

Submission to the Talks of the Panel of Parties and Drs Haas and O'Sullivan

Relatives for Justice welcomes the negotiations currently underway between the local political parties and the opportunity to make a submission to the Panel of Parties convened by Drs Haas and O'Sullivan. It is particularly welcome that the matter of "Dealing with the Past" is now at the heart of political negotiations.

Relatives for Justice: Who We Are

Founded in 1991 by families and long time human rights activists, Relatives for Justice is a region wide support organisation for individuals and families bereaved and injured as a result of conflict related violence.

The organisation supports over 3000 people per annum with services such as therapeutic support, social activities, personal development programmes and a youth programme.

At the heart of Relatives for Justice is the support for those bereaved and injured seeking truth and accountability for conflict related violations. The organisation supports families as they recover historical memory and record their experiences. Integral to that process is the identification of outstanding issues and the pursuit of accountable redress.

This model of integrated and holistic support is needs based and one which reflects international best practice of transitional justice. While it is backward looking it is simultaneously a forward looking process looking towards securing the peace and building accountable democratic institutions capable of withstanding the rigour of transition.

Why “Deal with the Past”?

Good Friday Agreement on Victims

The Good Friday Agreement of 1998 did not give a lot of focus to the needs of victims and victims rights in a transitional process. However it did provide acknowledgement of the special place of those who suffered the worst of our conflict in processes of reconciliation and recognised that there was work yet to be done to support those with outstanding needs.

Reconciliation and Victims of Violence

11. The participants believe that it is essential to acknowledge and address the suffering of the victims of violence as a necessary element of reconciliation. They look forward to the results of the work of the Northern Ireland Victims Commission.

12. It is recognised that victims have a right to remember as well as to contribute to a changed society. The achievement of a peaceful and just society would be the true memorial to the victims of violence. The participants particularly recognise that young people from areas affected by the troubles face particular difficulties and will support the development of special community-based initiatives based on international best practice. The provision of services that are supportive and sensitive to the needs of victims will also be a critical element and that support will need to be channelled through both statutory and community-based voluntary organisations facilitating locally-based self-help and support networks. This will require the allocation of sufficient resources, including statutory funding as necessary, to meet the needs of victims and to provide for community-based support programmes.¹

¹ The Agreement. Agreement reached in the Multi-Party Negotiations 1998 Chapter 6

A key part of addressing the suffering of those who have been bereaved and injured is the dignity of the recovery of truth.

The Right to Truth

In the Updated Set of Principles to Combat Impunity, the Right to Truth is established as a universal international principle.

PRINCIPLE 2. THE INALIENABLE RIGHT TO THE TRUTH

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

PRINCIPLE 3. THE DUTY TO PRESERVE MEMORY

A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

PRINCIPLE 4. THE VICTIMS' RIGHT TO KNOW

Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate.

PRINCIPLE 5. GUARANTEES TO GIVE EFFECT TO THE RIGHT TO KNOW

States must take appropriate action, including measures necessary to ensure the independent and effective operation of the judiciary, to give effect to the right to know. Appropriate measures to ensure this right may include non-judicial processes that complement the role of the judiciary. Societies that have

experienced heinous crimes perpetrated on a massive or systematic basis may benefit in particular from the creation of a truth commission or other commission of inquiry to establish the facts surrounding those violations so that the truth may be ascertained and to prevent the disappearance of evidence. Regardless of whether a State establishes such a body, it must ensure the preservation of, and access to, archives concerning violations of human rights and humanitarian law.²

In 2006 the Office of the UN High Commissioner for Human Rights concluded that the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. And in the 2009 report on the Right to the Truth³ the Office of the UN High Commissioner for Human Rights identified best practices for the effective implementation of this right, in particular practices relating to archives and records concerning gross violations of human rights, and programmes on the protection of witnesses and other persons involved in trials connected with such violations.

Clearly international standards for societies in transition from conflict establish that truth recovery is a key mechanism for healing. While this was not explicitly examined by any of the political talks to this point there have undoubtedly been acknowledgements of the importance of truth recovery to confidence building in the broader process.

The announcement of the Bloody Sunday Inquiry by then Prime Minister Tony Blair was seen as a key moment in building nationalist confidence in the peace process.

