... to sabotage the operation of the police complaints system".[471] PSNI correspondence disclosed in relation to the judicial review also revealed that the PSNI had rejected the findings of the Ombudsman's report. Once again therefore the PSNI had in relation to a legacy report simply dissented from its findings albeit on this occasion, unlike McGurks, done so privately rather than publicly.[472]

PSNI disclosure to the Ombudsman

There have been significant developments since the failed NIRPOA judicial review in May 2014. In June 2014 the Police Ombudsman took the unprecedented step of launching legal action against the PSNI for failure to disclose documents, including intelligence documents, in cases including major legacy investigations which engage alleged police wrongdoing. The Ombudsman's Office confirmed that investigations into more than 60 deaths 'have now been stalled by a PSNI refusal to provide certain material'.[473] The cases in question encompass numerous allegations of collusion and reportedly include:

- the 'Good Samaritan Bombing' itself;
- the 1994 UVF Loughinisland massacre;
- the 1992 IRA murder of RUC Constable Colleen McMurray, of which it is claimed RUC Special Branch had advanced warning and that informants were involved;
- the murder of senior Sinn Féin member and MI5 agent Denis Donaldson;
- the 1990 UVF murder of Sinn Féin member Tommy Casey, with alleged failings in the RUC investigation;
- the 2010 car bomb attack on PSNI constable Peadar Heffron
- the 1974 UDA murder of independent councillor Patsy Kelly with the alleged involvement of UDR members.[474]

This PSNI move was despite the existence of a clear legal authority, under Section 66 of the Police (Northern Ireland) Act 2000, which states the Chief Constable of the PSNI 'shall supply the Ombudsman with such information and documents as the Ombudsman may require for the purposes of, or in connection with, the exercise of any of his functions'. The Ombudsman told the BBC in June that the legal action had been launched after a deadline for the PSNI to hand over requested material had expired, Dr Maguire stated:

> At this point in time, the police have refused us access to 100 pieces of information involving investigations surrounding in the region of 60 murders... I find that unacceptable and we have no other choice but to take legal action against the Chief Constable. We're talking about complex investigations into over 60 murders where there

[470] *In the matter of an Application by the Northern Ireland Police Officers Association for Judicial Review [2014] NIQB 58,* 6 May 2014, paragraphs 65, 68-74.

[471] Paragraph 77.

[472] 'Hysteria and Home Truths' Pat Finucane Centre Newsletter Issue 12/Summer 2014. See also NI Policing Board, Question to Chief Constable (Good Samaritan Case- Dolores Kelly) 6 November 2014.

[473] See 'Police Ombudsman takes legal action against PSNI' *The Detail* 3 June 2014.

[474] Police Ombudsman: Attacks at centre of PSNI legal action, *BBC News Online*, 4 June 2014.

> have been allegations of police criminality and misconduct in relation to their failure to investigate those murders; the fact that they may well have been protecting individuals involved in those murders.[475]

It is notable that in December 2013 the Criminal Justice Inspection produced a report focusing on the relationship between the two, including "in particular, how requests for police intelligence surrounding historical cases are handled by the PSNI". This inspection report concluded that, at that time, the PSNI were cooperating with the Ombudsman "when required to provide sensitive information for the purpose of investigation." The report did however highlight there was some 'tension' between the PSNI and Ombudsman over ECHR duties. The report references specific PSNI objections to a revised protocol on the sharing of sensitive information. The objections were founded on ECHR Article 2 grounds, presumably relating to officer and informant identities being passed to the Ombudsman.[476] The Ombudsman indicated that an agreement had been signed with the Chief Constable, Matt Baggott in September 2013, covering how such disclosure would be handled.[477] The disclosure relationship was given a clean bill of health by the CJI report in December 2013, but clearly collapsed to the extent that the Ombudsman took the unprecedented step of going to court six months later.

At the time of the Ombudsman's announcement of legal action against the PSNI CAJ stated that the withholding of documents was a subversion of "one of the most important policing accountability mechanisms that we have" and expressed deep concern that this was "another example of an attempt to cover up past crimes" and that "it appears that some politicians and elements of the security establishment are determined to maintain impunity for state agents."[478] Leave was granted for judicial review and further detail given to the High Court, including that Ombudsman investigators had allegedly been turned away from PSNI buildings as part of the alleged obstruction. The initiation of legal action coincided with the subsequent early retirement of Matt Baggott and his replacement with George Hamilton as Chief Constable. Both parties told the court the incoming Chief Constable and Ombudsman had had 'constructive' discussions on the matter, and had agreed interim measures.[479] Following these talks in September 2014 the Ombudsman withdrew the legal action stating that all outstanding information was now being made available and that the PSNI had now accepted that the Ombudsman had a legal right to such material. The Policing Board Performance Committee Chair Jonathon Craig MLA welcomed George Hamilton having resolved the issue with the Ombudsman stating:

> It is critical for public confidence in the service that there is police cooperation in the provision and disclosure of information to the institutions with legislative responsibility for delivery of independent oversight of the PSNI.[480]

Cuts to the Ombudsman's budget

Having seen off difficulties over obtaining disclosure from the PSNI, the next obstacle thrown at the Ombudsman was the withdrawal of funding from the Office. In September 2014 it was

[475] Kearney, Vincent NI's chief constable accused of obstructing Troubles' investigations BBC news Online, 3 June 2014.

[476] *The relationship between the Police Service of Northern Ireland and the Office of the Police Ombudsman for Northern Ireland*, Criminal Justice Inspection for Northern Ireland, December 2013.

[477] Police Ombudsman takes legal action against the PSNI OPONI Press Release, 3 June 2014.

[478] Kearney, Vincent NI's chief constable accused of obstructing Troubles' investigations *BBC News Online*, 3 June 2014.

[479] 'Ombudsman/PSNI legal action: George Hamilton and Michael Maguire in talks' *BBC News Online* 27 June 2014.

[480] 'PSNI complaints files row resolved' *Belfast Telegraph* 2 September 2014.

widely reported the Police Ombudsman faced severe budget cuts.[481] The Office was also hit with the withdrawal of additional funding from the Department specifically for historic cases.

During 2014 the Police Ombudsman had submitted a business case to the Department of Justice outlining a requirement for £1.1 million to complete the work for its Historic Investigations Directorate. The Department responded by making available only £400,000 of this.[482] Yet this was then withdrawn and a further cut was imposed to the overall Ombudsman budget of a reported £750,000. Whilst acknowledging the context of cuts London was imposing on the NI Executive CAJ noted that the Ombudsman constituted only a small fraction of the overall Departmental budget, with its overall budget for historic cases only being around £2 million a year.[483] We raised concerns that we could not "detach the current issue [of cuts] from what we regard as the concerted pattern of cover up we are witnessing in relation to investigations into past human rights violations."[484] CAJ also voiced concerns that the additional cuts, which came on top of previous 'efficiency savings', would particularly impact on historic cases given the short term nature and background to funding this function. This meant that most of the Police Ombudsman's temporary staff, who are most likely to be affected by cuts, are located in historic cases and the loss of the specific skills set of such staff will have a particular impact on these investigations. The Ombudsman himself voiced similar concerns stating specifically that:

> The reduction in budget has undermined our ability to deal with the past...It is ironic that on the release of a Criminal Justice Inspection report, which states that the independence of the Office has been fully restored, our capacity to undertake work has been significantly reduced.[485]

The Minister of Justice himself openly acknowledged to the Assembly that the cuts "will impact significantly the work of ...the Police Ombudsman's historical investigations"[486] The cuts have therefore resulted in significant delays to the Ombudsman being able to consider and complete legacy cases.

[481] See for example 'Police Ombudsman: Budget cuts delay investigations into killings' *BBC News Online* 30 September 2014.

[482] Minutes of the Department of Justice and Office of the Police Ombudsman Northern Ireland Quarterly Governance Review Meeting Thursday 8 May 2014. New Cathedral Buildings, paragraph 5.2.

[483] CJINI '*A Review of the Cost and Impact of Dealing with the Past on Criminal Justice Organisations in Northern Ireland*', paragraph 2.49.

[484] CAJ's submission no. S.438 Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland (November 2014).

[485] Police Ombudsman Press Release 'Police Ombudsman's Office cuts 'historical' workforce by 25%: Major investigations to be delayed'. 1 October 2014.

[486] Official Report, Northern Ireland Assembly Justice Committee 1 October 2014, David Ford MLA.

CHAPTER SEVEN:
Inquests

Last night we had a briefing from senior retired police officers about the threat to national security from evidence that is being given in inquests in Northern Ireland that opens up the whole modus operandi of our security forces and security services. What do the Government intend to do to protect national security from this threat?

Parliamentary Question, Jeffery Donaldson MP, 4 July 2012.

Inquests are increasingly being seen as means by which the procedural requirements of ECHR Article 2 can be discharged by the UK.[487] An inquest compliant with ECHR Article 2 will determine: who the deceased was; how, when and where he or she died; and what were the broad circumstances surrounding the death.[488] The purposes of an inquest include ensuring "so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrong-doing (if unjustified) is allayed..."[489] It has been held that:

> The purpose of an inquest is to investigate fully and explore publicly the facts pertaining to a death occurring in suspicious, unnatural or violent circumstances, or where the deceased was in the custody of the state, with the help of a jury in some of the most serious classes of case. The coroner must decide how widely the inquiry should range to elicit the facts pertinent to the circumstances of the death and responsibility for it.[490]

Inquests can cover issues relating to state culpability in deaths but equally can deal with non-state involvement cases. This chapter will examine the evolution of the inquest process in Northern Ireland, including the reforms prompted by right to life cases taken to the European Court of Human Rights. It will then address some of the problems faced by recent inquests into conflict related deaths, including gaps in powers, resourcing and endemic delays in disclosure.

From Special Powers to Strasbourg: Northern Ireland and Inquests

Inquests into suspicious deaths have long been controversial in Northern Ireland. In what appears to be a licence to cover up extra judicial killings section 10 of The Civil Authorities (Special Powers) Act (Northern Ireland) 1922 provided the Minister of Home Affairs with extraordinary powers ('for the purpose of preserving the peace and maintaining order') to prohibit the holding of an inquest (or inquests in general) or to substitute the functions of a

[487] 'In the absence of full criminal proceedings, and unless otherwise notified, a coroner should assume that this inquest is the means by which the state will discharge its procedural investigative obligation under Article 2.' in R (Middleton) v West Somerset Coroner [2004] UKHL 10, [2004] 2 AC 182.

[488] To ensure compliance with the procedural requirements of Article 2 as set out in R (Middleton) v West Somerset Coroner [2004] UKHL 10, [2004] 2 AC 182.

[489] Para 31, R (Amin) v Home Secretary [2004] 1 AC 653.

[490] *Re Jordan & McCaughey* [2007] UKHL 14; [2007] 2 AC 226, paragraph 37.

coroner or their jury with any other person appointed by them.[491] Inquests are currently held under the Coroners Act (Northern Ireland) 1959.[492] At August 2014 there were a total of 49 'legacy' inquests involving 78 deaths before the Coroners Court.[493] However, inquests into conflict-related killings have been beset by problems for some time.

