



Addressing the Legacy of Northern Ireland's Past

Amnesty International UK response to the UK Government, Northern Ireland Office, public consultation (2018)

Introduction

We welcome this opportunity to respond to the NIO consultation on Addressing the Legacy of Northern Ireland's Past in the hope of achieving a means of upholding the human rights of all who have hitherto suffered as a result of the conflict in Northern Ireland. Our focus in this response will be on the proposals for the Historical Investigations Unit (HIU) and an Independent Commission for Information Retrieval (ICIR).

Amnesty International UK is a national section of a global movement of over seven million supporters, members and activists. We represent more than 230,000 supporters in the United Kingdom, including thousands in Northern Ireland. Collectively, our vision is of a world in which every person enjoys all of the human rights enshrined in the Universal Declaration of Human Rights and other international human rights instruments. Our mission is to undertake research and action focused on preventing and ending grave abuses of these rights. We are independent of any government, political ideology, economic interest or religion.

In September 2013, Amnesty International published a report entitled *Northern Ireland: Time to Deal with the Past*.¹

¹ *Northern Ireland: Time to deal with the past*, AI Index: EUR 45/004/2013/, available here; <http://www.amnesty.org/en/library/info/EUR45/004/2013/en>

The report concluded that the patchwork system of investigation—made up of the Historical Enquiries Team (now defunct), the Office of the Police Ombudsman for Northern Ireland, coroner’s inquests, public inquiries and criminal investigations by the Police Service of Northern Ireland (PSNI)—that has been established in Northern Ireland is not fit for the purpose of comprehensively and systematically addressing past human rights violations and abuses, including violations of the right to life.²

The fragmented and incremental approach to establishing the truth and providing victims with remedy - all too often subject to protracted legal disputes, inadequate disclosure and resultant delay at several stages - has exacerbated the lack of a shared public understanding and recognition of the violations and abuses committed by all sides.

The report called on the UK government to establish a mechanism capable of ensuring that all allegations of human rights violations and abuses committed in the past are investigated in a prompt, impartial, independent, thorough and effective manner; and to ensure that any such mechanism is able to investigate overall patterns of abuse, policy and practice of state and non-state actors, identify those responsible at all levels and issue recommendations aimed at securing victims’ right to an effective remedy, including full reparation.

Such a mechanism should provide truth, justice and reparation for all those who suffered torture or other ill-treatment or were seriously injured during the three decades of political violence, and who have to date been largely excluded from the mandates of existing accountability mechanisms.

² Some of these concerns are reflected in the following documents by other organizations: “*Joint Submission by 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*”, February 2012; “*An inspection of the Office of the Police Ombudsman for Northern Ireland*”, report by the Criminal Justice Inspectorate, September 2011 and its follow-up report: “*The independence of the Office of the Police Ombudsman for Northern Ireland: A follow-up review of inspection recommendations*”, January 2013.; Her Majesty’s Inspectorate of Constabulary, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, 3 July 2013, and on the case of Patrick Finucane: Amnesty International press release, *De Silva report makes strongest case yet for full inquiry into Finucane killing*, 13 December 2012, and public statement, *United Kingdom/Northern Ireland: Deplorable government decision to renege on promise of public inquiry into Finucane killing*, AI Index EUR 45/017/2011, 13 October 2011.

The Haass Talks

Between September and December 2013, the Northern Ireland Executive organized interparty talks, on a number of contentious issues including dealing with the past, chaired by an independent external chair, the former US diplomat Dr Richard Haass. The results of the talks were inconclusive at the time the Chair published a draft proposal at the conclusion of the talks in December 2013.

On the issue of “dealing with the past”, however, the draft proposal in general provided a solid basis from which to proceed with efforts to deliver truth and justice for victims and their families and Amnesty International has urged the Northern Ireland political parties and the UK government to take them forward through legislation. In particular, as Amnesty noted at the time, the proposal to establish a Historical Investigations Unit (HIU) and an Independent Commission for Information Retrieval (ICIR) had the potential to advance efforts to secure truth and justice for victims of human rights violations and abuses, although some work still needed to be done to ensure these mechanisms operate in full human rights compliance.