² Orentlicher, D. Updated Set of principles for the protection and promotion of human rights through action to combat impunity *E/CN.4/2005/102/Add.1 page 8*

³ http://www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/12/19

Similarly the Weston Park Talks establishing a process towards commissioning public inquiries into the cases of Patrick Finucane, Robert Hamill, Rosemary Nelson, Billy Wright and Constables Breen and Buchanon was a key outcome from those talks.

However the piece meal approach to examination of the past has led to widespread frustration amongst the greater number of victims of the conflict that their interests have not been addressed as part of the political process and are subject to politicking.

The Historical Enquiries Team

On 3rd July 2013 Her Majesty's Inspectorate of Constabularies reported on the workings of the Police Service of Northern Ireland's Historical Enquiries Team⁴. This specialist investigation was commissioned by the Northern Ireland Policing Board, following a report by Professor Patricia Lundy which was critical of HET investigations when the state was responsible or implicated⁵.

The Historical Enquiries Team (HET) was established in 2005 by then Police Service of Northern Ireland (PSNI) Chief Constable Hugh Orde. The Team was charged with investigating all of the killings during the conflict. Next of kin or close family members are invited to engage with the HET on issues relating to the deaths of their loved ones. While it is a criminal investigation under the control of the Chief Constable, the aspiration of the team is to "bring a measure of resolution"⁶ to families. Much assurance was given to families of the Team's operational independence from the PSNI⁷.

⁴ The full report can be viewed at < <http://www.hmic.gov.uk/media/inspection-of-the-police-service-of-northern-ireland-historical-enquiries-team-20130703.Pdf>>

⁵ Lundy, Patricia *Research Brief: Assessment Of The Historical Enquiries Team (Het) Review Processes And Procedures In Royal Military Police (Rmp) Investigation Cases* (2012) See Also Minutes Northern Ireland Policing Board April, May And June 2012 and also Minutes Of Northern Ireland Policing Board Minutes Of The Corporate Policy, Planning And Performance Committee Meeting, (18th October 2012)

⁶ HET Introduction Pack to Families. Police Service of Northern Ireland (2005)

⁷ *ibid*

In parallel to the individual “resolution” process the Historical Enquiries Team has played a significant role in the British Government’s answers to the Committee of Ministers following a critical judgement in the ECtHR in 2001⁸.

The ECtHR judgement in 2001 was a critical moment for families affected by state killings or killings in which state involvement and collusion with non-state actors was suspected. The judgement focussed on the procedural obligations of Article 2 of the Convention and found that the British Government was shown to disclose the following shortcomings in investigating the use of lethal force:

1. a lack of independence of the police officers investigating the incident from the officers implicated in the incident;
2. a lack of public scrutiny, and information to the victim’s family concerning the independent police investigation into the incident, including the lack of reasons for the decision of the DPP not to prosecute any police officer at that stage for perverting or attempting to pervert the course of justice;
3. the inquest procedure did not allow for any verdict or findings which might play an effective role in securing a prosecution in respect of any criminal offence which may have been disclosed;
4. non-disclosure of witness statements prior to their appearance at the inquest which prejudiced the ability of the applicant’s family to participate in the inquest and contributed to long adjournments in the proceedings;
5. the PII certificate had the effect of preventing the inquest examining matters relevant to the outstanding issues in the case;
6. the police officers who shot the deceased could not be required to attend the inquest as witnesses;
7. the independent police investigation did not proceed with reasonable expedition;
8. the inquest proceedings did not commence promptly and were not pursued with reasonable expedition.⁹

⁸ Hugh Jordan v. the United Kingdom ECHR (*app no 24746/94*) 2001

⁹ Chamber judgments Hugh Jordan v. the United Kingdom ECHR (*app no 24746/94*) 2001, McKerr v. the United Kingdom ECHR

The years following this judgement were significant in terms of the outworking of the 1998 Peace Agreement and how the new institutions provided for in the Agreement were used to convince the Committee of Ministers of the British Government's resolution. Families' engagement in emergent processes was also of significance during this period of consideration.