The 2001-2003 Strasbourg Judgments and their implementation

During 2001-2003 there were six landmark judgments by the European Court of Human Rights into procedural breaches of Article 2 in the 'group of cases concerning the actions of the security forces in Northern Ireland' (*Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane v UK*).[494] It is notable that of the eleven systemic failings identified in investigative procedures by the court in relation to this group of cases, seven related directly to inquests. These were namely:

- The inquest procedure did not play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed (*Jordan, McKerr, Kelly and others, Shanaghan, McShane, Finucane)*
- The scope of examination of the inquest was too restricted (*Shanaghan, Finucane)*
- The persons who shot the deceased, (and in the *McShane* case, the soldier who drove the armoured personnel carrier that fatally injured the applicant's husband), could not be required to attend the inquest as witnesses (*Jordan, McKerr, Kelly and others, McShane)*
- The non-disclosure of witness statements prior to the appearance of a witness at the inquest prejudiced the families' ability to prepare for and to participate in the inquest and/or contributed to long adjournments (*Jordan, McKerr, Kelly and others, Shanaghan, McShane)*
- The absence of legal aid for the representation of the victim's family (*Jordan)*
- The public interest immunity certificate had the effect of preventing the inquest from examining matters relevant to the outstanding issues in the case (*McKerr)*
- The inquest proceedings did not commence promptly and did not proceed with reasonable expedition (*Jordan, McKerr, Kelly and others, Shanaghan, McShane)*[495]

In summary the issue of the lack of compellability of witnesses suspected of causing death meant that their reliability or credibility could not be assessed and this detracted from the inquest's capacity to establish the facts immediately relevant to the death, in particular the lawfulness of the use of force. The lack of verdicts at the inquest was criticized as this could play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed. The absence of legal aid and non-disclosure of witness statements

[491] Civil Authorities (Special Powers) Act (Northern Ireland) 1922, 10:(1) For the purpose of preserving the peace and maintaining order, the Minister of Home Affairs may by order:- (a) Prohibit the holding of inquests by coroners on dead bodies in any area in Northern Ireland specified in the order, either absolutely or except in such circumstances or on such conditions as may be specified in the order; or, (b) Prohibit the holding of any particular inquest specified in the order; and (c) Provide for the duties of a coroner and a coroner's jury (or of either of them) as respects any inquest prohibited by the order being performed by such officer or court as may be determined by the order.

[492] The general purpose of an inquest is set out in Rule 15 of the Coroners (Practice and Procedure) Rules (Northern Ireland) 1963 (as amended).

[493] Information from Coroner office cited in S435 CAJ submission to Committee of Ministers in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland See also Cobain, Ian *'Delay, delay, delay': Northern Ireland Troubles inquests still outstanding The Guardian* 13 April 2014. Rutherford, Adrian '75 deaths in the past 40 years and still no inquests to uncover facts' *Belfast Telegraph* 23 April 2014, p4-5.

[494] Jordan v UK [2001] ECHR 327; Kelly & Ors v. UK [2001] ECHR 328; McKerr v. UK [2001] ECHR 329; Shanaghan v. UK [2001] ECHR 330; McShane v. UK [2002] ECHR 469; Finucane v. UK [2003] ECHR 328.

[495] Council of Europe Committee of Ministers Appendix III to Interim Resolution ResDH(2005)20.

prejudiced the applicants' ability to participate in the inquests and contributed to adjournments – the interests of the next-of-kin were not fairly or adequately protected. The limited scope of the inquest had excluded concerns of collusion and failed to address serious and legitimate concerns of the family and public, and hence it was not an effective investigation into the incident or a means of identifying or leading to prosecution.

In 2005 following a number of changes and undertakings by the UK in relation to the inquest system (in part compelled by legal challenges), the Committee of Ministers decided to close its examination of a number of the above matters.[496] The Committee did however keep open for several years a measure asking the UK to keep it informed of the concrete effects of reforms to the Coroner's Service – in particular in relation to the issue of delay.[497] CAJ and others retained considerable concerns about inquests that remained unresolved many years after the judgment. This in itself indicated that there had not been a practical and effective implementation of the Court's rulings vis-a-vis the need for promptitude by the state or state agents in such a way to as implement expeditious inquests in analogous cases. CAJ stated in a legal intervention in McCaughey, Grew and Quinn that:

> This and other like cases suggest that the problem of delay in controversial inquests in Northern Ireland might be said to be endemic. The pattern of delay, punctuated by adversarial disputes between families and state agencies and pattern of lengthy adjournments is indicative of a lack of will, whether on behalf of the state generally, or state agencies acting on behalf of the state, to assist in bringing such inquests to an expeditious conclusion.[498]

In 2006 the Northern Ireland Human Rights Commission issued a report on the application of Article 2 in lethal force deaths which included a study of the views of coroners over delay citing police disclosure, post-mortem delays and litigation as reasons.[499] Other concerns of CAJ included that there had not been changes to the rules in respect of verdicts or the actual scope of inquests despite the severe criticism in the *Shanaghan* case. Despite citing the advent of the Human Rights Act 1998 as part of the remedy to the defects indentified by the Court the UK Government nevertheless engaged in significant resistance to the Article 2 duties applying to investigations of deaths which occurred before the commencement (in 2000) of the Act. The issue is the extent to which the Human Rights Act 1998 required a coroner to carry out an inquest in a way which is compatible with Convention rights even though the

[496] At the 948th (DH) meeting (November 2005) for full information see Memorandum prepared by the Secretariat incorporating information received up to 12 June 2006 CM/Inf/DH(2006)4 revised 2 23 June 2006.

[497] Interim Resolution CM/ResDH(2007)73.

[498] This particular 'lack of will' might be discerned from inter alia :- (i)The well-documented history of judicial review proceedings arising in the Jordan, McKerr & McCaughey cases which stem from the unwillingness and outright resistance of the security services to submit to an 'Article 2 compliant investigation' (ii) the evidence recorded in the 2006 NIHRC paper to the following effect 'One coroner indicated that delay might also occur, following the opening of an inquest, where there are applications for a public interest certificate and anonymity. The coroner explained that he understands that government lawyers will not approach ministers for a certificate until an inquest is close to hearing. A date then has to be set for the inquest. If a certificate is issued, there will inevitably be a hearing about whether public interest immunity should be granted, which in turn almost always leads to the inquest being adjourned'(iii) the repeated reluctance of the security services to provide documentation to families, even this is required by domestic legislation (see e.g. Re McCaughey & Grew (2004) NIQB 2, (2005) NICA 1 & Re Jordan & McCaughey's Application (2007) UKHL 14) (iv) and the at times bizarre lengths that the security sources have gone to frustrate sharing of documents, (e.g. Re PSNI's Application, (2008) NIQB100, 19th September 2008), even when having previously agreed to share such documents (see Re Jordan's Application (2008) NIQB 148).

[499] *"[coroners) indicated that reasons for [the delay] may vary and can include the following: delay in the provision of material relating to the death from the police; delay in the provision of a post mortem report (on occasion up to three years), and delay due to ongoing litigation in other cases, the outcome of which will affect the conduct of inquests generally"* Fiona Doherty and Paul Mageean "Investigating Lethal Force Deaths in Northern Ireland: the application of Article 2 of the European Convention on Human Rights" NIHRC February 2006(p42).

death occurred *before* the coming into force of the Act. In 2004 in *McKerr* the House of Lords decided that there was no obligation of Article 2 compliance for deaths occurring before the commencement of the Act. CAJ subsequently drew the Committee of Ministers attention to the Grand Chamber decision in *Silih*[500] which held that the procedural obligation to carry out an effective investigation under Article 2 ECHR has evolved into a separate and autonomous duty, and can give rise to a detachable obligation, capable of binding a state even before the European Convention on Human Rights was incorporated into domestic law. This matter was not resolved until the decision of the UK Supreme Court on the 18 May 2011 in *McCaughey and Grew*[501] reversed the earlier decision clarifying where a decision is taken to hold new inquests they do have to be Article 2 compliant, even if death had been before the entry into force of the Human Rights Act 1998. This itself did not oblige the holding of fresh inquests into pre-1998 deaths. However, the decision held that where the inquest has yet to be held into a pre 2 October 2000 death, Article 2 imposed a freestanding or 'detachable' obligation in relation to the investigation of a death.

Inquests today: delays, interventions and limitations

Notwithstanding the reforms and developments in 2013, CAJ has become increasingly concerned at the capacity of the inquest system, as it is functioning at present, to provide effective investigations in compliance with ECHR Article 2 in historic cases. The main issues which (cumulatively) have prevented the inquests mechanism meeting the requirements of ECHR Article 2 centre on:

- the process of appointing a jury preserves the anonymity of potential jurors and therefore there is inadequate provision for vetting jurors who may have a conflict of interest or potential bias;
- an inquest jury in Northern Ireland, unlike in England and Wales, needs to reach a unanimous decision;
- inquests in Northern Ireland cannot issue verdicts of lawful or unlawful killing, which falls short of international standards;
- there are protracted delays and litigation involving the Police (PSNI) and armed forces ministry (MOD) in relation to disclosure to next-of-kin, of material that is submitted to be relevant, such as details of witnesses' involvement in other lethal force incidents, which falls within the broader circumstances of the death;
- there are concerns about failures to secure attendance of security force personnel at the hearing; and
- inquests continue to be subject to excessive delays.[502]

As referenced above the Coroners Service has a considerable number of outstanding legacy inquests which have not been opened or completed. Notwithstanding the generality of resourcing issues the main reasons for this do not appear to relate to lack of coroners but rather delays in receiving material and other effective cooperation from state agencies.

[500] *Silih v Slovenia* [2009] 49 EHRR 37.

[501] In the matter of an application by Brigid McCaughey and another for judicial review (Northern Ireland) [2011] UKSC 20.

[502] CAJ Submission S407 to the United Nations Committee Against Torture on the UK's 5th Periodic Report under the Convention Against Torture (April 2013).

In 2012 former Ulster Unionist Party leader Tom Elliot MLA caused controversy after urging persons at a public meeting to 'clog up' the inquests system to prevent inquests focusing on the actions of the security forces, stating "I just believe the system is continually being weighed against the security forces in Northern Ireland and the former security forces in Northern Ireland."[503]

During the course of the negotiations for the Stormont House Agreement CAJ understands that the UK Government advocated ending legacy inquests and subsuming them within the proposed Historical Investigations Unit (HIU). This was not accepted and the Stormont House Agreement ultimately stated:

> Legacy inquests will continue as a separate process to the HIU. Recent domestic and European judgments have demonstrated that the legacy inquest process is not providing access to a sufficiently effective investigation within an acceptable timeframe. In light of this, the [Northern Ireland] Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.[504]

The Attorney General's powers to open inquests

Since the devolution of most justice powers from London to Belfast in 2010 the power to direct a coroner to hold an inquest (including a fresh inquest when one has already been held) has been vested in the Attorney General for Northern Ireland. Section 14 of the Coroners Act (Northern Ireland) 1959[505] empowers the Attorney General (now an independent office) to direct such an inquest when it is 'advisable' to do so. Among the factors taken into account in this test are whether there has been the discovery of significant new evidence, irregularity or unfairness of proceedings or the improper rejection of significant evidence. Between the 2010 and 2013 reporting years the Attorney General has directed 33 inquests be held, and declined 13 requests. In 2013-2014 21 inquests were opened, 18 requests were declined, and another 42 cases were still under consideration.[506] Many inquests relate to conflict legacy inquests. The Attorney General does not presently have any power to obtain papers or information that may assist in making the decision. The Attorney General has recently advocated a legislative change to allow for such powers, initially across all agencies, but subsequently limited the request to health and social care providers, to address specific issues relating to deaths, for example, in hospitals, rather than legacy issues.[507]

The Attorney General's power is qualified insofar as the Secretary of State can transfer the power to the Advocate General for Northern Ireland (a member of the UK cabinet) when the Secretary of State certifies information relevant to whether there should be an inquest includes information whose disclosure may be against the interests of the undefined concept of 'national security'.[508] There was a lack of clarity in relation to how this would operate and as to whether the Attorney General for Northern Ireland could open national security cases. This issue came to a head in November 2012 when the Senior Coroner suspended 21 inquests directed by the Attorney General arguing that the Attorney may not have had the power to direct them and hence they could ultimately be rendered void, including cases the Coroner had petitioned the

[503] Sean Brown and Francis Bradley 'not real victims' says Tom Elliot, *Mid Ulster Mail* 9 August 2012

[504] Stormont House Agreement, paragraph 31.

