RELATIVES FOR JUSTICE

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Gaolta ar son na Córa

Rule 9 submission to

the Committee of Ministers of the Council of Europe

September 2015

Execution of Judgments of European Court of Human Rights in

McKerr, Hemsworth, McCaughey, Grew, Kelly, McCann & (many) others v. UK

Introduction

Established in 1991 by relatives of people killed in the conflict **Relatives for Justice (RfJ)** is an Irish based human rights NGO providing holistic support services to the bereaved and injured of the conflict. Initially established by relatives of people killed by British soldiers, members of the RUC and by loyalist paramilitary organisations, including in circumstances where collusion with state forces is suspected, RfJ today provides support to the bereaved and injured of all the actors to the conflict in an inclusive and non-judgemental basis. Rfj aims to provide appropriate therapeutic and developmental based support for the bereaved and injured of the conflict within a safe environment. It seeks to examine and develop transitional justice and truth recovery mechanisms assisting with individual healing, contributing to positive societal change, ensuring the effective promotion and protection of human rights, social justice, and reconciliation in the context of an emerging participative democracy post conflict.[1]

[1] See www.relativesforjustice.com

RfJ has supported its members and clients as they negotiate various legal and investigative mechanisms dealing with their loss. This has involved:

- documentation and analysis of information related to incidents;
- publishing case studies putting information in the public domain;
- developing strategic litigation;
- referring families to qualified solicitors for legal advice;
- accompanying families to attend trials, hearings, inquests and other legal processes;
- supporting families and clients in engagement with investigative mechanisms such as criminal investigations by the Police Service of NI (PSNI), case reviews by the Historical Enquiries Team (HET), investigations into complaints against the police by the Office of the Police Ombudsman of NI (OPONI);
- supporting families in making applications for fresh inquests;
- providing public commentary on clients' and families' perspectives;
- informing the international community of the difficulties involved in holding the British state and its agencies to account for the deaths it has caused or facilitated.

In February 2012, RfJ made a submission to the Committee of Ministers of the Council of Europe. A substantive submission followed in September 2014 and a series of updates followed.

The current submission seeks to provide an update of developments since then including an assessment of the implementation programme for new legacy arrangements arising from the Stormont House Agreement (SHA) of December 2014. The benchmark for this assessment is the continuing obligation on the UK government to provide prompt, thorough, impartial investigations in a manner that provides timely information to families. As this submission was being completed, a draft bill prepared by the Northern Ireland Office that had been given to the political parties during talks, was leaked. In the concluding section of this submission, we provide an initial assessment of this draft legislation.

RfJ hopes that the Committee of Ministers finds the following information of assistance in its continued monitoring of the UK government's obligation to respond to the findings of the European Court of Human Rights (ECtHR) in the variety of cases from this jurisdiction. In our

experience, international scrutiny is one of the few things the UK government takes seriously when it comes to respect for human rights arising from the conflict between 1969 and 1998.

1. Stormont House Agreement

In December 2014, despite wide expectation that nothing would emerge, talks between the political parties and the Irish and British government finally produced a two part agreement, which became known as the Stormont House Agreement (SHA).[2] RfJ gave the agreement a guarded welcome[3], not least because, for the first time, significant resources from the UK Treasury (£30 million a year over the five year horizon of the architecture, giving a total of £150 million) were to be made available to deal with legacy issues.

One part of the deal involved agreement between the local parties on implementation of welfare changes brought in by the Conservative government as part of its austerity programme. The second dealt with flags, parades and dealing with the legacy of conflict. These sections of the agreement build on earlier discussions and negotiations such as the Consultative Group on the Past[4], which reported in January 2009, and the Haass/O'Sullivan talks proposals[5], which concluded in December 2013.

Like those ultimately abandoned initiatives, the SHA envisages the establishment of a number of bodies to address outstanding legacy issues from the conflict. The primary objective is how to balance the search for justice with delivering truth, where prosecutions are not achievable. Mechanisms are proposed which will seek prosecutions where possible and/or as much information as possible for relatives about the death of their loved one/s. The former function (investigation leading to prosecution) is to be carried out by an Historical Investigations Unit (HIU) with full police powers, an independent director and full access to government files. The second function (the provision of information) will be performed by an Independent Commission on Information Retrieval (ICIR) jointly established by the Irish and British

[2]https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390672/Stormont_House_Agreement.pdf
[3] "Comhaontú na Nollaig - Some initial thoughts" Mark Thompson 09/01/2015 <http://relativesforjustice.com/comhaontu-na-nollag-some-thoughts/>
[4] http://cain.ulst.ac.uk/victims/docs/consultative_group/cgp_230109_report.pdf
[5] http://www.northernireland.gov.uk/haass.pdf

authorities to seek and receive information from all combatant groups concerning deaths that they caused. A third body, the Implementation and Reconciliation Group will examine themes and patterns arising out of the work of the other two entities. Finally, as part of the agreement on legacy issues, there are measures to try and address the increasing logjam in the coronial system.