In November 2001 the new Police Service of Northern Ireland was founded to replace the Royal Ulster Constabulary as part of the Patten Commission reforms initiated as a part of the peace agreement in April 1998. A Police Ombudsman's office had been legislated for in 1998 under the Police Act for NI 1998, this was integrated into the reforms of policing and seen as a critical confidence building measure¹⁰. Investigations into historic cases were included into the remit of the Police Ombudsman's Office in 2001 with the RUC (Complaints etc) Regulations (2001). Families affected by direct RUC killings and where collusion was suspected lodged complaints in the Ombudsman's office.

The investigative role of the Police Ombudsman and the HET were used in submissions to the Committee of Ministers as part of a "package of measures"¹¹.

As the Committee of Ministers considered the execution of the judgement Chief Constable and the head of the Historical Enquiries Team gave evidence to the Committee¹². A crucial part of this, was the statement that the Secretariat considered the HET to be independent in its approach and that it provided "a useful model for bringing a "measure of resolution" to those affected in long-lasting

(App no 28883/95) 2001, Kelly & Others v. the United Kingdom ECHR (App No 30054/96) 2001, and Shanaghan v. the United Kingdom ECHR (App No 37715/97) 2001

¹⁰ A New Beginning to Policing in Northern Ireland: The report of the Independent Commission on Policing in Northern Ireland September (1999)

¹¹ Interim Resolution CM/ResDH(2009)44

¹² Information contained in answers to Freedom Of Information request from Relatives for Justice to PSNI F2011-02374 PSNI

conflicts”¹³. This consideration led to a closing by the Committee of this element of its examination of the judgment in 2009.

However there were continuous worries about the issues of independence and compliance with Article 2 of the ECHR from NGOs regarding the Historical Enquiries Team, in addition to emergent fundamental concerns regarding the operation of the Police Ombudsman¹⁴. This prompted NGOs to further communicate with the Committee of Ministers requesting a reopening of consideration of the entire judgement¹⁵.

The commissioning of the HMIC report into its work last year was therefore of significance. The resulting report even more so.

On July 5th the HMIC released their report, which found that:

- *the HET is not conforming to current policing standards in a significant number of important areas. In particular, HMIC found a lack of explicit systems and processes; different teams adopting different working practices; no clearly defined complaints process; and (until now) no independent review of the HET’s processes;*
- *the HET treats state involvement cases differently as a matter of policy and this appears to be based on a misinterpretation of the law. This is entirely wrong, and has led to state involvement cases being reviewed with less rigour in some areas than non-state cases; and*

¹³ European Court of Human Rights Committee of Ministers Interim Resolution CM/ResDH(2009)441; Action of the Security Forces in Northern Ireland (Case of McKerr against the United Kingdom and five similar cases); Measures taken or envisaged to ensure compliance with the judgments of the European Court of Human Rights in the cases against the United Kingdom listed in Appendix II 19/03/2009

¹⁴ Criminal Justice Inspection Northern Inspection. An inspection into the independence of the Office of the Police Ombudsman for Northern Ireland, (9th September 2011)

¹⁵ For examples of this and backgrounds to same please see S358B 2nd Addendum to CAJ’s and PFC’s joint submission to the Committee of Ministers in relation to the supervision of Cases concerning the action of the security forces in Northern Ireland September 2011; Communication from a NGO (Relatives for Justice) in the McKerr group of cases against United Kingdom ECHR (Application No. 28883/95) 2001
<<http://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2041033&SecMode=1&DocId=1862020&Usage=2>>

- *as a result, HMIC considers that the HET's approach to state involvement cases is inconsistent with the UK's obligations under Article 2 ECHR.*¹⁶

The report found significant failings regarding the working of the Historical Enquiries Team in all investigations. Recommendations included those relating to systems, staffing and operational policies employed by the HET¹⁷.

The criticisms and recommendations that carried most public attention however were those around the approach taken to deaths “with state involvement”.¹⁸

The fundamental problems uncovered by the HMIC report led to the Chief Constable saying that the differential approach to state killings had ended¹⁹ and the Policing Board establishing a working group to take forward and examine the recommendations of the HMIC²⁰.

This then left families, whose loved ones' deaths had been the subject of investigation, with fundamental questions and expressed trauma. These families had not chosen or given consent to this process. It was designed without their input and investigations are carried out whether the family engages or not. For families affected by state actions their position is now particularly stark. The ECtHR had confirmed in 2001 what they had already known – that the investigations into the deaths of their loved ones were never compliant with international standards.