[505] As amended by the Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010.

[506] Attorney General for Northern Ireland Annual Reports 2010/11; 2011/12; 2012/13; 2013/14.

[507] Correspondence from the Office of the Attorney General to the Justice Committee of the Northern Ireland Assembly, provided by the Committee and dated 5 March 2014 and 30 April 2014 respectively.

[508] S14 Coroners Act (Northern Ireland) 1959 (as amended).

Attorney General to open. The cases in question which risked designation as being 'national security' cases included an inquest into a child killed by a plastic bullet, 11 persons dead shot by the British Army in the 'Ballymurphy massacre', and a loyalist killing with suspected collusion.[509] Families mounted a legal challenge to the decision which resulted in a temporary lifting of the suspension. Following clarification by the Office of the Advocate General stating their view that the Attorney General had the power to order such inquests unless a certificate had actually been issued from the Secretary of State in relation to 'national security' information, the suspension was permanently lifted.[510]

In late June 2014 however the Secretary of State did exercise her 'national security' powers, issuing a certificate in relation to the request for a fresh inquest into the 1987 Loughgall killings of nine persons by the SAS. *McCann and Others v the UK* had held that there had been no effective investigation in contravention of ECHR Article 2 in relation to the killings. The Secretary of State's intervention took the decision out of the hands of the Attorney General for Northern Ireland, John Larkin QC, and transferred it to the Advocate General for Northern Ireland, initially Dominic Grieve MP, who was shortly afterwards replaced by Jeremy Wright MP in a cabinet reshuffle. CAJ represented the families in Strasbourg and in the request for a new inquest and was first informed of the certificate by the Attorney General for Northern Ireland who stated in correspondence that "he considers the Secretary of State's decision to be profoundly wrong in principle." In a press statement at the time CAJ stated that "We don't know why this case has been singled out for the 'national security' veto – is it because the SAS were involved, or did a UK Minister give the green light for the ambush?"[511] In this instance whilst arguably the intervention has simply resulted in a change in decision maker, there are clear issues over independence. A Conservative MP and cabinet minister has intervened to take a decision off the independent Attorney General for Northern Ireland and pass it to another Conservative MP who attends cabinet, on a controversial ambush which took place under a Conservative Government and which may have had ministerial approval. The process which led to the devolution of policing and justice established that the Office of Attorney General for Northern Ireland was to be held by a legal figure rather than a politician due to past concerns, both under direct rule and the Stormont Parliament, of political involvement in decision making. Notwithstanding that the Advocate General's Office is to take the decision independent from Government, the process of transfer clearly ignores those concerns in one of the most sensitive areas of policy.

Interventions to prevent access to archives

A different yet no less remarkable intervention was made in the late summer of 2013 when the Secretary of State for Northern Ireland and Chief Constable of the PSNI sought injunctions against NGO Relatives for Justice and KRW Law acting on behalf of a victim's family who had successfully sought the release from the Public Records Office for Northern Ireland (PRONI), under freedom of information, of copies of past inquest papers. The purpose of seeking copies of historic inquest papers, which were of inquests which had been heard in public, was and is usually to gather evidence, including of flaws in the past inquest, in order to petition the Attorney General to exercise the powers to open a fresh inquest.

Following requests from the victims' representatives to the PRONI for this material the documents were released by the devolved Northern Ireland Culture Minister (Carál Ní Chuilín MLA). The Culture Minister is responsible for the PRONI and had consulted with both the Secretary of State (Teresa Villiers MP) and devolved Department of Justice before exercising powers to release the documents. This action had followed the PRONI earlier declining to

[509] Families win first stage of battle over inquests suspension *BBC News Online* 19 November 2012.

[510] See 'Grieve bats Troubles inquests back to coroner' *The Detail* 10 February 2013.

[511] CAJ Press Release '"National security" shutter down on Loughgall Inquest' 8 July 2014.

release court and inquest papers to families following representations from the PSNI Historical Enquiries Team. In a remarkable move hours after the Culture Minister had released the papers the, Secretary of State and Chief Constable sought and, after midnight in the absence of the other parties, were granted temporary injunctions against these representatives.[512] The Attorney General for Northern Ireland advised the Court that the Culture Minister was the 'keeper of the records' and had acted within her powers.[513] On 13 September the Secretary of State and PSNI withdrew their legal action and the documents were disclosed.[514] The application was therefore dismissed and full costs were awarded to RFJ and KRW Law.

The legal basis for this remarkable intervention has remained unclear, with reports only containing general references to any potential 'security risks' to personnel. CAJ expressed concern at the time that we did not believe that there was any justifiable reason to withhold such material which could assist families in obtaining a proper investigation into the death of their loved ones, particularly given the assurances that names of individual security force members had been redacted. We also stated that the UK has an obligation to carry out investigations in accordance with Article 2 and not to thwart attempts by families and their representatives who are acting on their own initiative to learn the truth about the deaths of their next of kin.

It is difficult not to conclude that this whole episode was indicative of concern by senior officials that there was access to legacy information that they could not readily veto. Arguably there was perceived to be a 'gap' in the increasingly complicated structure of limitations and 'national security' exemptions to accountability that allow the state to thwart due scrutiny of conflict related deaths in which they may be implicated. In this instance family representatives had been seeking the papers from May 2012, and had faced significant delays. This was just three months after the same representatives had published a damning report into the 1992 sectarian UDA attack on Ormeau Road Bookmakers shop in which 12 people were shot and five, including a child, died.[515] The report cited materials obtained from the Public Records Office, by way of a trial deposition of two individuals convicted of possessing a Browning weapon used in the shooting. This contained a firearms report indicating that the weapon was in good working order, which contradicted the RUC position to the Stevens and Cory inquiries that they had rendered the weapon inoperable before giving it back to an agent within the UDA. The public record thus provided evidence that RUC Special Branch had supplied the weapon then used in the atrocity.[516] CAJ understands that since the legal challenge of 2013 the Department of Culture, Arts and Leisure has subsequently put into place a draft Protocol setting out the process to be adhered to by PRONI and the NIO/DoJ in responding to requests for access to conflict-related inquests and court records. However, the NIO have argued this protocol has not been 'agreed' by them and therefore it does not regard there as being an 'agreed' protocol in place in relation to access such information.[517]

[512] Davenport, Mark 'Release of Troubles' killings documents sparks legal row' *BBC News Online*, 12 August 2013.

[513] 'A late-night injunction on decades-old murder papers: why are the PSNI and NIO keeping them under wraps?' *The Detail* 11 August 2013.

[514] NI Secretary Theresa Villiers withdraws Troubles documents case *BBC News Online* 13 September 2013.

[515] Sean Graham Bookmakers Atrocity, Relatives for Justice, February 2012.

[516] Summary Briefing for UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Niall Murphy, KRW LAW LLP Belfast, 6 June 2014.

[517] Correspondence to KRW Law, by PRONI 22 August 2014 and NIO 10 September 2014.

There are also other reasons why the state may wish to tighten its grip over its archives, in that given the passage of time papers are now being released, under standard rules, challenge the official narrative of the conflict.[518] Such documents and assessments of them add to the questions as to whether disclosure to inquests and other legacy investigations is being delayed in the context of information within files compromising the official narrative of the conflict.

McCaughey & Grew and Jordan Inquests 2012

Two high profile legacy inquests did take place in 2012, those of Martin McCaughey & Dessie Grew (which had taken 22 years to be held) and Pearce Jordan (which had taken 20 years). However the experience of these two inquests, both relating to 'shoot to kill' incidents identified some of the deficiencies in our coronial system as it presently stands. Whilst there was limited other media coverage comprehensive reports were provided by *the Detail*. In relation to McCaughey and Grew one issue is the failure of a number of SAS soldiers involved in the incident to attend the inquest, in which the jury ultimately and controversially held the shootings were 'reasonable force'.[519] In Jordan the jury, whose verdict unlike England and Wales must be unanimous, could not reach a verdict on the key issues surrounding the death. *The Detail* reported that "while the jurors' deliberations in both cases are unknown – as is a strictly-guarded convention – debate has now opened up behind the scenes as to whether juries in Northern Ireland can be impartial in such contentious cases." They went on to state:

> *The Detail* can reveal that the issue of potential bias has arisen in the only two `shoot-to-kill' inquests to have taken place since security force members were compelled to give evidence in court.
>
> In the first instance in March a juror taking part in the inquest into the SAS shooting of PIRA men Dessie Grew and Martin McCaughey was alleged to have been asleep or not paying attention to evidence on five different occasions during the inquest. It was further alleged in documents seen by The Detail that the same juror had shown hostility towards legal counsel and the PIRA men's relatives and had spat at two family members outside the court.

[518] Contrast for example the official position on the UDA, which remained a legal organisation until it was ultimately proscribed in 1992. It was long the practice of the UDA to claim murders and other activities under the name of the effectively non-existent 'Ulster Freedom Fighters' (UFF). This position was given official legitimacy by the proscribing of the UFF but not the UDA until 1992. However, by contrast an official secret 'guide' to loyalist paramilitary groups document recently uncovered in declassified archives by the Pat Finucane Centre describes the UDA as "the largest and best-organised of the loyalist para-military [sic] associations" and the UFF as "an essentially fictions organisation widely known to be a nom de guerre of the UDA". This document is dated 2 September 1976 and hence demonstrates from at least that time the authorities were clearly aware of the role of the UDA, yet chose to maintain its status as a lawful organisation. Other official documents also contradict the official line of distance from loyalist paramilitarism. One 1973 British Army intelligence document, released under the 30 year rule, entitled "Subversion in the UDR" (available at: http://cain.ulst.ac.uk/publicrecords/1973/subversion_in_the_udr.htm [accessed September 2014.]) sets out the official assessment that a 'significant proportion' of UDR soldiers, providing estimates of 5-15% will also be members of loyalist paramilitary organisations. It also sets out that at the time at least "the biggest single source of weapons (and the only significant source of modern weapons) for Protestant extremist groups has been the UDR." The official picture of the security forces treating loyalists in the same manner as republicans is somewhat challenged at least in the era for which documents have been released by, for example, the release of minutes of an official meeting on 19 December 1974 with representatives of the UVF, UDA and other loyalist paramilitary groups. The de Silva Review into the killing of Pat Finucane stated that MI5 in 1985 assessed that "85% of the UDA's 'intelligence' originated from sources within the security forces. I am satisfied that this proportion would have remained largely unchanged by February 1989, the time of Patrick Finucane's murder" (de Silva Review 2012, paragraph 49.)

[519] McCaffery, Barry 'Jury says SAS justified in shooting IRA man on ground' *The Detail*, 3 May 2012.