The Stormont House Agreement

Following the failure of the Haass talks, the five executive parties in Northern Ireland, and the UK and Irish governments continued negotiations, chaired by the Secretary of State for Northern Ireland, Theresa Villiers. As a result of these negotiations, on 23 December 2014 the UK government published the Stormont House Agreement, which contained proposals on a number of political issues in Northern Ireland, including on how to deal with the past.³

The Stormont House Agreement and now the proposed Bill contain proposals for the establishment of two primary mechanisms to investigate the past: a Historical Investigations Unit (HIU) and an Independent Commission for Information Retrieval (ICIR). It also contains

³ The Stormont House Agreement can be accessed here: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf

proposals to establish an Implementation and Reconciliation Group, which will oversee the establishment and work of an Oral History Archive, amongst other things.

The Agreement also outlines a number of important principles that will be respected in the establishment of mechanisms to deal with the past, echoed in the consultation document, including “upholding the rule of law”, “acknowledging and addressing the suffering of victims and survivors”, “facilitating the pursuit of justice and information recovery”, “is human rights compliant”, and “is balanced, proportionate, transparent, fair and equitable”.⁴

These principles bring a measure of hope that robust investigatory mechanisms can be built. However, it must be emphasised that, as the government’s proposals stand, there are a number of concerns that must be addressed in order for any mechanism that emerges to be truly independent, effective and ultimately capable of discharging the UK’s obligations under the ECHR, ICCPR and other international human rights law.

Amnesty International’s primary focus concerns the HIU as the primary investigatory mechanism proposed in the Agreement. The Agreement states that the HIU will be a new independent body to take forward investigations of outstanding cases from the Historic Enquiries Team (HET) and the legacy work of the Police Ombudsman of Northern Ireland (PONI) and subsequent Troubles-related deaths up to 31 March 2004. Following an investigation, a report will be produced in each case.

The Historical Investigations Unit

The Stormont House Agreement states that *“In any society, holding people accountable for breaking the law is a fundamental responsibility of government. Doing so consistently and even-handedly reinforces belief in the integrity of government and reassures citizens that their society is safe, fair, and just”*.⁵

The proposals for the establishment of the HIU represent an important step forward in securing truth and justice for victims of human rights abuses and violations. The Agreement recognizes - both explicitly and implicitly - that the investigatory system currently in place is

⁴ Stormont House Agreement, page 5.

⁵ Stormont House Agreement, page 24.

inadequate. It highlights the need for a mechanism that is capable of carrying out investigations that are compliant with Article 2 of the ECHR in an independent manner and which can command the confidence of the entire community in Northern Ireland. Given this, with necessary revisions, Amnesty International believes that the proposal for the HIU contained in the proposals provides a solid basis on which progress can - and should - be made to introduce legislation that will finally establish an effective investigatory mechanism that is capable of securing a measure of truth and justice for victims of human rights abuses and violations.

There remain, however, some areas where further changes to the proposals should be considered.

For example, there is a need for explicit guarantees of sufficient resources so that the HIU can carry out its work promptly and effectively. The draft Agreement recognizes the need for the substantial investment of financial and other resources in implementing the proposals and that the Northern Ireland Executive would need to play its part in securing these resources. However, the UK government would also have a crucial role to play in providing financial and other resource support to ensure that the HIU would be able to function effectively. The UK government is obliged under international and domestic law to ensure that investigations are carried out in a manner that is consistent with international human rights law and standards. It is imperative that it support the establishment of the proposed new independent investigatory mechanism and commit to providing it with the necessary resources. As a number of cases have cross-border implications and connections, it would also be important that any bodies established have the full support and cooperation of the Irish government and its agencies.

The importance of guaranteeing sufficient resources is starkly highlighted by the caveat in the Agreement that the HIU would conduct reviews and investigations into cases involving serious injuries only “if resources permit”.⁶ A lack of resources should not be used as a reason to deny those who were seriously injured the possibility of a review of their case where there are grounds to do so.