¹⁶ Her Majesty's Inspectorate of Policing Press Release issued with the publication of the full report 05/07/2013 #018/2013 – “The Historical Enquiries Team's approach to reviewing deaths during ‘the troubles’ is inconsistent, has serious shortcomings and so risks public confidence”

¹⁷ Inspection of the Police Service of Northern Ireland Historical Enquiries Team. Her Majesty's Inspectorate of Policing ISBN: 978-1-78246-163-0 (2013) page 10

¹⁸ *ibid*

¹⁹ ‘Chief Constable's statement in response to the publication of the HMIC Inspection of the Historical Enquiries Team’, Police Service of Northern Ireland Press Statement (03/07/2013). Available at <http://www.psnipolice.uk/general__chief_constable_s_statement_in_response_to_the_publication_of_the_hmic_inspection_of_the_historical_enquiries_team_>

²⁰ The Following points were made by the Policing Board at their meeting on 4th July 2013 in their Public Statement

- *The Board has no confidence in the leadership of the Historical Enquiries Team and the Chief Constable has been asked review and action the management arrangements of the Unit with immediate effect.*
- *It is the view of the Board that all military case reviews by the HET are suspended. The HET should continue the process of conducting all other reviews but it should not finalise any cases until all the necessary reforms are completed.*
- *The Board has established a dedicated working group to take forward and oversee the implementation of all of the recommendations in the HMIC Report. This group, comprising political and independent membership, will also review PSNI failures to respond promptly to issues raised in relation to the work of the HET.*

Statement available at < <http://www.nipolicingboard.org.uk/news/article.htm?id=14330>>

Following this report they have now been informed that they, having been engaged in a process which was meant to offer resolution to families as one of the key objectives, this process is in fact deeply flawed, and in cases of state killings operating illegally²¹.

It is worth noting that this development also enveloped the new institutions. The new Policing Service and its oversight body the Policing Board established post peace agreement are the institutions dealing with the failure to create a separate transitional mechanism to deal with cases arising from conflict related killings, areas fundamental to transition²², yet neither were designed for that purpose.

The Historical Enquiries Team was not designed as a truth process for a transitional justice purpose. Indeed the then Chief Constable Hugh Orde states that he established it in the absence of a larger process²³.

However in the absence of a more comprehensive process, and given the scale and nature of the investigations, and indeed the modesty of the stated aims of the investigations, it had the appearance of a de facto transitional justice mechanism. Being neither fish nor foul has meant that it is now the subject of fundamental criticism for not meeting basic policing standards of operation and it does not operate as a transitional justice mechanism.

However, it is not as though this has not been recognised for a significantly long period. In June 2007 then Secretary of State Peter Hain commissioned a consultative group on past to examine “how Northern Ireland might approach its past in a way that heals rather than poisons, that enables everyone to focus on building a shared future, not looking constantly over shoulders to a divided past”²⁴. Six years later the

²¹ ibid p85 “This approach to state involvement cases is illegal and untenable as it is inconsistent with the UK’s obligations under of Article 2 ECHR”

²² Mendez, J. “In Defence of Transitional Justice” in *Transitional Justice and the Rule of Law in New Democracies*. (A. James McAdams University of Notre Dame Press) 1997

²³ Brian Rowan. ‘Where is the big idea to deal with the troubled past?’ *Belfast Telegraph* (4th July 2013)

²⁴ ‘Press release on behalf of Peter Hain About The Formation Of An Independent Consultative Group To Look At The Legacy Of The Past,’ Northern Ireland Office (22 June 2007)

imperative remains – but political will has remained stubbornly lacking in engagement.

However despite government acknowledgement that the HET was not a long term appropriate mechanism - the HET has been cynically promoted by the British state as an effective form of investigation to the Committee of Ministers. This has been highly disingenuous as the illegality of the operation of the HET has been known by the Chief Constable since 2010.

To a large extent therein lies the issue. Keeping the investigations separate to the process of building peace, and the failure to build and integrate a mechanism for dealing with the past has left families engaging with inadequate processes and equally as bad, the new policing body at risk of an undermining of confidence as they attempt to build a post-conflict service.