Broadly, RfJ is of the view that the legacy architecture contained in the SHA has the capacity - finally - to address Art 2 requirements in respect of state killings, as long as implementation does not undermine the requirements of independence, and thoroughness. In this regard, the fact that the text of the agreement contains little detail, being focused more on broad strategic headings, shows that implementation will be all-important. In this respect, the first draft of the legislation, which will be discussed at the end of this submission, is alarming.

RfJ understands that, notwithstanding political uncertainties regarding devolution, there is a commitment on the part of the British government to implement the legacy elements of the SHA. This is possible because it has always been the plan to put legislation required to establish the new legacy architecture through Westminster rather than trying to take it through the devolved legislative assembly in Belfast. According to latest contacts with officials, the draft legislation is to be tabled in or around 12th October 2015.

There are, however, two areas of great concern:

- linking legacy with welfare; and
- shackling the HIU to a British government veto on disclosure.

2. Linking legacy to welfare cuts

As well as the legacy architecture, the SHA also contained a section on welfare reform. This has proved contentious and the nationalist parties have resiled from the detail of its implementation on grounds that the "reforms" will impact more harshly than was claimed on the poorest and most vulnerable in society. In recent weeks, the British government representative in the north of Ireland, Secretary of State Theresa Villiers, has suggested that

the legacy elements of the SHA will only be implemented if the welfare package also begins to bite.[6]

In RfJ's view, the question of welfare[7] should not be tied to a matter of the UK government's human rights obligations. Over many years, our families have fought for accountability under the rubric of Article 2 of the European Convention on Human Rights (ECHR). And over many years, they have won the argument in a series of cases at the ECtHR. These judgments have spelt out – progressively – the procedural requirements on the UK. The execution of ECtHR judgments is not a matter for political horse-trading with other elements of UK government policy. Dealing with the historic legacy of state abuse of article 2 rights is an absolute obligation even if the way it is done is a matter of policy.

As Nils Muižnieks, the EU Commissioner for Human Rights, said during his visit to Belfast in November 2014:

> *"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."*[8]

RfJ agrees with the Commissioner that Article 2 obligations are free-standing and cannot be linked to other policy matters. RfJ requests the Committee of Ministers to clarify such linkage from UK government representatives.

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[6] http://www.newsletter.co.uk/news/northern-ireland-news/plans-to-deal-with-legacy-of-troubles-not-activated-until-stormont-row-ends-1-6972825

[7] Relatives for Justice submission to the United Nations Committee on Social, Economic and Cultural Rights. October 2015 <http://relativesforjustice.com/submission-to-un-cttee-on-economic-social-and-cultural-rights/>

[8] http://www.bbc.co.uk/news/uk-northern-ireland-29941766

3. A British government veto

The second concern which RfJ wishes to mention arises from an NIO document[9] issued towards the end of September 2015 which, for the first time, outlines the NIO's plans for its part of the HIU process. (This concern is intensified by the draft legislation which has just been leaked.) Up to this point, the lead on developing plans for the HIU lay with the devolved Department of Justice, under Justice Minister David Ford. RfJ has had a number of meetings with the officials involved and was reasonably content with the plans as they were developed and outlined by the civil servants with whom we met.

At those meetings, it had been explained that the NIO was undertaking the legislative drafting for the non-devolved elements of the SHA. Despite a request to meet with NIO officials, this was not progressed. Therefore the first opportunity anyone had to assess the NIO's approach was the publication of **Northern Ireland (Stormont House Agreement) Bill 2015, Summary of measures**, a policy paper preparatory to the tabling of draft legislation at Westminster in mid-October.