> The alleged incidents made up part of an appeal against the inquest verdict, with Mr McCaughey's legal team arguing: "The coroner's repeated failure to discharge a juror who paid inadequate attention to the evidence and exhibited hostility towards the next of kin amounted to a failure to ensure that the inquest was determined by an impartial and fair tribunal of fact and undermined the integrity of the jury's verdict."
>
> It can also be revealed for the first time that a complaint was made during the Jordan inquest after a member of the jury sent a note to the coroner criticising Mr MacDonald's questioning of a police witness. The note, read: "*Is an opinion necessary? I feel this inquest is very unfair. Do we really need to hear all this*?" The Jordan family's barrister asked the coroner to remove the juror concerned from the inquest claiming the note showed the juror was 'clearly vexed' and was incapable of assessing the evidence in the case dispassionately. Mr Macdonald said it was clear the juror's mind was already made up and he expressed concern that the juror had unduly influenced other members of the jury. While Mr Sherrard refused to dismiss the juror involved, he did issue a warning to the jury that they should only make up their minds after having heard all the evidence in the case. He said that any juror who did not feel they were able to act impartially should make themselves known to him so that they could be removed. No juror did so and the panel remained unchanged for the entirety of the inquest. [520]

In January 2014 the High Court in Belfast, in a judgment which served as a devastating incitement of the deficiencies in the inquest system, quashed the Jordan inquest verdict on a range of grounds.[521] This, it was reported, included:

- The non-disclosure of the Stalker/Sampson reports into other so-called 'shoot-to-kill' cases to the Jordan family
- A refusal to permit the family's lawyers to deploy these reports in cross-examination of key police witnesses who played key roles in Mr Jordan's shooting and other incidents in the Stalker/Sampson probes
- The decision to sit with a jury
- The refusal to discharge a juror who claimed the inquest was unfair
- The limited form of verdict returned by the inquest jury and the coroner's acceptance of it.[522]

In November 2014 the Court of Appeal upheld the High Court's decision to quash the verdict following appeals from the parties. The court also commented on deficiencies in the coronial system as regards legacy inquests, and suggested other models. The Lord Chief Justice in the ruling stated it was "abundantly clear that the present arrangements are not working" and stated that there were: "...models within this jurisdiction, such as the Historical Institutional Abuse Inquiry, which might provide the basis for an effective solution" whilst also emphasising that "The inquiry would need facilities for independent investigation and powers of compulsion in respect of witnesses and documents."

[520] McCaffery, Barry 'Hung jury in Jordan case raises new questions about juries in Troubles killing inquests' *The Detail* 29 October 2012.

[521] Jordan's Applications (13/002996/1), (13/002223/1) (13/037869/1) for Judicial Review [2014] NIQB 11, paragraph 50.

[522] Pearse Jordan inquest findings quashed in IRA death case *BBC News Online* 31 January 2014.

He also stated "Unless a solution is achieved we will continue to incur considerable public expense in legal challenges and claims for compensation such as those arising in this case.."[523]

Delayed disclosure and conflicts of interest

An issue which has constantly beset inquests is the difficulty caused by the police or other security agencies delaying or refusing the disclosure of documents or imposing unreasonable conditions. There is also the question, covered in the first chapter, of redactions to documents, including names of personnel, which may impact on the effectiveness of the inquest. When the names of personnel are redacted by the security forces it is generally on grounds that the disclosure of their names may place them at risk, although this assessment can be made even when the name has already been in the public domain, often through previous proceedings. It is worth noting that the Coroner may not be in a position to effectively challenge unnecessary redactions, given the impracticality of having to conduct what would be his or her own risk assessment as to whether there is actually a danger.

Another example of issues with disclosure occurred in the inquest in 2003 into the loyalist murder of 76 year old Roseann Mallon. In this case involving suspected collusion, a Coroner had to suspend the inquest after the PSNI and Ministry of Defence (MoD) had at first refused to provide full and unredacted information. The Coroner for East Tyrone and Magherafelt ruled in September 2003 that the material sought by him was relevant to the inquest, and that the PSNI and MoD should furnish it to him within 21 days. This ruling was complied with but the coroner was required to view the documentation at a PSNI station. Then, when he was leaving the police station, he was advised that he could not take his notes with him. As a result of this treatment, the coroner stated in open court that he was unable to rely on any information disclosed by his examination of the papers in the conduct of the inquest. A reopened Mallon inquest in 2013 has still been affected by problems of disclosure and cooperation, with the Judge accusing the PSNI of only 'drip feeding' information and procrastinating. There was also controversy over the destruction of evidence by the local head of RUC Special Branch at the time who, rather than leaving them in a secure police station, had taken police notebooks home and burned them. It was also reported that the Northern Ireland Retired Police Officers Association (NIRPOA), of which he was a member, had been giving former RUC officers advice on how to avoid giving evidence to inquests. He stated he was unaware of this.)[524]

PSNI Legacy Information Evenings

It has since become apparent that the PSNI from 2012 have been holding Legacy Information Seminars twice a year advising retired police officers on engagement with the legacy process. Freedom of information requests from the Pat Finucane Centre and CAJ revealed that the PSNI did hold 'information evenings for retired colleagues' which provide an opportunity to discuss the legacy inquest process. In response to a request for disclosure of information held in relation to the meetings the PSNI replied no recorded documents at all existed, due to the 'unstructured' and 'informal' nature of the meetings.[525]

[523] Jordan's Applications 13/002996/1; 13/002223/1; 13/037869/1 [2014] NICA 76 Courts Service 'Court of Appeal suggests approach to deal with legacy cases' Summary of Judgment 17 November 2014.

[524] Roseann Mallon murder: MoD files on slain pensioner still not handed to inquest *Belfast Telegraph* 13 November 2013; Roseann Mallon murder: Judge hits out over hindering of inquest *Belfast Telegraph* 29 November 2013; Roseann Mallon murder: Top Special Branch officer burned notebooks after pensioner murdered by loyalists *Belfast Telegraph* 21 November 2013.

[525] PSNI Freedom of Information request reference F-2013-04772, F-2014-01277 and F-2013-05780.

The PSNI had reportedly maintained that there was 'no fixed agenda' at the meetings, and had also downplayed the role of the NIRPOA at the seminars.[526]

However, following media coverage of the issue and an FoI appeal by CAJ, the PSNI reviewed their position and established that the original FoI request had been incorrectly interpreted. Fifteen pages of information were then released to CAJ. Whilst there were no handouts or minutes these documents did include the formal Agendas to the meetings, which were entitled "Briefing to Northern [Ireland] Retired Police Officers Association". The events were a high level affair as among the speakers at the seminar were the Deputy Chief Constable (DCC) and Assistant Chief Constables (ACC), and an agenda indicates they then took "Questions from the floor from NIRPOA". [527] The *Irish News*, in the context of NIRPOA not cooperating with the Police Ombudsman over some legacy investigations, further noted "A spokesman for the PSNI refused to reveal if matters relating to the Police Ombudsman have been discussed at the 'legacy information' events. He also refused to explain why police will not answer the question."[528]

CAJ at the time called for the PSNI to explain just what is being advised at the meetings, given as the obfuscatory approach to requests for information had only heightened concerns in relation to their role. In June 2014 Mr Justice Weir made a similar request for clarification to ascertain whether retired officers had been prompted on what to say prior to appearing as witnesses in inquests. He queried the lack of existence of records reportedly stating:

> If you are going to conduct a seminar you will have some sort of speaking note - people don't just turn up for a chat...Have you been given a script - the 'Ladies and gentlemen, thank you for coming, what I'm now about to do is tell you what to say when you appear at a legacy inquest'.[529]

Mr Justice Weir consequently sought from PSNI representatives signed statements from those involved in the seminars and any speaking notes that were used. Further revelations then emerged in the Coroners Court in November 2014, including that an official PSNI note did in fact exist in relation to the Legacy Information Evenings. In cross examination of PSNI Deputy Chief Constable Drew Harris, counsel for the Coroner challenged the DCC on his earlier assertion that the purpose of the seminars had been to identify witnesses for inquests. Counsel put to the DCC that no witnesses had in fact been identified through the seminars. The DCC responded that he thought one individual had. Among the most significant matters which emerged were the positions recorded in the official notes as having been articulated by senior PSNI at the seminars. The court heard that notes set out that:

- The former DCC Judith Gillespie had told retired officers that "our interests are similar" and that "the PSNI is determined to play our part in the defence of the RUC"
- The then ACC Drew Harris stated that "We don't disassociate ourselves from what happened in the past. I have great pride in my RUC service"

[526] Young, Connla 'Police documents confirm briefing seminars took place' *Irish News* 3 June 2014.

[527] F-2014-01277 and PSNI correspondence to CAJ 30th May 2014.

[528] Young, Connla 'Police documents confirm briefing seminars took place' *Irish News* 3 June 2014.

[529] Young, Connla 'Judge demands to know why senior police meet retired officers about Troubles inquests' *Irish News* 21 June 2014.

- The PSNI Senior Legal Advisor then articulated that "The bedrock of what we are trying to do is protect our people. To protect the reputation of the organisation and to protect peoples security."[530]

In cross examination the DCC did not deny making or hearing the above remarks but did state he had 'no recollection' of the form of words used. It would appear to be a generous interpretation to suggest that such remarks were designed to speak the language of former officers to encourage participation in inquests, which was conceded as a legal obligation. The victims NGO RFJ have regarded the quotes as indicating that "the purpose of the meetings was to reassure former officers that the PSNI would defend the legacy of the RUC and put its activities in the best possible light through the inquest process."[531] This sits very uncomfortably with the PSNI's obligations role both to diligently facilitate complete disclosure to the Coroner, to ensure its personnel fully cooperate with inquests, and that former officers are not discouraged from doing so. DCC Harris clarified that the seminars also related to retired officers and other inquires beyond inquests, including those by the Police Ombudsman. The DCC was pressed on the implications of what had been stated at the meeting:

> Counsel for the Coroner: "...you and the other officers who were present at these meetings assured these officers that the PSNI was on their side and that you would do what you could to protect them; is that right?"
>
> DCC "Well, we assured them that we as an organisation would assist them in the inquest process, I think. I'm not sure that the impression would be on their side, but certainly we weren't shirking our responsibilities in respect of retired officers and their actions within the Royal Ulster Constabulary."
>
> Counsel: "Were you not effectively saying that you were on their side and that you would be protecting them? "
>
> DCC: "...I think that is not an accurate reflection in terms of protection or on their side. What we were doing was exercising (1) to reach out to them, to encourage individuals to come forward and (2) setting out how we would support those who were required to give evidence."
>
> Counsel: It was more than that, wasn't it, Deputy Chief Constable, because you were saying in terms that you had great pride in your RUC service and you don't disassociate yourselves from what happened in the past, which all meant that you were standing over what had been done by the RUC in the past; isn't that right?
>
> . DCC: Well, I qualify that again. When I say I have great pride in my RUC service, I have great pride [in] my RUC service.
>
> Counsel: "But you can see that what the senior legal advisor is stressing there is that the bedrock of what they are doing, that is the central function as far as they were concerned, was to protect 'our people' and that's a reference to not just the PSNI but the RUC, isn't it?
>
> DCC: Well, yes, in the room at that time, yes, that would have been correct.
>
> Counsel: And to protect the reputation of the organisation, that's the PSNI and the RUC as a police service?

[530] Ritchie, Mike 'Drew Harris shows RUC Special Branch Legacy safe in his hands' *Relatives for Justice Blog* 25 November 2014. See also Murphy, Niall KRW Law LLP 'Transitional Justice in the Contaxt of European Convention Obligations: Article 2 and the Package of Measures. Inquests as an Article 2 Mechanism'. Presentation to University of Ulster, Transitional Justice Institute conference 6 November 2014. Ulster Hall Belfast, published 25 November 2014, p15.

[531] Ritchie, Mike 'Drew Harris shows RUC Special Branch Legacy safe in his hands' *Relatives for Justice Blog* 25 November 2014.