The European Court of Human Rights and Inquests

On 16th July 2013 the European Court of Human Rights delivered their judgement in the cases of Martin McCaughey and Desmond Grew killed in 1990 by the British army and John Hemsworth, beaten by the RUC in July 1998 and who died from his injuries in 1999²⁵.

The judgment upheld unanimously that there has been an ongoing violation of the procedural obligations of Article 2. Addressing the time period since the McKerr group of cases in 2001²⁶ the court found that “The Court considers that the carrying out of investigations, including holding inquests, into killings by the security forces in Northern Ireland has been marked by major delays. It further considers that such delays remain a serious and extensive problem in Northern Ireland”²⁷.

²⁵ McCaughey and others V. the United Kingdom ECHR (App No. 43098/09) 2013

²⁶ Jordan V. The United Kingdom ECHR (App No 24746/94) 2001, McKerr V. The United Kingdom ECHR (App No 28883/95) 2001, Kelly & Others V. The United Kingdom ECHR (App No 30054/96) 2001, Shanaghan V. The United Kingdom ECHR (App No 37715/97) 2001

²⁷ Nt 39 Para 144

This issue is again one which has significance not only for the families whose inquests have yet to be heard decades after the killings. It also has significance for the post-peace agreement criminal justice structures to which other families have looked in the absence of a wider transitional justice process.

The devolution of justice powers to the Executive occurred in April 2010 following the Hillsborough Castle Agreement²⁸, enacting the Justice (NI) Act of 2002. One of the final steps in the full enactment of the peace agreement, the new powers provided for a Justice Ministry, an attorney general, a new Public Prosecution Service, and a new Courts and Tribunals Service under which the coroners service would now operate.

The new location of justice powers created a new dynamic where requests for consideration of the reopening of inquests began to be made to the new Attorney General. Within a week of his appointment in May 2010 the Attorney General John Larkin referred the case of Francis Bradley, killed in 1986 by the British army for a fresh inquest.

However following this precedent a number of high profile cases where the state had been responsible for deaths have been referred for fresh inquest, including the cases of 10 of the 11 people killed by the Parachute Regiment in Ballymurphy August 1971 and Francis Rowntree an 11 year old boy killed by a rubber bullet fired by the British army in 1972²⁹.

Cases in which collusion between state actors and the loyalist paramilitaries have also been referred for inquest, including the killing of Gerard Slane by the Ulster Freedom Fighters in 1988, mentioned in the Stevens Reports³⁰ on collusion and the report by Sir Desmond De Silva on the killing of human rights solicitor Patrick Finucane in 1989³¹.

²⁸ Agreement At Hillsborough Castle (5th February 2010)

²⁹ These cases were referred by the Attorney General on 5th November 2011 and June 2012 respectively

³⁰ Stevens Enquiry 3, Overview and Recommendations (April 17 2003);

³¹ Sir Desmond De Silva. Patrick Finucane Review: Executive Summary and Principle Conclusions. (December 2012)

The issue of the powers of the Attorney General to make such referrals was the subject of contention in late 2012 when the Coroner John Leckey suggested that the Attorney General had overstretched his powers in making the 21 referrals and suspended all cases while awaiting clarification from the British Secretary of State. In a bizarre turn around in February 2013 as fourteen of the families took judicial reviews to the High Court, the coroner lifted the suspensions, thus ending the question.

At a conference in May where the Director of Public Prosecutions spoke to his office's inability to address conflict related killings, the Attorney General also spoke to the limitations of his office and the coronial system for conflict related killings.

For families however the search for some form of accountability is clearly meaning placing the circumstances of the killings of their loved ones in whatever arena of investigation emerges. The new location of coronial powers within the devolved institutions and developments in the inquest system since 2001 created an expectation that this may be a worthwhile avenue of pursuit in the absence of a broader transitional process.

The judgment of the European Court of Human Rights in McCaughey, Grew and Hemsworth will clearly have an impact on how families affected by state killings and in cases of collusion now view the inquest system, just what that is remains to be seen.

It also remains to be seen how the devolved system answers to the European Court, as it is the British Government that is the answering party. Institutions formed as a part of the peace agreement to bring localised accountability with devolved powers are now implicated in judgments arising from past violations by the British Government direct rule arrangements, which have become ongoing violations under their watch.