In that document, the HIU is promised to be "an independent investigative body responsible for … outstanding investigations into Troubles-related deaths". Moreover, the "HIU will consider all cases in a manner compliant with the requirements of the ECHR Article 2 and will produce a report in each case". So far, so promising.

The problems arise when we come to oversight and issuing of reports in respect of matters deemed to fall outwith devolved areas, such as national security. Oversight of the HIU is allocated to the Northern Ireland Policing Board, made up of all political parties and independent members. This has been a decision agreed to by the parties in implementation discussions. However, "[t]he Secretary of State will have oversight of the HIU regarding reserved and excepted matters" (page17). Reserved and excepted matters are those which remain under the control of the UK government: national security, MI5, Ministry of Defence,

[9] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/462888/Policy_Paper_-_Summary_of_Measures_23_Sept_2015_Final.pdf

and so on. Thus, when the most sensitive issues are being investigated, the HIU will lose its independence and be subject to line management from the British government[10].

Moreover, the Summary of Measures document outlines further matters, which compromise the independence of the HIU when it deals with reports. Where the case in question has required access to files relating to reserved and excepted matters (i.e. matters still under the control of the UK government), the HIU "will be required to refer the matter to the UK government, which may prevent disclosure, if necessary" (page 19). This means that the HIU will lose its autonomy and independence is deciding what should and should not be published. The policy paper delineates an unacceptable governmental veto on transparency. The policy is copper-fastened in the first draft of legislation supposedly giving effect to the SHA.

RfJ requests the Committee of Ministers to inform the UK government that independent investigations must not be subject to that government's vetting.

4. Disclosure: redactio ad absurdam…

Even without these new measures designed to prevent transparency, disclosure of information has already developed into a massive problem. A blanket has been thrown over previously public information to prevent the most elementary information being released without screening. Thus, documents already held in the Public Record Office and up 'til recently publically available must now be checked by sponsor agencies before they can be released.

For example, inquest papers have been, for many years, held by the Public Record Office (PRONI) in Belfast. In recent years, NGOs such as RfJ have been accessing these papers on behalf of families. In a number of occasions, it has been possible to challenge police conclusions about particular incidents by virtue of forensic or ballistic information made

[10] "Will truth always be a prisoner of national security asks Daniel Holder CAJ" Daniel Holder 23/09/2015 <http://eamonnmallie.com/2015/09/will-truth-always-be-a-prisoner-of-national-security-in-northern-ireland-asks-daniel-holder-deputy-director-caj/>

publicly available at the time of an inquest. In response, the PSNI and the NIO clamped down on the Public Record Office and established the new system. This operates as follows:

- a request is made to PRONI for inquest papers;
- this must now be forwarded on to the Northern Ireland Office and the Department of Justice who, in turn, forward the matter to the police;
- before release, each document is then checked by the PSNI and the NIO and redacted as required;
- the file can then be released;
- but not before the family have to sign an undertaking that the file will not be shown to anyone outside the immediate family and their legal advisers.

This absurd and byzantine procedure is mirrored in disclosure to inquests where the information is still held in police registries and has not been released to the PRONI. Time and again the police claim that they are agents of the coroner in respect of disclosure of information. Yet the system the police have established has made the inquest system grind to a halt. The police hold the information and they have appointed staff who a) wish to protect the reputation of the old RUC against allegations of mal-practice during the conflict and b) are risk-averse in disclosing information anyway.

The best example is the documentation relating to the killing of Gervaise McKerr, Sean Burns, Eugene Toman, Michael Tighe, Seamus Grew and Roddy Carroll in late-1982. These Shoot-to-Kill incidents are the subject of one of the longest running inquests in legal history. The inquest into the killings by an SAS-trained group of RUC officers known as E4A is among the lead cases being monitored by the Committee of Ministers.

According to civil servants, the archive related to these deaths is contained in a row of large plastic bins, which are stored in a nine high row that measures perhaps forty metres. In the course of discussions during the inquest about how long it is taking for the police to release documentation, it has emerged that each document in the considerable archive is marked "Top Secret", the highest level of security classification available. Because of the "Top Secret" classification, each document must be screened and redacted. This includes press cuttings that are available in public libraries. Despite this, each press document – like all other documents – is reviewed and redacted as required under the PSNI's new system.

It emerged during inquest hearings that there has never been a review of the "Top Secret" security classification of the shoot-to-kill archive.

