

# McCUE JURY & PARTNERS

## Augmenting Existing HMG Northern Ireland Legacy Proposals

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### I. Background

1. On 14 July 2021 the Northern Ireland Secretary published a policy paper titled ‘Addressing the legacy of Northern Ireland’s past’ setting out the government’s (HMG) plans for legislation to address the legacy of the Troubles.
2. In summary the Northern Ireland Office’s plan (NIOP) has three limbs: (i) introduce a statute of limitations (SoL) to apply equally to all Troubles-related incidents and across criminal, civil and coronial proceedings (**First Limb**); (ii) establish a new independent body to enable individuals and family members to seek and receive information about Troubles-related deaths and injuries (**Second Limb**); and (iii) establish a major oral history initiative (**Third Limb**);
3. While most would agree that “there is broad agreement across Northern Ireland that the current system for dealing with the legacy of the Troubles is not meeting the needs of anybody”, the NIOP has united all political parties and factions in NI and the Republic of Ireland in opposition to its proposals. [¶1, NIOP.]
4. The NIOP is open for criticism for not meeting the essentials of any progressive transitional justice model that seeks a sustainable and enduring peace. Justice has simply been side-stepped. Ignoring it – in any of its forms (e.g., mediation,

litigation, prosecution etc) – or its deliverables (e.g., truth and reconciliation, custodial sentences, compensation etc) simply allows a chasm to open over time unnoticed; through which the NI peace process will inevitably fall.

## II. Executive Summary

5. In drafting this document, we have sought to lay out initial thoughts on a way forward that is in keeping with and builds on the NIOP and the Stormont House Agreement, but that addresses the recent criticisms of HMG's policy and approach, and which should result in acceptable outcomes to the most important stakeholders, the victims and survivors of the Troubles and justice itself.
6. We propose the establishment of a Peace Centre in NI, which has the following designated functions: (i) repository for an archival and oral history of the Troubles and Troubles related killings; (ii) mediation services focused on truth and reconciliation between victims and survivors and suspected perpetrators; (iii) incentivisation for the meaningful and effective participation of paramilitaries in the truth and reconciliation process; (iv) tribunal for the adjudication of any cases not resolved through mediation; and (v) a meaningful, fair and appropriate government compensation process.

## III. The Issues

### A. First Limb

7. As it stands, the First Limb is morally indefensible, open to legal challenge and inherently flawed.
8. Given the statistic that paramilitaries were responsible for 90% of killings during the Troubles, ending the possibility of justice, accountability and closure will

- disproportionately impact on those who have been bereaved by paramilitary violence.
9. The legal/procedural equivalence this proposed moratorium creates between terrorist perpetrators and those agents of the state who saved NI from sectarian anarchy is unacceptable. No amount of sophistry can disguise a process that robs victims and survivors of the hope, however slim, that violent extremists will be held to account for their crimes.
  10. As well as fortifying terror groups worldwide, the proposals will feed a growing and destabilising perception amongst the NI Unionist community that violence pays, and their communal suffering is simply collateral damage for stopping vexatious prosecutions against a relatively small number of veterans.
  11. At the same time, and in opposition to its Unionist Community, the NI Nationalist community will view this as a continuation of HMG's efforts to cover up alleged unlawful killings by the British Army and the British state's collusion in a 'dirty-war'.
  12. By creating further differences between the Unionist and Nationalist communities, the NIOP risks having the reverse impact to that which its proposals seek to achieve. Grief and grievance will be weaponised.
  13. It is also inevitable that, if implemented, the NIOP's proposed SoL will be subject to Article 2 challenges under the HUMAN RIGHTS ACT 1998 from both communities in respect of any end to criminal, civil or coronial proceedings; thereby bringing any hope of address legacy issues to a grinding halt while those challenges are litigated. Further, as regards seeking to bring an end to civil litigation, HMG will have to vault an additional hurdle as it would, in effect, be an unlawful expropriation of a private right to seek a private remedy through the civil courts.