⁶ Stormont House Agreement, page 27

The proposed remit of the HIU – and by extension the provisions included in the draft Bill - is restricted to conflict-related deaths and does not include other matters such as attempted murders, torture, or serious injuries. However, Articles 2 and 3 ECHR (and thus the Human Rights Act 1998) create duties to ensure that such matters are effectively and independently investigated in the same way, as numerous domestic cases also make clear. Whilst these investigations would not necessarily have to be undertaken by the HIU, the obligation must be properly discharged. The current situation leaves a significant gap around such cases. The government should clarify how it intends to discharge its obligations in this area.

Further assurances are also required with respect to ensuring appropriate access to intelligence information held by the state agencies. It will be necessary to ensure an effective and independent procedure capable of guaranteeing that all relevant intelligence in every case is made available to the HIU.⁷ including the HIU's ability to compel witnesses and documents. The HIU should also have access to intelligence information or other material held by other bodies, including the Ministry of Defence, the security services, and other government departments and public bodies. This is vital to ensuring that all HIU reviews are thorough and effective.

Though it is clear that HIU would have police powers to carry out criminal investigations, it is also important that it have powers to compel witnesses and documents in all cases that it will review – including those where no criminal investigation is expected to take place.

The consultation proposes that the UK government will make full disclosure to the HIU and notes, importantly, that this obligation is not subject to an express national security caveat. Given the historical failures by state bodies to consistently ensure full disclosure of sensitive material to investigations, it is important that the draft legislation has express provisions

⁷ This issue is particularly pertinent given that processes for accessing PSNI intelligence on historic cases have previously given rise to concern. The inspection of the Historical Enquires Team (HET) by Her Majesty's Inspectorate of Constabulary (HMIC) highlighted this matter as a particular area of concern which had undermined the body's independence. The HMIC report raised concerns that the HET's intelligence unit was staffed largely by former RUC or PSNI employees, and similarly that staff in the PSNI intelligence branch – effectively the gatekeepers for intelligence passed to the HET – have included former RUC special branch officers. The HMIC thus recommended: *“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. For this reason, it would be preferable to institute some independent procedure for guaranteeing that all relevant intelligence in every case is transmitted for the purposes of review, to ensure compliance with the Article 2 standard.”* (HMIC, Inspection of the Police Service of Northern Ireland Historical Enquiries Team, 3 July 2013, page 22-23).

placing an obligation on all public authorities (including the security services) to provide material to the HIU and cooperate fully with it.

However, the proposals as they currently stand would give the UK government the power to prevent the onward disclosure by the HIU to a bereaved family of any information contained in its report which is deemed a risk to national security. Families could challenge a refusal to disclose information, but only under judicial review principles. In reality, the high threshold that a judicial review process involves, would make it extraordinarily difficult for families to secure a reversal of a national security veto, particularly given the deference usually paid by domestic courts to the government on security matters.

The government's insistence on a national security rider appears to have the potential to undermine the requirements of international human rights law. The right to an effective remedy and reparation includes a right of access to relevant information concerning those violations.

The obligation to investigate under article 2 of the European Convention on Human Rights (right to life) includes both a requirement that there be a sufficient element of public scrutiny to secure genuine accountability, and a requirement that the family of the deceased are involved in the process to the extent needed to safeguard their legitimate interests.

While the Court has said that disclosure of sensitive information is not an automatic requirement under article 2, it has indicated that this does not mean information can be withheld from victims indefinitely. The Tshwane Principles likewise emphasise that information concerning human rights violations should always be disclosed to victims.⁸

Amnesty recommends that this restriction on disclosure is reviewed by government and that particular attention is paid to alternatives models of decision-making and review, such

⁸ Tshwane Principles available at: <https://www.opensocietyfoundations.org/publications/global-principles-national-security-and-freedom-information-tshwane-principles>

as that advanced by the Model Bill Team of experts from Queen's university Belfast, Ulster University and Committee on the Administration of Justice.⁹

Despite these outstanding questions, Amnesty International believes that the proposals for the HIU provide a solid basis on which to proceed with efforts to deliver at last an effective and independent investigatory mechanism. Amnesty International urges the UK government to ensure that new legislation to provide for an investigatory mechanism fully complies with the UK's international human rights obligations. The new mechanism should energetically pursue the search for evidence that could identify those responsible and be used to hold them accountable.