> DCC: Well, again that's what the note says and I'm being asked to comment on a note of words that I did not use and I find it difficult to provide an analysis or commentary on expressions that I didn't use, sir.[532]

During cross examination DCC Harris still sought to downplay the role of NIRPOA in the seminars indicating they were for all retired officers, despite it being pointed out that the title of the meeting 'Briefing to Northern Ireland Retired Police Officers Association' tended to suggest that it was a briefing to the Northern Ireland Retired Police Officers Association. Whilst indicating that he was unaware of NIRPOA position on inquests expressed to Haass, the DCC did confirm that members of the PSNI Legacy Support Unit, were members of NIRPOA. The potential conflict of interest between past and present roles was also discussed in the context of personnel who were involved in sourcing, redacting and providing material to the coroner:

> Counsel: Its former Special Branch Officers are at the heart of that process, isn't that right?
>
> DCC: Well, yes, that's correct, they are former Special Branch Officers.
>
> Counsel: Even though they don't need to be Special Branch Officers or former Special Branch Officers or have any understanding of RUC Intelligence Systems, isn't that right? [...].As we know from their recent adverts?
>
> DCC: Well, but in practice their experience has been invaluable, it is just that we cannot advertise for that particular experience going forward. [...]
>
> Counsel: Would it be fair to say the purpose of having Special Branch involvement in this Support Unit was to delay the process of disclosure, and ensure that basically former Special Branch Officers got the best protection available?
>
> DCC: No, I absolutely refute that. Throughout, our endeavours have been to assist the Coroner in dealing with what is a huge amount of documentation and very sensitive documentation, and also then deal with the very heavy and onerous responsibilities that are placed on the Police Service in dealing with such a huge exercise of disclosure of very sensitive material. [...]
>
> Counsel: Well Detective Chief Constable who could do a better job of protecting the Special Branch Officers responsible for the shootings that are the subject of this Inquest than the Special Branch Officers who served with them?
>
> DCC: Well I entirely refute the premise on which that question is based. There is no endeavour whatsoever to protect individuals from this process.[533]

The above exchange referred specifically to proceedings collectively known as the 'Stalker Sampson' series of inquests. It highlighted erosion the independence of the inquest system by the process of disclosure provided by the PSNI as well as the issue of conflicts of interests. The above concerns about the appointment of former RUC Special Branch and other RUC personnel into positions whereby they control the disclosure of police-held information despite having potential conflicts of interest with their former roles had been raised before.[534] The issue has been the subject of consideration by the Northern Ireland Policing Board's Performance Committee.[535]

---

[532] Murphy, Niall 'Summary of key exchanges at the Preliminary Hearing of the Stalker Sampson' Inquest of 24 November 2014 Briefing Note for NGOs.

[533] Stalker-Sampson, Preliminary Hearing at Belfast Coroner's Court, 24 November 2014.

[534] McCaffery, Barry 'Coroner told former Special Branch officers in charge of redacting `shoot to kill' files' *The Detail,*19 October 2012.

[535] See Board Members Questions to Chief Constable – July 2013, p3; and statement of Chair Jonathon Craig MLA 15 January 2015.

Despite the Article 2 requirement of practical and hierarchical independence CAJ was concerned to note that personnel working in PSNI's Legacy Support Unit were former members of Special Branch or RUC intelligence and have served directly with 92 serving and former police officers who could potentially be called as witnesses at the 'Stalker Sampson' inquests.[536]

Further rulings in the domestic and European courts

In 2013 the inquest system received a further indictment from the European Court of Human Rights in two damning judgments in the cases of *McCaughey & Ors v. UK*[537] and *Hemsworth v. UK*[538] which found the excessive investigative delays in the coronial system to be in violation of Article 2 ECHR. The Court has directed:

> ...that the Government take, as a matter of some priority, all necessary and appropriate measures to ensure, the present case and in similar cases concerning killing by the security forces in Northern Ireland where inquests are pending, that the procedural requirements of Article 2 are complied with expeditiously.'[539]

Judge Kalaydjieva in her concurring opinion in *McCaughey & Ors v. UK* reflected on the length of time the UK had had to remedy defects, indentified by the court a decade earlier:

> I am far from convinced that it was open to the respondent Government to reply on the deficiency or 'complexity' of the existing domestic procedure, which seem to have been known to the authorities for some years after the first judgments of this Court in similar cases against the United Kingdom...The fact remains that the respondent Government failed to demonstrate that it had taken any, still less 'all reasonable steps' to investigate with a view to establishing the facts of their own motion.[540]
>
> There is nothing to explain, still less to justify, the failure of the domestic authorities to meet their obligations through more appropriate and expeditious means of their own choice, including by introducing appropriate legislative changes in choosing 'as a matter of some priority' any other 'specific modalities'.[541]

Notably the 2009 following comments of the Northern Ireland Court of Appeal in *Hugh Jordan v. the Senior Coroner* were cited in these two judgments and have not been acted upon:

> The current state of coronial law is extremely unsatisfactory. It is developing by means of piecemeal and incremental case. It is marked by an absence of clearly drafted and easily enforceable procedural rules. Its complexity, confusion and inadequacies make the function of a coroner extremely difficult and is called on to apply case law which does not always speak with one voice or consistently.
>
> It is not apparent that entirely satisfactory arrangements exist to enable the PSNI to dispassionately perform its functions of assisting the coroner when it has its own interests to further and protect.

[536] Board Members Questions to Chief Constable – July 2013, p3.

[537] *McCaughey & Ors v. UK* (Application no. 43098/09), Judgment of 16 July 2013 [2013] ECHR 682.

[538] *Hemsworth v UK* (Application no. 58559/09), Judgment of 16 July 2013 [2013] ECHR 683.

[539] *McCaughey & Ors v. UK,* p32.

[540] *McCaughey & Ors v. UK*, p35.

[541] *McCaughey & Ors v. UK*, p36.

> If nothing else, it is clear from this matter that Northern Ireland coronial law and practice requires a focused and clear review to ensure the avoidance of the procedural difficulties that have arisen in this inquest.[542]

The comments of Judge Kalaydjieva, in *Hemsworth v. UK* which were echoed in *McCaughey & Ors v. UK* also apply to the large number of historic cases which the UK has failed to expeditiously investigate. She concluded:

> …the period of demonstrated, if not deliberate, systematic refusals and failures to undertake timely and adequate investigation and to take all necessary steps to investigate arguable allegations under Article 2 and 3 seem as a matter of principle to make it possible for at least some agents of the state to benefit from virtual impunity as a result of the passage of time.[543]

In late March 2014 the Department of Justice introduced a 'Legal Aid and Coroner's Courts Bill' to the Northern Ireland Assembly. This Bill proposes the designation of the Lord Chief Justice of Northern Ireland as the President of the Coroners' Courts to improve judicial case management. Remarkably in the context the Bill does not seek to deal with many of the above limitations surrounding legacy inquests that require redress. The Department of Justice did 'not consider it necessary to consult publicly' on this part of the Bill as the role was 'technical and specialist' in nature.[544]

In May 2014 the High Court in Belfast found that the delays in six inquest cases had been so protracted they were unlawful as a breach of convention rights. The applications were awarded compensation of £7,500 each.[545]

The December 2014 the Stormont House Agreement committed the Northern Ireland Executive to "take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements."[546] It remains to be seen whether and when this commitment will be taken forward.

[542] Paragraph 4, [2009] NICA 64.

[543] *Hemsworth v. UK*, p25.

[544] Explanatory Notes to Bill as introduced, paragraph 14.

[545] Jordan's and five other Applications [2014] NIQB 71.

[546] Stormont House Agreement, paragraph 31.

CHAPTER EIGHT:
Prosecutorial Decisions

The Secretary of State would return to London immediately to make a statement to the House of Commons in which he would... announce the Government's intention to carry on the war against the IRA with the upmost vigour. The Army should not be inhibited in its campaign by the threat of court proceedings.

Conclusions of a Morning Meeting held at Stormont Castle on 10 July 1972 chaired by Secretary of State, Rt Hon William Whitelaw MP

On November 15, 1971 the Chief Crown Solicitor passed the matter to the Attorney General for his observations. As a result of what the Attorney General said, the Chief Crown Solicitor responded to the Chief Constable on December 23, 1971 in the following terms: 1. If soldier A was guilty of any crime in this case, it would be manslaughter and not murder. Soldier A whether he acted wrongly or not, was at all times acting in the course of his duty and I cannot see how the malice, express or implied, necessary to constitute murder could be applied to his conduct.

Chief Crown Solicitor Correspondence to Chief Constable December 1971 cited in published HET summary report into the death of William McGreanery

The prosecutorial function is a key element of the criminal justice system. Regardless of the quality of an investigation decisions not to prosecute certain classes of person, where there is evidence of law breaking, can put persons above the law and afford impunity for human rights abuses. Conflict-era decision making on prosecutions of members of the security forces and in cases where informants may be implicated in cases has been particularly controversial.

This chapter covers those controversies before examining the outworking of changes to the prosecutorial system prompted by European Court of Human Rights rulings on the lack of reasons given for decision not to prosecute. It then turns to discussion over the 'public interest' limb of prosecutorial decisions in the context of 'On The Runs' and concludes by noting that there is presently no independent mechanism to review past prosecutorial decisions.

Prosecutorial Decisions during the Conflict

This section examines issues relating to conflict era prosecutorial decisions in relation to cases involving soldiers and informants.

The armed forces and prosecutorial decisions

Evidence that de facto impunity was afforded for British army actions is contained in official declassified documents. One 1972 meeting hosted by the Secretary of State in Stormont Castle with police and army chiefs concludes among other matters that the Government would announce their "intention to carry on the war with the IRA with the upmost vigour" and consequently "The Army should not be inhibited in its campaign by the threat of court proceedings and therefore should be suitably indemnified"[547]

A report of a meeting between army chiefs and the Attorney General reveals that the Attorney General had assured the army that:

> [the Attorney General] himself carefully reviews every serious allegation against a soldier and that the final decision whether to prosecute in such a case is made by him.... He assured me in plainest terms that not only he himself but also the [Director of Public Prosecutions] and senior members of his staff, having been army officers themselves... were by no means unsympathetic or lacking in understanding in their in their approach to soldier prosecutions in Northern Ireland. Rather the reverse, since directions not to prosecute have been given in more than a few cases where the evidence, to say the least, had been borderline.[548]

The correspondence gives further reassurance from the Attorney General that less than 10% of all case files submitted to the DPP of army shootings and assaults led to prosecutions. Assurances are also recorded that the Attorney General will always seek the army's views on the 'public interest' before a prosecutorial decision is made. This correspondence was followed by a secret agreement whereby, among other matters, army chiefs could make representations to the Attorney General that a prosecution of a soldier was 'not in the public interest'. On the back of these arrangements the Attorney General gave assurances that the criminal trial of a soldier for actions on duty remained an 'unlikely circumstance' which itself might require ministerial intervention.[549]

Despite such reassurances the head of the army nevertheless subsequently wrote to the Attorney General to lobby for 20 soldiers against whom who the DPP had directed prosecutions for crimes including 'fatal shootings', not to be prosecuted. The commanding officer argued that it was not in the 'public interest' for them to face trial, because the Army was "in effect conducting a war" and therefore "the strictly technical and normal approach to prosecutions – namely that the evidence indicates a *prime facie* case – is not meeting the requirements of public interest". He went on to warn that successful prosecutions of soldiers in the civilian courts would cause the Army to review its whole Northern Ireland operation.[550]

---

[547] Conclusions of a Morning Meeting held at Stormont Castle on 10 July 1972, chaired by William Whitelaw MP, Secretary of State for Northern Ireland.