The Imperative to Deal with the Past

The imperative to comprehensively address the past through a transitional justice mechanism built on international principles grows. We live with the legacy of impunity. Challenging impunity is a necessary pre-requisite to rebuilding a society and in creating the promotion and protection of human rights and in the administration of justice. In a recent report by the World Bank³² they linked development and security to justice. Truth informs positive change and reform, justice is the bedrock of democracy.

People are dying without truth and without justice and we owe it to them to collectively address the legacy of the past in a progressive way that delivers truth, accountability and transitional justice that consolidates the peace and heals the wounds. We also owe it to future generations. The cost of not doing so is too great. The quote “Those who forget the past are condemned to repeat it”³³ has never been more present.

An independent international truth commission could potentially provide the best opportunity for truth recovery for the greatest number of those affected by the conflict.

Such a process must be underpinned by key values and principles of independence and inclusiveness.

Narrowing the permissible amount of lies, securing truth, transitional justice and accountability is the only fitting memorial to those killed and for those injured.

All of the key issues within the peace process have required an international role and remit. Dealing with the past is the last piece of the jigsaw of the peace process and arguably it is the most contentious and challenging. We require international

³² The World Development Report 2011: Conflict, Security, and Development

³³ George Santayana (1905) Reason in Common Sense, volume 1 of The Life of Reason

assistance and not perfunctory processes that politick, conceal and prevent the truth from emerging.

No government, no organization, no party to the conflict with a vested interest in the outcome should determine, lead and drive processes that address past violations, rather they should be subject to an independent process.

The reality is that children are growing up with a narrative of injustice rather than a narrative of hope.

The issues are far from going away, if anything they are growing and they will not be brushed under the carpet. Mona Ashrawi, UN Assistant High Commissioner for Human Rights, recently said: 'people don't forget they keep their loved ones close'³⁴. Facing the truth is the only option. We need to face the past and the unpalatable truths otherwise they will have a negative and corrosive effect on our body politic and within civil society.

Individual, communal and societal healing, recovery and reconciliation can only take root within the context of such a process.

What is to be done?

As stated the jurisdiction faces the imperative of dealing with the past as the new institutions become compromised or overwhelmed by questions of accountability and justice regarding the conflict. But from a moral viewpoint this society must deliver a process of substance to victims of the conflict who have suffered too long.

As far back as 2003 Christine Bell observed that "The absence of any forum for addressing the past and moving towards a 'social truth' which could underwrite and justify institutional transformation, haunts attempts at reform. Even more

³⁴ Address to Nottingham University on Human Rights, truth, justice & accountability February 2012

dramatically, it destabilizes political institutions”³⁵. At the time she was referring to the suspension of the Executive following allegations of an IRA spying. Fast forward ten years and still not having a forum for addressing the past has meant that ever more institutions are at risk of destabilisation as issues of confidence and even operational legality are called into question.

The only big idea other than carrying on with what is currently in place, or the “package of measures”, so far has been the recommendations contained in the report of the Consultative Group on the Past.

Consultative Group on the Past

The report contains recommendations covering reconciliation, commemoration, reparation and investigation of conflict related harms. It is fair to say that the report while robust also has glaring gaps.

Importantly there was no recognition of the need to address endemic gender inequalities, gender specific harms and no recognition of the unequal participation of women in post conflict structures³⁶. This gap is in the context of UNSCR 1325 one that cannot be repeated. Women experienced the conflict differently and have specific needs relating to those experiences. In Relatives for Justice the issues of gender, awareness and need have been mainstreamed – any legacy process must do built in cognizance.

The report concentrated on the experience of those bereaved and there were few mentions and no processes for those injured³⁷, leaving their issues of reparation and justice only to the Commission for Victims and Survivors. This is a gap that must not be repeated. Not only does it mean that the experiences and needs of those injured

³⁵ Bell, C. Dealing with the Past in Northern Ireland. *Transitional Justice – Northern Ireland and Beyond*. 26 *Fordham International Law Journal* (2003) 1099

³⁶ O’Rourke, C. ‘Gender And Post-Conflict Transitional Justice: Dealing With The Past In A Post-Conflict Society: Does The Participation Of Women Matter? Insights From Northern Ireland’ 19 *William and Mary Journal of Women and the Law* 35 (2012)

³⁷ Report page 92; see also Breen-Smyth, M. The needs of individuals and their families injured as a result of the Troubles in Northern Ireland May 2012

are ignored and the feelings of isolation and disempowerment are reinforced. It means that significant violations are missed. As was seen in Chile, when any process misses significant violations this will not mean that they go away, rather it means that processes will be incomplete and will be revisited as time passes.