When the relevant staff are screening the documentation, an ever-growing list of factors now requires redaction:

- there is an Article 2 check lest any information is released which might put someone's life in jeopardy;
- there is an Article 8 check lest any information is released which would compromise anyone's right to privacy and family life;
- there is a Freedom of Information check lest any excepted information is released;
- there is a data protection check lest protected information is released;
- there is an official secrets check, to ensure that material covered by the Official Secrets Act is not released;
- there is a Public Interest check, to assess whether information should be subject to a Public Interest Immunity certificate; and
- there is, finally, a national security check which allows for a final legally undefined check which seems to be discretionary if not arbitrary.

After all these redactions are proposed, each document to be released to the inquest must be approved by the Chief Constable and the Secretary of State. The coroner has sight of the document and, in theory, has to agree the redactions. It is not known how often, if at all, a coroner has objected to redactions.

However, it has become increasingly clear over the course of the past year that coroners are frustrated by the delays caused by the police screening and redaction process[11]. In case after case, there are police excuses and complaints by the coroner about how long the discovery process is taking[12]. In RfJ's considered view, from having attended many such occasions, the police have established a system designed to prevent transparency by instead becoming the arbiters of what information can be put in the public domain. As a result, the inquest system

[11] "Drew Harris shows RUC Special Branch legacy is safe in his hands" Mike Ritchie 25/11/2014 <http://relativesforjustice.com/drew-harris-shows-ruc-special-branch-legacy-is-safe-in-his-hands/>
[12] "Leaving Court With Two Arms the One Length" Mike Ritchie 13/02/2015 <http://relativesforjustice.com/leaving-court-with-their-two-arms-the-one-length-blog-by-mike-ritchie/>

has been progressively tied up in a snail's pace discovery process that yields information slowly and in manageable chunks. Families are therefore frustrated and grow old while kept in ignorance of what the state really did to their loved ones.

As a final comment on the British state's attitude to disclosure, a recent Freedom of Information Tribunal judgment is instructive.[13] In this case, an Irish historian, Barry Keane, requested a file from the Home Office, which had been freely available in the Public Record Office until 2009. It related to payments made to informants in Ireland between 1892 and 1910, a pivotal period of growing nationalist activism in the lead up to the Easter Rising. Despite the fact that the material dates from a century ago, the Tribunal rejected Mr Keane's request as it might endanger the recruitment of current informants as well as put the family of the informants at risk. It is stated explicitly in the course of the judgment that, in relation to informants: "the policy is to guarantee confidentiality in perpetuity".

If this is the approach of the British state to such historical material, one must hesitate to believe the UK government's assertion at para 37 of the SHA:

> *"The UK Government makes clear that it will make full disclosure to the HIU."*

Indeed, in the SHA, this bald statement of apparent transparency is immediately rendered nugatory by what follows:

> *"In order to ensure that no individuals are put at risk, and that the Government's duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU."*

Fully three-and-a-half pages of the Summary of Measures issued by the NIO in September 2015 outline the extensive pre-cautionary approach, which is to be imposed on the HIU in respect of "onward disclosure". The impression is that there will be little scope for proper independence on the part of the HIU to make its own decisions in respect of providing information to victims.

The irony is that the UK government and the PSNI claim that such disclosure is dangerous on human rights grounds. In the ruling by the Information Tribunal cited above, the assertion is

[13] http://www.informationtribunal.gov.uk/DBFiles/Decision/i1625/EA-2015-0013_13-08-2015.pdf

made that the state has a duty to protect the descendants of informants from danger under Articles 2, 3 and 8. Such respect and awareness for human rights obligations is notable.

One is left with the feeling that, had the various governmental and police authorities been as assiduous – and respectful of human rights – in implementing the procedural obligations of Article 2 in respect of investigating deaths caused by its agents during the conflict, their current approach to neutering the HIU would not be necessary.