[548] Correspondence, 17 January 1974 from Lieutenant General Sir Frank King to General Sir Cecil Blacker.

[549] 'Prosecutions of Soldiers in Northern Ireland' Attorney General document 24 January 1974 reference LM to 154 (AG Sec).

[550] Correspondence, 3 April 1974 from Lieutenant General Sir Frank King to Attorney General SC Silkin QC.

Recently declassified documents from 1985 reveal that senior civil servants did consider, but not take forward, bringing in a new 'killing' offence less serious than murder for members of the security forces. This proposal had the support of the then DPP but officials considered that it would draw a mixed reaction from the General Officer Commanding of the Army and Chief Constable of the RUC, "since the effect of the change could be on the one hand to ensure that those at risk were convicted of a lesser offence, but on the other that more of them were charged and convicted."[551]

The current Office of the Attorney General for Northern Ireland is independent from Government and does not have the power to direct prosecutorial decisions. Prior to this, under both the Stormont Parliament and direct rule the Attorney General was a Government minister, with power over prosecutorial decisions. Under the 'Shawcross' convention the Attorney General was also to consult relevant cabinet colleagues in relation to prosecutions to be aware of relevant facts which may have bearing upon 'public morale and order' in relation to prosecutions.[552] One high profile case subject to the 'Shawcross' exercise was the prosecution of British Army operative Brian Nelson, where evidence has emerged of (often misleading) representations by Defence and Northern Ireland ministers, along with the head of MI5, against a prosecution. The Ministry of Defence made clear its priority was to protect the 'Army's reputation over the administration of justice in this case'.[553] Whilst ultimately a prosecution did take place in 1991 the DPP decided not to proceed with some charges against Nelson, notably the offence connected to the murder of Pat Finucane.

Informants and Prosecutorial Decisions

As controversial as decisions over soldiers and police officers have been decisions not to prosecute when it is suspected an informant is implicated in a killing or other serious crime, or when prosecutions are aborted to protect the identity of informants.

It has become apparent that the *modus operandi* of running paramilitary informants during the conflict included setting aside Home Office guidelines restricting agent involvement in criminality. As a result informants were involved or otherwise implicated in serious crimes including killings. Declassified Records of a high level RUC–NIO meeting in March 1987 confirm the approach involved:

> Placing/using informants in the middle ranks of terrorist groups. This meant they would have to become involved in terrorist activity and operate with a degree of immunity from prosecution.[554]

The system also involved holding back information from the judicial processes to protect informants. The record concedes that all this was 'technically' in breach of guidelines. The RUC therefore advocated for more 'realistic guidelines'. This 1987 RUC request, which in effect would have reduced to writing the policy of running agents outside the law, was met with a 'not overly enthusiastic' response by the NIO. The then UK Attorney General, Patrick Mayhew, was concerned his "officials should not participate in the drawing up of guidelines which condone the commissioning of criminal offences."

[551] McBride, Sam 'Consideration was given to creating new offence of killing for security force members' *Belfast Newsletter*, 3 September 2014.

[552] For further information see de Silva Review, paragraph 24.97.

[553] De Silva Review, Chapter 24. paragraph 24.103.

[554] Declassified in the De Silva Review, paragraph 4.36.

In this correspondence from March 1988 the Attorney appeared content for prosecutors to use their 'discretion' not to prosecute informants for crimes they had committed but drew the line at putting in writing guidelines in which the authorities would have authorised offences being committed in advance.[555]

Further declassified RUC documents on 'the use of terrorist informers' in 1988 released to CAJ under freedom of information provides extracts from the 'McLachlan report', into the use of informers by RUC Special Branch. McLachlan describes RUC Special Branch informant handling and the concept of 'evidential' privilege as its most important issues. It discusses guidelines or principles for when paramilitary informants have to take part in (but not instigate) criminal activities either because it is the only way of obtaining important information or they might be 'disciplined' (i.e. injured or killed) for not doing so "then so long as [the informants] role was declared to the prosecutor and his activity was seen to be in the national or public interest, he would not be required to appear in court and his identity would be protected". [556] The document also records, in relation to the concept of 'evidential privilege' that McLachlan 'firmly rejects' the view of John Stalker, who had conducted the 'shoot-to-kill' inquiries into the RUC, that there must be full disclosure to the DPP and the Courts. Rather McLachlan advocates that it would serve the public interest more if the judiciary would accept an interpretation of 'evidential privilege' that would afford the maintenance of confidentiality between police and prosecutors on matters which need to be kept secret – including the existence of any informant.

There are numerous examples of cases where the alleged involvement of informants has impacted on prosecutorial decisions. One more recent example was the aborted prosecution of a politics graduate who had spend 17 months in custody charged in relation to a series of firebombings in 2006. He was refused High Court bail on strong opposition from the PSNI and Public Prosecution Service (PPS), usually an indicator there was a strong case against him. However on the day of the trial he was acquitted, on direction of the judge, following the last minute decision of the PPS not to offer any evidence against him. The PPS also declined to publicly give any reasons for this decision. It had followed a defence claim that he had been set up by a security service informant, acting as an *agent provocateur*. According to UTV news the Judge stated that the information on which the decision was based, which it reports was apparently contained in a PPS letter, had to remain 'cloaked in confidentiality.'[557]

In evidence to a Westminster Committee examining the 'On The Runs' (OTR) administrative scheme an official in the (London) Attorney General's Office confirmed that it had not been unusual for trials to be stopped to protect the identity of an informant:

> If, for instance, in a trial it suddenly becomes clear that there was an informant and to continue with the trial would mean that the identity of that informant becomes public knowledge and that therefore the informant may be at risk of death or serious injury, then the prosecutor has to balance the public interest in stopping the trial against someone who may have committed very serious criminal offences, or continuing the trial and taking the risk that the informant is identified and killed—not that unusual, unfortunately, in Northern Ireland at certain times.[558]

[555] de Silva Review.

[556] Guidelines on the Use of Terrorist Informers RUC Submission Ref WJAI/5315/BN24 February 1988, paragraphs 9, 13, 1-15.

[557] See CAJ 'The Policing You Don't See', p70-71.

[558] Northern Ireland Affairs Committee, Oral evidence: Administrative scheme for 'on-the-runs', HC 1194, Wednesday 30 April 2014, Kevin McGinty, Director of Criminal Law and Deputy Head, Attorney General's Office, Q524.

Examining the test for prosecution

The following section examines issues in relation to the test for prosecution. Firstly, the criticism by the European Court of Human Rights of the system in Northern Ireland in relation to conflict deaths at the hands of the state. Secondly, the discussion of the public interest element of the test at the time of the OTRs scheme. Finally an examination of the mechanisms which have tried to examine past prosecutorial decisions.

Prosecutions and the European Court of Human Rights Judgments

Where cases concerning the actions of the security forces in Northern Ireland have reached the European Court of Human Rights, the Court have been critical of prosecutors. In one typical case concerning collusion, in which CAJ acted as solicitors, the Court did conclude that the DPP was institutionally independent but went on to state:

> However, where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making. It appears that the DPP considered the report on the investigation conducted by the RUC into the allegations made in the unofficial inquiry as to police collusion and decided, without further explanation, that no action was necessary. Where no reasons are given in a controversial incident involving a killing, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision. In this case, Patrick Shanaghan was shot and killed after photographs identifying him fell off the back of an army lorry. It is a situation which, to borrow the words of the domestic courts, cries out for an explanation. The applicant was however not informed of why the incident was regarded as not disclosing any problems of collusion. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected. This cannot be regarded as compatible with the requirements of Article 2, unless that information was forthcoming in some other way. This however is not the case.[559]

Among the 'general measures' required by the Court to implement the verdicts was to remedy:

> *The lack of public scrutiny of and information to victims' families on reasons for decisions of the Director of Public Prosecutions not to bring any prosecution.*

Scrutiny of this measure was closed in 2007 following the adoption of a Code for Prosecutors, which set out a policy on the giving of reasons for non-prosecution and the potential for Judicial Review of decisions not to prosecute.[560] CAJ did express scepticism however that the changes would provide effective remedies in practice. In 2006 we drew attention to potential disparities in prosecution rates between files submitted by the PSNI and Police Ombudsman.[561] We also raised concerns about the limitations of the policy of giving of reasons which was one of 'when asked and in the most general terms'.[562] Also noted was the apparent limitation on the power to

[559] *Shanaghan v United Kingdom* (Application no. 37715/97, 4th August 2001), paragraphs 107-108.

[560] Committee of Ministers Interim Resolution CM/ResDH(2007)73.

[561] In 2006 our submission included statistics which were supplied to us by the PPS in response to a Freedom of Information request dated 16 December 2005. These statistics report that in 2005 the PSNI submitted over 20,000 cases to the PPS, and 13,110 people were prosecuted; whereas in the same year, OPONI submitted 114 files to the PPS and only 2 people were prosecuted. Whilst noting this disparity may have many explanations, not all of them by any means reflecting badly on any of the institutions involved, CAJ noted there is clearly a very sharp disparity.

[562] CAJ commentary on the Revised Code of Prosecutors, May 2005.

judicially review prosecutorial decisions in that the high threshold of irrationality would have to be met. This followed a decision by the Northern Ireland Court of Appeal in a case concerning a DPP decision not to prosecute police officers for alleged perjury relating to a disputed confession, despite a recommendation from the Police Ombudsman for the DPP to do so. The Court held the DPP "is entitled to refuse a request that he give reasons for not prosecuting unless he is satisfied that the case comes within an exceptional category."[563]

CAJ did express concerns that if a case concerning the false imprisonment and detention of someone on the basis of allegedly perjured police statements did not constitute an exceptional case, a further high threshold was being set. CAJ also noted that whilst it had been accepted that a reasonable expectation might arise that reasons would be given in cases where a death was, or may have been, occasioned by agents of the state, this could be countered by 'compelling grounds for not giving reasons'. We questioned the extent to which 'national security' considerations could close off a review into conflict related deaths. There therefore remains no effective independent mechanism to review conflict related prosecutorial decisions. A review can be requested from the PPS itself into the decisions of its own predecessor bodies.

Prosecutions and the OTRs inquiries

The attention paid to the specifics of the 'On The Runs' (OTR) administrative scheme following the *Downey* judgment, the subsequent Hallett Review Report and inquiry at Westminster, provide an opportunity to examine how the test for prosecution operated in those cases. The scheme involved the PSNI conducting a review and the DPP and Attorney General determining whether arrest or prosecution was justified.[564] The Hallett Review further elaborates and concludes:

> The role of the DPP(NI) and the Attorney General was to apply the two-stage test for prosecution (the evidential test of 'reasonable prospect of conviction' and the public interest test). Successive Attorneys General expressed their firm resolve to act independently of government and not to compromise their prosecutorial discretion for political reasons. They were, however, prepared in one case to receive representations from ministerial colleagues in accordance with the 'Shawcross doctrine' on the public interest aspect...[565]

There are a number of OTR interfaces with the role of the Attorney General. The Hallett Review sets out that there was a request in 1999 from the then Secretary of State for NI (Mo Mowlam) to the UK Attorney General to reconsider the case of 'one high-profile individual'

[563] In the matter of an application by John Boyle for Judicial Review of the decision of the Director of Public Prosecutions [2006] NICA 16. See also In the Matter of an Application by Marie Louise Thompson for Judicial Review [2004] NIQB 62. In the Matter of an Application By Julie Doherty for Leave to Apply for Judicial Review and in the Matter of a Continuing Decision by the Director of Public Prosecutions [2004] NIQB 78. Where applications for a JRs relating to decisions not to prosecute soldiers were declined on grounds of the passage of time.