From the political domain Sinn Féin rejected the report because it was not perceived to be independent enough³⁸, in terms of the establishment of the Consultative Group or the recommendations citing the need for an independent truth commission.

However the one overwhelming issue that took centre stage was the recommendation that every family bereaved during the conflict would receive a recognition payment of £12,000³⁹.

The issue was whether all victims of the conflict should be treated equally with some holding that there was no equivalence between actors and civilians, or state actors and non-state actors⁴⁰.

The result of the “firestorm”⁴¹ was that by the 25th February the British Government, without any formal process of consultation, announced live on the BBC’s chat show the Nolan programme that this recommendation would not be taken forward⁴². The report never recovered from this body blow and has remained on the shelf since. Frustratingly for many victims of the conflict there was no substantive discussion on the role of reparations or the need for reparations. The voice of those who informed this recommendation – who received little or no compensation at the time and who live in abject poverty as a result of the long term implications of the violent killing of their loved one – was lost in the furore.

³⁸ Sinn Féin Press Release “Adams Comments on Eames Bradley Report” 28/01/2009

³⁹ Report Page 92

⁴⁰ Hancock, L. ‘Transitional Justice and the Consultative Group: Facing the Past or Forcing the Future’ 11 *Ethnopolitics: Formerly Global Review of Ethnopolitics* 2 (2012)

⁴¹ *ibid*

⁴² ‘Woodward Rules Out Troubles Cash’ BBC 25th February 2009 <http://news.bbc.co.uk/1/hi/northern_ireland/7909625.stm>

However that was one recommendation in a report of 180 pages and 36 recommendations.

The question now four years later is whether the “big idea” still has merit. Much of the recent comment has centered on “Eames Bradley” as a possible vehicle for addressing the repeated contention that has arisen from issues relating to the past.

The report advocates a Legacy Unit whose mandate

“would consist of four strands of work:

- helping society towards a shared and reconciled future, through a process of engagement with community issues arising from the conflict;*
- reviewing and investigating historical cases; - conducting a process of information recovery;*
- examining linked or thematic cases emerging from the conflict”⁴³*

The Legacy Unit would have a chief commissioner, to be an international figure and two other commissioners.

Additionally the Unit would contain a Review and Investigation Unit, which would take over the current historical investigations currently being carried out by the Historical Enquiries Team and the Police Ombudsman.

This is clearly a very attractive proposition given the current mess which faces the PSNI and Policing Board⁴⁴. However convenience would not necessarily mean solution.

The proposals include the Legacy Unit conducting criminal investigations taken forward by the Review and Investigation Team, examining whether prosecutorial

⁴³ Report page 17

⁴⁴ While not examined in detail in this piece the Office of the Police Ombudsman has been severely criticized for its treatment of historic cases and subject to two heavily critical reports including one by the Criminal Justice Inspectorate NI ‘An inspection into the independence of the Office of the Police Ombudsman for Northern Ireland’ 05/09/2011 which led to the suspension of investigations of all historic cases until February 2013

opportunities might exist. However this is strongly caveated by the idea that a passage of time has deeply contaminated the possibility of convictions. Therefore the idea of protected statements is proposed. Drawing on the experience of the Commission for the Location of the Remains of the Disappeared and the Saville Inquiry the Group propose this as a 'middle way' between a widespread amnesty and a prosecutorial focus.

"Firstly, before a case is subject to this procedure, it would have to be reviewed or investigated to see if there was a case for prosecution. That process of review and investigation would have been completed before any person could provide information under the rules of information recovery.

"Second, if evidence emerged outside of the process that a person had committed a crime, that could still be brought before a court. A person could not go from the process of information recovery and give the same information to the press or elsewhere with impunity.