5. Inquests

As already adverted to, disclosure has hobbled the capacity of inquests to investigate controversial deaths in the jurisdiction. Ever since cases were won at the ECtHR setting out criteria by which inquests could be deemed to deliver Article 2 compliant investigations, the row-back began. Steps forward in discovery, with coronial decisions requiring the police to yield information to the relatives of deceased, have been followed by tactical decisions to make disclosure more and more restricted. These deliberate cover-up methodologies feed into increasing reliance on secrecy at institutional levels when national security is claimed. Screening of witnesses, closed material proceedings, viewings by the coroner in the absence of the deceased legal team are all increasingly-used mechanisms to frustrate efforts to access information. Reports are common of coroners and lawyers expressing frustration at delays.[14]

A further issue relates to the number of coroners and the lack of staff available to them. There is now a back-log of 55 "legacy" inquests into 96 deaths. Presiding over these is a much reduced complement of coroners. The long-standing senior coroner, John Leckey, retires at the end of October 2015. His successor is unlikely to be in post until April 2016. John Leckey's two colleagues, Suzanne Anderson and Jim Kitson, are on long-term sick leave. It has been agreed that High court judges should be appointed and that they could hear linked cases in order to increase the throughput. In this regard, the Lord Chief Justice, Declan Morgan, has

[14] See, for example: http://www.belfasttelegraph.co.uk/news/northern-ireland/coroner-fury-over-inquest-delays-30894968.html; https://www.thedetail.tv/articles/the-stories-behind-the-inquest-delays-as-coroners-crisis-continues; and http://www.bbc.co.uk/news/uk-northern-ireland-30223100

been asked to take a role that might enhance the status of inquests and thereby expedite them.

While Declan Morgan has agreed to this approach and will in token and in due course assume the Presidency of the Coroners' Courts he recently[15] sought to spell out the challenges in addressing the logjam. He stressed that "significant additional resources" would be required if any major impact on the build-up was achievable. He has also suggested that, at current rates, legacy inquests would not likely be completed until 2040.[16]

In the meantime, and recognising that previous inquests were so truncated and hampered by lack of proper independent investigation and scrutiny, the Attorney General continues to order new inquests into conflict-related deaths where new information or circumstances give rise to doubt about the original inquest reaching Article 2 standards of thoroughness and independence.

An interesting development (laying bare the operation of the distinction between devolved and non-devolved powers) occurred in relation to the inquest in to the deaths of 9 men in Loughgall in May 1987. These SAS killings are the subject of the ECtHR case *Kelly & others v. UK*.[17] In this case, an application was made to the NI Attorney General to re-open the inquest. John Larkin agreed; however, the Secretary of State Theresa Villiers intervened to block this decision saying that, because national security is engaged, the decision is properly one for the UK Advocate General as opposed to the NI Attorney General. While the supposition was that this was intended to prevent a new inquest from taking place, in fact, the UK AG eventually made the same decision as the NI AG. [18] It remains to be seen whether, when the inquest gets under way, the invocation of national security will ensure that the truth of what took place remains as opaque as ever.

[15] http://www.bbc.co.uk/news/uk-northern-ireland-34180103
[16] http://www.newsletter.co.uk/news/northern-ireland-news/inquests-into-contentious-troubles-deaths-could-go-on-until-2040-1-6421833
[17] http://hudoc.echr.coe.int/eng-press?i=001-59453#{%22itemid%22:[%22001-59453%22]}
[18] http://www.irishnews.com/news/northernirelandnews/2015/09/23/news/guarded-welcome-for-new-loughgall-inquests-from-families-271015/

Meanwhile, with considerable irony, the PSNI Chief Constable told the Policing Board in late September 2015 that the inquest system is "chaotic".[19] Claiming that the police simply want to assist the coroners in their work, he claims that they are open to improving the way in which information is provided. In RfJ's view, however, it has been the PSNI themselves who have set up the convoluted disclosure system which is the cause of all the delays. Now that, thanks to ECtHR judgments and the oversight of the Committee of Ministers, we finally had an inquest system that delivered an Article 2 compliant level of inquiry. At that very point, the process of discovery and disclosure was targeted. It now suits the authorities to criticise the coronial process rather than provide the information and leave it for the coroner to decide on what is relevant.

6. Police Ombudsman

The Police Ombudsman (PONI) is another of the "package of measures" that the UK government claimed amounted to an Article 2 compliant environment dealing with conflict-related Article 2 cases. Michael Maguire is the current incumbent, having taken over in 2012 from his predecessor, Al Hutchinson. Under the latter, the office had lost credibility and was seen as too close to the police and, particularly, former Special Branch officers of the RUC. Ombudsman Maguire, however, has restored some public confidence in his role through adopting a more robust approach to the police.

In 2014, he resorted to the courts as a way of forcing the police to provide access to information that he required to investigate complaints. It was notable that the police claimed that they were not required to provide access where national security issues were engaged. It was also clear that the police objective was to prevent independent assessments of how agents and informants were handled. In the event, when the case came to court in September 2014, the Chief Constable conceded.[20] The ombudsman has now the access he needs.