[564] The Hallett Review sets out that the administrative scheme, which it concludes was 'allowed to evolve and operate without any proper structure or policy', involved the submission of names to the UK Government largely by Sinn Féin, and to a lesser extent by the Irish government and the Northern Ireland Prison Service (the latter in relation to prison escapees) and then: In general, the NIO would forward the names, via the [UK] Attorney General's Office and the Public Prosecution Service (PPS) for Northern Ireland, to the PSNI. A dedicated PSNI team conducted a review and submitted a report to the DPP(NI). The DPP(NI) and Attorney General then determined whether arrest/prosecution was justified. If the Police/prosecutorial review concluded that an individual was 'not wanted', the NIO wrote to Sinn Féin enclosing a letter for onward transmission to the individual. If the review concluded that the individual was 'wanted', the NIO informed Sinn Féin, but no letter was sent to the individual. On occasion, a composite letter was sent to Sinn Féin setting out a list of individuals and giving their status. (Hallett Review Report, paragraph 2.21).

[565] Hallett Review Report, paragraph 2.18.

asking for a reconsideration of the case 'taking into account the positive effect that an undertaking not to prosecute would have on the Northern Ireland peace negotiations.' The Attorney General agreed to reconsider the case and took input from Ministers in a Shawcross exercise, ultimately deciding not to change the position and not to give an undertaking the individual in question would not be subject to prosecution.[566] According to a lead civil servant in the Attorney General's Office, in light of the evidential test being met, this decision was made on the basis of the Attorney General and DPP reaching the view that the apparent benefit to the peace process did not mean that it was not in the 'public interest' to prosecute.[567] In effect the 'public interest test' was not going to be the vehicle to provide for an overarching stay in prosecutions for OTRs. Most OTR review decisions, in the absence of the subsequently introduced and aborted legislation, were going to be made on the evidential and not public interest test.

The exception to this were those OTRs who had escaped from prison (and may have committed offences during the escape), where it was considered that it was in the public interest not to prosecute. The current DPP, Barra McGrory has set out that in relation to this:

> ...Sir Alasdair [Fraser], as [then NI] Director of Public Prosecutions, was subject to the superintendence and direction of the Attorney-General of England and Wales, to whom the powers of the Attorney-General for Northern Ireland had been transferred when Stormont had been prorogued. The Attorney-General was the person who had initiated this discussion.
>
> Sir Alasdair, as I have put on the record, had expressed his grave reservations and had suggested that if there was any examination of these individuals it should be done on a case-by-case basis, and the evidential test should apply. However, in the context of the escapees there was a discussion about the public interest and Sir Alasdair sought advice from the Attorney-General. The conclusion was, as a consequence of that dialogue, that the public interest would apply in not prosecuting those individuals who had escaped for that particular offence.
>
> In the context of considering the public interest, a range of factors was considered, including the fact that there was a political element to this, in terms of the political negotiations; but it was concluded that that alone would not be sufficient to exercise the public interest in favour of not prosecuting. There were broader considerations, and when an Attorney-General of a sovereign state is engaged in the public interest exercise in the United Kingdom state he undertakes what you call a Shawcross exercise, which is named after an Attorney-General in 1951, which takes into account the broader interests of the state across Departments, so that the prosecuting authority does not take decisions blindly. It takes them with a broad overview. That exercise was engaged in by the Attorney-General of the day, who was John Morris, and the conclusion was that the public interest would be applied only in respect of those cases.[568]

Thus a decision was taken involving the UK Attorney General and cabinet colleagues as to what would constitute the public interest test in the case of OTRs. A curious feature of the PSNI involvement in the scheme also occurs during a period when processing OTR cases was expedited under the police's 'Operation Rapid' which in 2007-8 processed a significantly larger number of applications. Here the test applied by the PSNI as to whether a person was

[566] Hallett Review Report, paragraph 4.2-4.

[567] Northern Ireland Affairs Committee, Oral evidence: Administrative scheme for 'on-the-runs', HC 1194, Wednesday 30 April 2014, Kevin McGinty, Director of Criminal Law and Deputy Head, Attorney General's Office, Q523.

[568] Oral evidence NI Affairs Committee, Barra McGrory: Administrative scheme for 'on-the-runs', HC 177 Morning Session, Tuesday 10 June 2014, Q1297-8.

wanted for questioning or arrest differed from the usual police test, centred around reasonable suspicion that an individual may have committed an offence, to a test more resembling the test for prosecution, whereby evidence would have to be assessed as withstanding a legal challenge in a judicial process.[569]

The UK Attorney General, Dominic Grieve, was involved in the decision to bring the prosecution against Downey himself through his superintendence role of the Crown Prosecution Service (CPS) in England and Wales, and particularly given as his consent was required for a charge under the Explosive Substances Act. Mr Grieve and the CPS regarded both the evidential and public interest tests as having been met for prosecution.[570] In *Downey* the prosecution was stayed as it was held not to be in the 'public interest' following a balancing exercise of competing considerations. Sweeney J held:

> Given the core facts as I have found them to be, and the wider undisputed facts, I have conducted the necessary evaluation of what has occurred in the light of the competing public interests involved. Clearly, and notwithstanding a degree of tempering in this case by the operation of the 1998 Act, the public interest in ensuring that those who are accused of serious crime should be tried is a very strong one (with the plight of the victims and their families firmly in mind). However, in the very particular circumstances of this case it seems to me that it is very significantly outweighed in the balancing exercise by the overlapping public interests in ensuring that executive misconduct does not undermine public confidence in the criminal justice system and bring it into disrepute, and the public interest in holding officials of the state to promises they have made in full understanding of what is involved in the bargain. Hence I have concluded that this is one of those rare cases in which, in the particular circumstances, it offends the court's sense of justice and propriety to be asked to try the defendant.[571]

It is also apparent in the OTR administrative scheme in general that there was some amendment to the evidential limb of the test. The usual test, that there be sufficient evidence to afford a reasonable prospect for conviction, was amended to whether there was now, *or ever could be*, sufficient evidence to meet the test for prosecution. The given reason for this was that if an individual returned and was ever arrested further evidence could be gathered that might change the evidential position. The letters then issued made clear therefore that the position was based on the evidence then available and could change. The Downey judgment sets out that the rationale for this was given as:

> It was to the forefront of the minds of the prosecutors that if an individual who had received such a letter returned to the jurisdiction and started commenting publicly through the authorship of books, articles or appearance on television that they had in fact been involved in terrorist activity (which was not as farfetched as it may seem) public confidence in the criminal justice system would require the authorities to be able to act. It followed that the letter sent could never amount to an amnesty of absolute and final promise not to prosecute.[572]

The OTR system, as well as highlighting the role of the Attorney General and further application of the Shawcross doctrine, therefore produced an additional system of review of prosecutorial decisions in these limited cases. As well as some amendment to the evidential test it also had implications for considerations within the public interest test.

[569] Hallett Review Report, paragraph 5.25.

[570] Northern Ireland Affairs Committee, Rt Hon Dominic Grieve QC MP**,** Oral evidence: Administrative scheme for "on-the-runs", HC 177 Wednesday 2 July 2014, Q1258 & Q1276.

[571] R -v - John Anthony Downey, paragraph 175.

[572] R -v - John Anthony Downey, paragraph 82.

The suggestion that decisions not to prosecute any OTRs would be in the public interest was rejected, although prosecutions against a more limited category of prison escapees were not instigated on this basis. The *Downey* abuse of process application also highlighted a complex application of competing 'public interest' principles, which on the facts of that case led to a stay of prosecution.

Scrutiny over past prosecutorial decisions

In its February 2012 response to a number of submissions to the Council of Europe Committee of Ministers by CAJ and others the UK Government effectively ruled that the (largely unwritten) remit of the HET did not extend to questioning past prosecutorial decisions. The UK stated that the "HET was not established to review or question the decision making of the PPS, nor does it have the legal qualifications to do so."[573] This means that none of the criminal justice 'dealing with the past' institutions have the scope to question past prosecutorial decisions.[574]

Prior to the decision to prevent the HET from 'questioning past prosecutorial decisions' it appears HET reports could and did deal with prosecutorial issues. One such report considered the murder charge against a former British soldier for the killing of Bernadette Friel in October 1975, which the then DPP controversially reduced to manslaughter for which a 12 month sentence was served. In 2010 the HET however found that the soldier's explanation that the death occurred as part of a game of Russian Roulette 'clearly lacks credibility', had been 'fabricated' and it was 'incomprehensible' that the victim would have consented to it.[575] A further case dealt with by HET at around the same time was that of the 1971 killing of William McGreanery by a soldier. As set out in the HET review report the RUC were "satisfied that a *prima-facie* case of murder has been established against ['solider A'] and I recommend proceedings accordingly". However, as a result of advice from the Attorney General (then a member of Government), the then prosecutorial authorities in effect advised that where a soldier was acting in the cause of duty he could not be guilty of murder by definition, and levied no charges for manslaughter.[576]

The Pat Finucane Centre, who supported families in relation to the above HET reports, have reported that the HET following the Friel report were given an ultimatum by the PPS that the HET must provide copies of HET reports to the PPS prior to publication in those cases where reference was made to prosecutorial decisions. When the HET declined to agree the PPS for a number of months prevented HET access to the files they hold. The matter was only resolved when the HET decided to no longer comment on prosecutorial decisions. Subsequent to this HET reports have carried a standard sentence that prosecutorial decisions are beyond their scope.[577]

A further investigative area whereby scrutiny of prosecutorial decisions has been curtailed was the public inquiry into the murder of Robert Hamill. In the Robert Hamill Inquiry the Secretary of State excluded analysis of the role the Director of Public Prosecutions (DPP) from the Terms of Reference. The Inquiry requested this be added but the Secretary of State rejected the request

[573] United Kingdom Response to the CAJ/PFC and RFJ submissions made to the Committee of Ministers – February 2012, part 1, paragraph 25.

[574] One recent development was the decision to refer to the Attorney General for review a PPS decision not to prosecute Sinn Féin President for withholding information. This decision was taken further to a request by the PPS and there is no entitlement to such a referral (see 'Decision not to prosecute Gerry Adams over brother's abuse to be reviewed' *Newsletter* 7 October 2013).

[575] Conclusions of HET report into Bernadette Friel death *BBC News Online* 18 October 2010.

[576] HET Summary Report http://www.patfinucanecentre.org/cases/mcgreanery.pdf.

[577] Telephone interview with PFC 10 September 2014.

on the basis of the DPP's decisions having been reasonable.[578] The Hamill family sought a judicial review seeking scrutiny of the decisions.[579] The family further claimed that there was potential bias in the decision of the Minister.[580] Justice Weatherup upheld the family's complaint that the test applied "did not correspond to the test of public interest" under s15(6) of the Act. The Secretary of State still declined to extend the Terms of Reference but now stated they could be interpreted as allowing limited scrutiny of DPP decisions insofar as they shaped the RUC investigation, but precluding the Inquiry from examining the merits of the prosecutorial decisions themselves.[581]

It remains the case therefore that these mechanisms, which form part of the package of measures, cannot scrutinise past prosecutorial decisions. Such a remit is also beyond the Police Ombudsman, given that Office focuses on the police. Both the Haass-O'Sullivan Proposed Agreement and Stormont House Agreement are silent on the matter.