"Thirdly, the Group proposes that oral evidence under thematic examination should not be taken until two years after the Commission's establishment"⁴⁵

The idea of a "middle way" between prosecution and amnesty clearly requires greater consideration. Arrests and convictions by the HET of some loyalists and a small number of republicans for conflict related deaths and injuries⁴⁶ created scenes of protest and civil unrest, with the HET being cited as part of the crisis within loyalism since the flags disputes beginning in December 2012. The old chestnut of whether prosecutorial focus on past violations places the wider peace process at risk could be seen playing itself out on the streets⁴⁷. However it would seem from the report that the question of a widespread amnesty was set aside due to considerations of victims' desire to see prosecutions and a view of ECHR obligations. But the report also recognizes the potential benefit from incentivized protected

⁴⁵ Report page 127

⁴⁶ "HET Deny Anti-Loyalist Bias Claim" UTV (5/03/2011)

Henry McDonald "Loyalists say 'provocative' police tactics sparked riots in Belfast" *The Guardian* (26/10/2010)

⁴⁷ Bell, C. 'Dealing with the Past: Amnesties and Accountability' *Negotiating Justice? Peace Agreements and Human Right* (2006) ICHRP

statements in return for truth⁴⁸. The “middle way” is an attempt at juggling both with the aim of delivering truth to bereaved families as prosecutorial opportunities diminish with the passage of time⁴⁹.

This highly relevant and arguably contentious part of the Consultative Group’s report which provides considered thoughts on how individual actors can engage a process through protected statements has been lost in the debate on the legitimacy of the recognition payment.

It surely prompts questions however on the potential role of amnesty, transactional immunity or protected statements vs the questions of impunity and the right to justice for conflict related harms. These are legitimate questions in a transitional setting that require far more consideration by all relevant parties⁵⁰.

For ex-political prisoners there is consideration of the issues they raise regarding the Special Advisors Bill. On pages 80 and 81 there is a recommendation that,

“The Group recommends that the guidance produced by the Quigley-Hamilton working group to eliminate discrimination against those with conflict-related convictions, should be incorporated into statute and made applicable to the provision of goods, facilities and services as well as recruitment.”⁵¹

Had this recommendation been acted on there is some possibility that the context for the Special Advisors Bill debate may have been different. Certainly the pain that ex-prisoners expressed about ongoing discrimination as the debate progressed would have been in a changed environment.

⁴⁸ It should be noted that the report also makes a provision for thinking about an amnesty at the end of the five years. But past the following bullet point on page 40 there is little detail *“The Group is not proposing an amnesty but recommends that the new Commission itself make recommendations on how a line might be drawn at the end of its five year mandate so that Northern Ireland may best move to a shared future.”*

⁴⁹ See Report page 127. It should be noted that the assumption of diminishing prosecutorial opportunities is one that is thrown into question when reading the HMIC report re the HET where it is clear that opportunities may have been compromised by the investigations themselves.

⁵⁰ Nt 63

⁵¹ The Report Page 81

So while the Consultative Group's proposals are certainly not a finished piece they lay the foundation for further discussion and development.

Relatives for Justice position on what is required now

A Transitional Justice Process must be put in place. It is over due and needed to support our society towards long-term stability and peaceful resolution.

1. The Report by the Consultative Group on the Past provides the basis for constructive development towards a realizable process.
2. Underpinning any comprehensive process must be the principle of independence. At the heart of the failure of all current mechanisms has been a lack of independence.
3. There needs to be international intervention and involvement in any process – just as all of the other big parts of the implementation of the Good Friday Agreement involved international oversight and involvement Dealing with the Past merits the same approach.
4. Any process must be cross-jurisdictional and involve not only the local parties but also the two governments. Any process that does not involve the state and consequently ignores the central role of the state is unreasonable and unworkable.
5. Equally they must be human rights compliant, with not only a view to the ECHR but also the ICCPR to which the two governments are both signatories .
6. Any process must be inclusive of harms and victims rather than exclusive. An exclusive approach will not only be lack human rights compliance but will compound the issues at stake. A process should value the current definition of victims which has stood to support the greater number of victims with dignity.

Relatives for Justice thanks the Panel and Dr Haass and Prof O'Sullivan for the opportunity to make this submission to you. Should you require any further information or to meet with our staff or Board to discuss any area we would be welcome the opportunity to engage further.