The Independent Commission for Information Retrieval

The proposals recognize the need of victims to know as much as possible about the circumstances of their case and, with this in mind, proposes the establishment of an Independent Commission for Information Retrieval (ICIR) to contribute to truth recovery. Victims and the immediate families of victims would be able to register with the ICIR a request for information about any violent incident connected to the conflict. The ICIR would then reach out to designated intermediaries in organizations and governments, who would then seek out individuals within their networks who may have information relevant to the request. After the ICIR has determined that it has learned all it reasonably can, its staff would prepare a private report for the victim or victim's family conveying the information it has gleaned regarding that specific case.

The proposals also envision an internal unit within the ICIR to analyse particular patterns or themes of importance arising from the political violence.¹⁰ The draft Agreement provides examples of relevant themes that the ICIR could examine, including:

- alleged collusion between governments and loyalist and republican armed groups;

⁹ *Model Bill team response to NIO legacy consultation* available at <https://s3-eu-west-1.amazonaws.com/caj.org.uk/2018/08/30135633/qub-uu-caj-response-to-nio-consultation-aug-18.pdf>

¹⁰ The need to investigate patterns of violations and abuses was highlighted in the Amnesty International report, *Northern Ireland: Time to Deal with the Past*, AI Index EUR 45/004/2013, 12 September 2013, page 45-51.

- the reported targeting of off-duty UDR soldiers, prison officers, and reservist Royal Ulster Constabulary officers;
- whether the Republic of Ireland provided a 'safe haven' to members of republican armed groups; and
- the mistreatment of detainees and prisoners.

Amnesty recommends that there should be a specific thematic investigation of sexual abuse and other gender-based violence, looking at broader patterns of sexual violence related to the Troubles, failures to report, investigate, and provide victims with access to remedy.

Amnesty International fully recognizes the value of having a mechanism that can effectively contribute towards truth recovery, both for individual victims and for society more generally. Many of the victims and relatives whom Amnesty International has met with in Northern Ireland have expressed a strong desire for the truth. They want to know the full story of what happened either to them or to a relative, to understand why the events leading to injury or loss of life occurred, and to have the harm and wrong they have suffered acknowledged. With the passage of time, the pursuit of normal avenues of justice for many families has become increasingly difficult, but they should still be able to access as much information as can be found in order to know the truth to the fullest extent possible. With that in mind, Amnesty International considers that proposals for a separate truth recovery process provide a good basis on which to proceed. However, it believes that the powers and remit of the ICIR as conceived in the Agreement need to be strengthened in a number of areas.

According to the proposals, the process of information retrieval by the ICIR would be facilitated by empowering it to offer a form of protection to persons who give statements to it (described as 'limited immunity' in the SHA proposals). The use of protected statements recognizes the importance of truth recovery for families as it aims to facilitate the possibility of the disclosure of information which – without these protections - would otherwise be unlikely to become available to a victim or his or her family. The protection offered would not amount to an amnesty for an individual, but would guarantee that statements - or information and evidence within them - given to the ICIR would be inadmissible in any criminal or civil actions against an individual who provided a statement to ICIR or any person

named in such a statement. The proposals' provision for the use of such "protected statements" would not provide protection against prosecution or the pursuit of civil damages, based on evidence derived from other sources.

Such protection can thus be distinguished from amnesties or general immunities, which are never acceptable – and which Amnesty International would always oppose - as they deny victims the right to an effective remedy for the abuses and violations they suffered and can perpetuate impunity. Amnesty International accordingly expects that the HIU, in its role as the complementary process to the ICIR, will vigorously pursue evidence that could serve as a basis for criminal prosecution in appropriate cases, thus providing victims with justice and avoiding the possibility that the new mechanism would contribute to impunity.