[578] "[My independent Counsel's] advice was that the decisions taken by the DPP and his staff were reasonable; that there was no basis for suggesting there were additional steps that should have been taken; and that the case was assessed both objectively and professionally. I have, therefore, concluded that in all the circumstances there are no justifiable grounds to extend the terms of reference." 'Woodward decides against extending Hamill inquest terms of reference,' *NIO Latest News* (20 March 2008).

[579An] Application for Judicial Review by Jessica Hamill [2008] NIQB 73.

[580] One of the advisors to the Secretary of State, David Perry QC, had also been involved in the original prosecution decision. 'Inquiries Update', *Just News*, CAJ (July/August 2008) p4.

[581] 'Terms of Reference Decision by the Secretary of State for Northern Ireland,' *Robert Hamill Inquiry Press Notice 013* (5 November 2008).

CHAPTER NINE:
Conclusions: An Apparatus of Impunity?

This report brings together relevant evidence about deficiencies in the current mechanisms tasked with uncovering the truth about human rights violations in Northern Ireland. The evidence does not support a conclusion that a 'package of measures' is being deployed in good faith by the UK Government, only held back by the complexity of the issues, cost and lack of consensus among Northern Ireland politicians. Rather, it points to a common purpose between the UK Government and elements within the security establishment to prevent access to the truth and maintain a cover of impunity for state agents.

Examining each mechanism or phenomenon on its own may create an impression that obstructionist activities are institution specific or aberrational. Yet the emergence of patterns across a number of mechanisms suggests a concerted effort by some to prevent damaging facts about state involvement in human rights abuses coming to light and those who were responsible for such abuses (or for covering them up) being held accountable.

This is the 'apparatus of impunity' which this report details. This chapter will briefly summarise some of the laws, policies and actions that have been taken by the various agencies and individuals to build a structure which seems to be designed to cover up past crimes.

The UK Government

Perhaps the most powerful and all-pervading element of the apparatus of impunity is the 'national security' doctrine. The UK Government has adopted a *Through the Looking Glass* philosophy when it comes to national security since there is no definition and the term is deliberately kept flexible.[582] Yet any matter which touches upon this concept is reserved to central government and in its name it can deploy huge powers of direction and concealment.

The Secretary of State for Northern Ireland can veto any action of a local minister or any piece of legislation if she considers it incompatible with national security and can direct a minister or department to take any action to 'safeguard the interests' of national security. The Security Service, protected from any serious scrutiny, has been given strategic primacy in 'national security' policing. The Secretary of State also has powers to curtail or direct investigations and censor investigatory reports which touch on national security.

The UK Government has also sought to designate the whole of the past in Northern Ireland a 'national security' matter since the Northern Ireland Office seeks to retain control of all pre-devolution records and it decides what is to be made available to devolved bodies. Furthermore, a wide range of agencies drop their usual line of accountability and instead report to the NIO when carrying out tasks which are deemed to impinge upon the undefined concept of national security.

Secret courts provide another mechanism to conceal human rights violations. The world of 'Closed Material Procedures' excludes civilian parties and their legal representatives from hearing any evidence designated as national security related. The Justice and Security Act 2013 extended this system to civil proceedings and it is beginning to be used in hearings relating to state conduct during the conflict.

[582] Lewis Carroll, Through the Looking-Glass, 1872: "Humpty Dumpty said: "When I use a word it means just what I want it to mean…neither more nor less."…"The question is," said Alice, "whether you can make words mean so many different things."; "The question is," said Humpty Dumpty, "which is to be master—that's all".

The definitions of 'collusion' and 'miscarriage of justice' have been officially changed in recent years to make findings of either much more difficult. Collusion was a term used by the British Army in the 1970s to describe incidents of collaboration between loyalist paramilitaries and some members of the RUC and UDR. There have been official attempts to narrow its definition to be synonymous with an organised conspiracy, thus leaving out major aspects of the facilitation and toleration of crime by state agents. The Government has also induced Parliament to amend the definition of 'miscarriage of justice' so as to make those who suffer such injustice prove their innocence beyond reasonable doubt. This will not just restrict the payment of compensation, but will prevent many people taking on the formidable task of proving innocence in civil proceedings that might embarrass the Government or uncover wrongdoing by state agents.

The power of public inquiries to expose state wrongdoing has been massively curtailed by the Inquiries Act 2005. This gives the Government the power to interfere with and direct inquiries at every stage. Even with that, the current Government has refused to allow an inquiry into the death of Patrick Finucane and cited cost in turning down other requests for inquiries. The supposed cost of 'dealing with the past' is not just used as an excuse to avoid proper investigations but also as a chilling rhetoric designed to dampen down agitation for the truth. In practical terms, the cost of investigating crimes by state and non-state actors during the period of Direct Rule is currently to be borne within the devolved budget, with the UK Government refusing to augment it for this purpose. The result is budget pressures on the Department of Justice and the agencies it funds, such as the inquest system, the Police Ombudsman and the PSNI itself, many of which are detailed in the report.

In this context, inaction can be as effective as the kind of blocking actions detailed above. It took a series of cases at the European Court of Human Rights in 2001 to get the UK to admit that it had a duty to properly investigate past crimes. It took time to bring together existing mechanisms and call them a 'package of measures' to placate the Committee of Ministers that oversees the implementation of court decisions. The proposals of the Eames-Bradley commission on dealing with the past were instantly rubbished by Government. The UK Government declined even to be involved in the Haass negotiations, and were drawn into the talks which led to the Stormont House Agreement mainly to seek redress over the UK Government's priority issues of welfare and public spending cuts. The UK Government had every chance to implement a proper, Article 2 compliant mechanism to properly investigate human rights violations before devolution. Since devolution it has refused to take any lead, and has laid the blame for inactivity on the lack of local political consensus. This inaction is at best a dereliction of duty and at worst part of a deliberate policy of providing impunity to state agents.

The Security Establishment

This is an inexact term for an amorphous and series of structures and networks. It is not known precisely how MI5 operatives, senior military officers, officials of the Northern Ireland Office, the Ministry of Defence and Home Office, certain senior police officers and establishment figures in a range of contexts interact. What is apparent however, are their actions which may or may not be the result of political direction but which are implemented at official level.

The 'lowering of independence' of the Police Ombudsman, detailed in this report, was the result of the actions of a web of influence that included police and political interference in the Office. It would appear that this relationship was directed towards restricting the scope of investigations and minimising criticism of the RUC.

A further example in this report was the failed intervention attempting to prevent families and their lawyers accessing court and inquest papers held in the Public Records Office. This appeared indicative of concerns by senior security officials that there was legitimate access to information that they could not readily control.

At another level entirely, in 2013 it was revealed that the Ministry of Defence was unlawfully holding a huge secret archive of material which should have been passed to the Public Records Office, including a mass of material transferred there when the Army headquarters in Northern Ireland had closed down four years before. That came on the back of the 2011 disclosure that the Foreign Office had deliberately concealed a mass of archives on colonial operations. These actions of concealment demonstrate that the culture of cover up whilst extending beyond Northern Ireland affairs, provides a natural home for the local efforts to conceal records in order to limit effective investigations.

The PSNI

This report does not indicate that the whole of the PSNI is inimical to the proper investigation of past crimes. In fact many police officers believe that this is essential in order to enable effective policing in the present and the outgoing and current Chief Constable indicated that it should be a body other than the PSNI that should carry it out. However, the reality is that a number of elements within the PSNI are engaged in historic investigations and the control of intelligence material is central to each of the 'package of measures.' While the Chief Constable and the command team must take responsibility for the actions of the organisation, we do not know how internal communication and information sharing works, nor do we know the modalities and implications of the interface with the Security Service. Our criticisms, therefore, are directed to those officers, whoever they are, who are responsible for the series of detrimental decisions and actions which we detail in the report.

One of the major ways in which the PSNI has been engaged in investigating the past is through the Historical Enquiries Team. It is not necessary here to detail its history nor to deny that it may have been set up in good faith. However, the report demonstrates that the manner in which the HET was controlled and ran meant that instead it became an obstacle in the way of the search for truth. Accepting that some families have been satisfied with the information they have received, the HMIC Report demonstrated bias in state involvement cases and a range of other failings leading to a suspension of much of its work. In our view the HET would not have been capable of carrying out Article 2 compliant investigations even if all the recommendations of the HMIC were implemented. The PSNI must take responsibility for managing a deeply flawed process for over a decade.

The term 'intelligence material' is broad and unspecific but in this context it covers the files of the Stevens and Stalker/Sampson inquiries, all Special Branch records (that have not already been destroyed), other intelligence reports and, at least when it comes to outside agencies, perhaps many ordinary police records. Problems over disclosure of these and other materials have manifested themselves in massive delays in inquests and other investigations. The archives are over-classified, redactions are unnecessarily large and the resourcing of the disclosure obligation is inadequate. Recently, until legal action was taken, the PSNI refused to share 'sensitive' intelligence with the Police Ombudsman, citing conflicting legal duties. The manipulation of access to intelligence material and other records is now an open scandal and represents one of the biggest elements of cover up – given its centrality to all forms of investigation, present and future it is a keystone of the apparatus of impunity.

There is a more general impact of what we have termed the 'rehiring scandal.' This refers to ex-RUC officers who have been rehired by the PSNI, into key legacy roles. The inclusion of ex-RUC Special Branch officers, including as rehired civilians not subject to the Police Ombudsman, into positions which control intelligence material has been documented, amongst others, by the HMIC Report and in the coroners court. These practices have weakened any claim of the PSNI to have the requisite independence to investigate past state involvement cases.

The anatomy of the apparatus of impunity

This report seeks to detail the anatomy of the apparatus of impunity. It does not allege a formal conspiracy – there is simply not enough known about how personnel from various state agencies, especially secret agencies, interact. What can be seen, however, is how a great number of laws, policies and actions together have the effect of providing impunity for state agents who might have been involved in crimes in the past. It appears that a significant numbers of individuals – politicians, officials, police officers and others – are working assiduously to conceal records, limit information or disrupt fact-seeking enquiries. Given the evidence, there is no reasonable alternative to the inference of a common purpose.

Evidence documented in this report, backed up by experience of NGOs, lawyers and victims' families, is that every piece of information about past misconduct by state agents has been hard won. There is a constant battle going on, in the courts, the media and the legislatures, between those who want justice and those who want impunity. This is not a battle over different versions of history, nor is it the result of a witch hunt against past state agents. It is a central question of human rights and of the rule of law itself.

Human rights cannot be protected without the rule of law. Misconduct by those tasked with upholding the law undermines the rule of law in a drastic and obvious manner. Impunity for such agents negates any concept of the impartiality of law and demonstrates that the coercive power of the state is not to be used to protect peoples' rights but instead as an instrument of arbitrary power. That is why the human rights movement in every country and collectively opposes impunity, demands justice for victims and perpetrators and seeks guarantees of non-recurrence.

The existing package of measures has not been able, or has not been permitted, to deliver accountability for human rights violations. The obligations of international human rights law require the dismantling of the various elements of the 'apparatus of impunity' detailed in this report. Remedies are required to ensure existing mechanisms and new institutions alike have the power, resources and structure they need to conduct human rights compliant investigations into the past without their independence being fettered. The state needs to address non-compliance with disclosure and cooperation obligations, conflicts of interest of personnel and to rescind doctrines of 'national security' that afford the opportunity to conceal human rights violations. The process of establishing new institutions needs to redress, rather than replicate and entrench, existing problems and gaps in powers. It is only full implementation of such requirements which will ensure accountability for the past and ensure non-recurrence in the future.

Notes

Notes

Notes

January 2015