[19] http://www.u.tv/News/2015/10/01/NI-inquest-system-chaotic-Hamilton-46103 and "Chief Constable's 'Chaos' is Madness of his Own Making" Mark Thompson 01/10/2015 <http://relativesforjustice.com/chief-constables-chaos-is-madness-of-his-own-making/>

[20] http://www.bbc.co.uk/news/uk-northern-ireland-29034151

The level of public confidence in the office has since grown and many victims now look to the Ombudsman to deal with issues they have relating to RUC investigations and killings. According to recent figures, PONI now has 350 cases relating to 400 killings on their books, an intimidating list by any measure.

However, coinciding with the legal proceedings brought by the Ombudsman against the Chief Constable, an arbitrary cost-cutting exercise by the devolved Department of Justice – passing on Treasury restrictions – imposed disproportionate cuts on the Ombudsman's budget. Since then he has had to reset his estimate of achievable completion of reports given his reduced staffing levels.

Here is yet another barrier to families seeking answers to questions about what happened to their loved ones in the most controversial conflict-related cases:

- First of all the British state **denies** wrong-doing on the part its agents;
- When the evidence mounts and the ECHR judgments condemn it, the British state **delays** providing information;
- When all credibility is lost due to procrastination, the British state **cuts resources**.

7. Draft Bill

The section of the SHA dealing with the past was recognised as an opportunity to put in place a comprehensive set of proposals, which would deliver truth, justice, accountability and reparations to victims and survivors. Indeed it was promoted as such by the UK Government itself when it with the Committee of Ministers and to the House of Commons' Joint Committee on Human Rights in January 2015.

The legislation drafted by the British Government as leaked to the media and to some victims of the conflict in early October 2015 in no way, shape or form meets that promise or that commitment to fulfil human rights obligations.

The draft bill deals with the Historical Investigations Unit (HIU) and the Oral History Archive.

There are 12 pages missing from the disclosure. It is believed that these 12 pages relate to the Independent Commission for Information Retrieval. Given that this is a joint responsibility between London and Dublin the British Government has not included it in the leaked pages.

The Stormont House Agreement laid out the following principles:

> *21. As part of the transition to long-term peace and stability the participants agree that an approach to dealing with the past is necessary which respects the following principles:*
>
> *- promoting reconciliation;*
>
> *- 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*

In the context of those principles the following was agreed regarding the HIU:

> *30. Legislation will establish a new independent body to take forward investigations into outstanding Troubles-related deaths; the Historical Investigations Unit (HIU).*
>
> *The body will take forward outstanding cases from the HET process, and the legacy work of the Police Ombudsman for Northern Ireland (PONI).*
>
> *A report will be produced in each case.*
>
> *31. Processes dealing with the past should be victim-centred.*
>
> *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 Executive will take appropriate steps to improve the way the legacy inquest function is conducted to comply with ECHR Article 2 requirements.*
>
> *37. The UK Government makes clear that it will make full disclosure to the HIU.*

In order to ensure that no individuals are put at risk, and that the Government's duty to keep people safe and secure is upheld, Westminster legislation will provide for equivalent measures to those that currently apply to existing bodies so as to prevent any damaging onward disclosure of information by the HIU.

There can be no grey area as to the commitment to human rights standards and the necessity to deliver for victims of conflict. Importantly, the British Government made explicit commitment to full disclosure. The draft legislation needs to be measured against these commitments. If it does not meet those standards then it requires change.

The reference to Article 2 in the heads of Agreement document is significant as this is the central issue for families affected by conflict. They have never had an Article 2 compliant investigation; this requires investigations that are **effective**, **independent** and **transparent**.

In the proposed British legislation, in the introductory provisions for the HIU it is clear that these requirements have been side-lined in favour of British national security interests. However, it is in the matter of **disclosure** that the problems become most visible.

On Page 6 of the draft bill, at Section 12 subsection 4, the legislation requires any relevant authority to whom requests are made for information to give that information to the HIU. However, in Section 13 subsection 5 and 6, this requirement is entirely undermined when it says that this requirement does not apply:

"in relation to
(a) a disclosure to the Secretary of State;
(b) any information which a relevant authority has identified as sensitive information or prejudicial information.