Amnesty International recognizes that there is precedent for the use of protected statements in the context of certain public inquiries in the UK (including those examining cases pertaining to Northern Ireland). The aim of such protection is both to protect the individual's right against self-incrimination and to facilitate or encourage greater disclosure by a witness during a factfinding inquiry.¹¹ For example, in both the Bloody Sunday Inquiry and the Baha Mousa Inquiry undertakings were provided by the Attorney General that no evidence given by a witness would be used against him or her in any subsequent criminal or civil proceeding.¹² In addition, in regard to truth commissions, the Office of the United Nations High Commissioner for Human Rights has noted:

"It may also be necessary to empower a truth commission to grant use immunity to a perpetrator who testifies before the commission. While this does not provide immunity from prosecution for witnesses, it ensures that the evidence they provide before the truth commission cannot be used as evidence against them in a later criminal proceeding. In short, truth commissions and other processes aimed at realizing the "right to truth" may be facilitated by granting perpetrators use

¹¹ For further detail concerning the use of immunity provisions or protected statements in the context of public inquiries see Jason Beer, *Public Inquiries*, 2011, Oxford University Press, page 208-209 and 325–332.

¹² Ibid. page 327-328. See also Prof Kieran McEvoy and Dr Louise Mallinder, *Truth, amnesties and prosecutions: models for dealing with the past*, 3 December 2013, page 13-16.

*immunity or reduced sentences for their testimony, but may not grant total immunity.*¹³

The proposals for the ICIR provide not only protection against self-incrimination for the person giving the evidence, but extends the protection so that the statements or evidence within them also cannot be used against third parties. Though Amnesty International understands the reasons why protection has been extended to third parties, the organization notes that this level of protection is not commonly provided in public inquiries in the UK and is concerned that this extension might limit the possibility for victims to seek and secure justice.

Amnesty International is also concerned about the proposals for a third layer of protection of information provided to the ICIR. This is that the ICIR “would not disclose to law enforcement or intelligence agencies any information provided to it”, building on the Agreement’s proposals that, specifically, the ICIR “will never inform law enforcement” of any claimed links between certain events and other people who may have been involved.¹⁴

This goes beyond the provision that statements or information would not be admissible in criminal and/or civil proceedings. Instead it allows for the scenario in which an individual could give anonymous evidence to the ICIR about a link of another individual to a different case and that information would remain forever secret. That information could never be passed to the HIU, for instance, as a possible avenue of inquiry, even though the HIU may at that very time be carrying out an investigation into the case. Amnesty International believes this provision has the potential to impede the possibility of both truth and justice for victims. More generally, while Amnesty International acknowledges that certain information may need to be redacted to protect individuals, it stresses that, in principle, the information which the ICIR obtains should be fully reflected in its thematic reports.

Moreover, in other contexts containing provisions for protected statements there have usually been coinciding powers of compulsion. Such powers are entirely absent from the proposals for the ICIR, which would operate on the basis of the voluntary cooperation of persons willing to give testimony. This is particularly important with respect to the role of

¹³ Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States: Amnesties* (2009).

¹⁴ Stormont House Agreement, pages 31 and 34.

the ICIR in the examination of patterns and policies, where its lack of powers to compel witnesses or the production of documents would significantly undermine its ability to come to informed conclusions. If members of loyalist or republican armed groups, for example, cannot be compelled to appear and provide information about the motivation for, planning, and execution of an operation, the ICIR would be hampered in its ability to carry out a thorough inquiry and produce a comprehensive record of human rights abuses committed by armed groups.

Likewise, an examination of torture and other ill-treatment of detainees, and whether state policy or state-sanctioned practices deliberately or indirectly gave rise to such unlawful conduct, would require robust investigation, including the possibility to compel witnesses and the production of documents. The lack of powers of compulsion for the ICIR contrasts with the previous proposals put forward by the Independent Consultative Group on the Past, which allowed for the use of protected statements, but proposed that the unit charged with thematic analysis would have powers of compulsion.¹⁵

Overall Amnesty International believes that the proposals for the HIU and ICIR are a positive development and have the potential to advance efforts to secure truth and justice for victims of human rights violations and abuses. Though work still needs to be done to ensure these mechanisms operate in compliance with international human rights standards, further momentum to address the past in Northern Ireland should not be lost. Government must now commit to refining these proposals to ensure full human rights compliance and that the establishment of effective mechanisms to deal with the legacy of the past becomes a reality.

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¹⁵ Report of the Consultative Group on the Past, 2009, page 147-148.