Indeed Section 13 closes down all avenues for either receipt or dissemination of any information determined to be "sensitive".

And it is not just the Secretary of State who will decide that information is likely to be sensitive it is any of "the relevant authorities". These are listed on page 8 at Section 14 (1) (b):

- The Chief Constable

- The Ombudsman
- ANY minister of the Crown
- The Security Service
- The Secret Intelligence Service
- GCHQ (which has the same meaning as in the Intelligence Services Act 1994)
- ANY other department of the United Kingdom Government
- ANY of Her Majesty's Services.

This is a pretty comprehensive list of state interests who have a veto on any disclosure.

Depressingly the next section defines what "sensitive information" looks like:

> *"information, which, if so disclosed, would, or would be likely to, prejudice the national security interests of the United Kingdom and*
> *"information which has been supplied by (i) Security Service; (ii) the Secret Intelligence Service; (iii) GCHQ; (iv) any part of Her Majesty's forces, of the Ministry of Defence, or of the Police Service which engages in intelligence activities".*

This means any information whatsoever on covert actions or collusion by the state with loyalist groups cannot be disclosed. These are the very areas of greatest controversy and where cover-up has been the traditional approach. Nothing in the draft bill suggests a change of heart.

Equally, section 13 sub-section 7 explicitly states that the HIU itself even if it was to receive such information:

> *"must not make the proposed disclosure if, or to the extent that, any of the information has been identified as sensitive or prejudicial information"*

either by the HIU itself or by any of the relevant agencies listed above. Essentially, therefore, if something manages to slip through the net to the HIU, the HIU itself is prevented from making any disclosure! The use of the words "must not" reveal the strength of the duty placed on the HIU in respect of non-disclosure.

The legislation goes on in that vein throughout.

It is also worth noting the references to "prejudicial information". This is not defined in the same way as "sensitive" information and is therefore open to a much wider interpretation.

But by Schedule 8 (page 55) it is made clear that potentially "prejudicial" information must be cleared directly by the British Secretary of State.

And then there is "protected international information". Again this is not defined in the exacting way that "sensitive" information is. However whatever that information might be determined to be, by Schedule 9 (3) on page 56: "the disclosure is not permitted to a court or tribunal in the United Kingdom". Neither is the HIU permitted to make disclosure "insofar as any of the information has been identified as protected international information by the Secretary of State" (Section 13, Subsection 8 on page 7) This has particular significance for any cases brought by families affected by our conflict in the South of Ireland, Germany or elsewhere.

The legislation also raises concerns about the roles of the PSNI in operational matters and the Department of Justice. There are matters of concern in the legislation related to recruitment of staff. Oversight of the HIU in respect of reserved and excepted matters is, as flagged in the Summary of Measures policy paper, is allocated to the Secretary of State; another matter of concern. However, these matters are all in the context of the architecture of British national security, which is writ large in this proposed legislation.

8. Conclusion

In this submission, RfJ has sought to bring to the attention of the Committee of Ministers of the Council of Europe relevant matters to consider in preparation for its next engagement in December 2015 with the UK authorities to examine progress in the execution of judgments. While the year began relatively positively with the promise of the SHA, that expectation has been severely undermined the UK government's detailed implementation.

The commitment in the SHA to full disclosure by the state has been made a nonsense of and the apparent commitment to families for truth from the state was a lie. The British Government has no intention whatsoever of participating in good faith with the HIU.

This draft legislation is not a genuine attempt at the development of an Article 2 compliant investigation in line with international legal obligations.

The Stormont House Agreement is not reflected in the proposed legislation[21]. This must be sent back expeditiously to drafters to write a piece of legislation for dealing with our past in a human rights compliant fashion. The current draft reeks of the fear and insecurity of the British establishment regarding their role in our conflict; it seeks to protect their interests.

RfJ respectfully asks the Committee of Ministers to question the UK government closely on its real intentions in respect of continuing failures to put in place proper investigative mechanisms. Families grow weary of false promises and assertions by UK authorities that they have a commitment to human rights standards. There is little evidence to back up these claims. The only steps forward have been won in the European Court of Human Rights. The supervision by the Committee of Ministers remains an important impetus to UK government policy.

[21] "British SHA Legislation Unacceptable For Families" Relatives for Justice 06/10/2015 <http://relativesforjustice.com/proposed-british-legislation-on-past-unacceptable-for-families/>