14. Perhaps most importantly, the inherent flaw in the First Limb is that it is unconditional, therefore it is inherently not about justice, fairness or peace; consequently, it also negates the efficacy of the Second and Third Limbs.

## B. Second & Third Limbs

15. There have, of course, been previous bodies established to give victims and survivors of the Troubles information about individual incidents. These include the Historical Enquires Team (**HET**), a unit of the Police Service of Northern Ireland (**PSNI**) set up in 2005 to investigate the 3,269 unsolved murders committed during the Troubles committed between 1968 and 1998. The HET was replaced in 2015 by the PSNI's Legacy Investigation Branch (**LIB**) whose role is to investigate deaths arising from the Northern Ireland 'Troubles' between 1969 and 2004. There have also been previous, albeit private, attempts at establishing a major oral history initiative, such as the 'Boston Tapes Project' (which ended in ignominy).

16. It is not by chance that the results of HET and LIB's labours, and subsequent decisions whether to prosecute made the Public Prosecution Service of Northern Ireland (**PPSNI**), have resulted in a demonstrable imbalance in the number of criminal and coronial proceedings relating to deaths arising from the actions of security forces and those relating to killings by paramilitaries.

17. PPSNI figures show that security forces are up to 54x more likely to be prosecuted than a Republican paramilitary<sup>1</sup>. Similarly, killings by the Army

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<sup>1</sup> During the Troubles, some 3,720 people were killed, the majority in Northern Ireland, and very many more were injured (David McKittrick & Others, eds., *Lost Lives*, Edinburgh & London, 2007, p 1553.). Statistics reveal that 90% of the deaths were caused by terrorists (60% by Republican paramilitaries and 30% by Loyalists paramilitaries). The number of state killings (by police and soldiers) – at 361 – is slightly less than 10% of the total. It is incontrovertible that the majority, if not all, the paramilitary killings were unlawful, while the majority of the state killings – with a handful of exceptions – were lawful. Research shows that, since 2007, despite being responsible for around 60% of deaths during the Troubles only seven (7) Republican paramilitaries have been subject to a decision to prosecute for offences committed prior to 1998. Disproportionately, given those figures above, six (6) former soldiers (to date) face prosecution in Northern Ireland (with twelve more expected to follow). Using those figures above as a reference point, if Republican paramilitaries killings were the subject of prosecution at the same rate as incidents involving the British Army, we should expect thirty-seven (37) rather than merely seven (7) Republican paramilitaries to have faced or be facing prosecution since 2007. Alternatively, if there really are only seven (7) possible prosecutions to be brought against Republican paramilitaries then we should expect the number of veterans to be facing prosecution since 2007 to be around one (1). Put simply, veterans are at

and/or police are at least around 18x more likely to be the subject of an inquest in NI than those of Republican paramilitaries.<sup>2</sup>

18. Setting aside any allegations that the NI authorities may have displayed a certain bias in the pursuit of prosecutions of service personnel over paramilitaries, this imbalance can be explained largely by the fact that the NI police and prosecution services have ready access to UK government records that provide much, if not all the information required to document the circumstances of any killing the security forces came about. Of course, paramilitary organisations were not as fastidious in their record keeping; as such, there is a comparative information deficit that makes the investigation and prosecution of paramilitaries far harder. (This has also led to a 'legacy litigation industry' representing claimants in civil proceedings against the state and in coronial proceedings, funded by legal aid at the expense of the taxpayer amounting to, as the NIOP states: "a significant proportion of the approximately £500 million spent on legal aid in Northern Ireland since 2011".)
19. Consequently, any ambitions of fairness and proportionality in implementing the Second and Third Limbs are thwarted by the fact that while any information gathering would have access to a surplus of information relating to deaths arising from the actions of the security forces it would not have equivalent access in respect of paramilitary killings.

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least around 6x more likely to face prosecution in Northern Ireland than Republican paramilitaries. Furthermore, this 6x calculation is not accounting for the fact, as stated above, that the majority, if not all, paramilitary killings were unlawful while any killings carried out by British troops during the Troubles – with a handful of exceptions were lawful. Applying that variable, even if we pick an arbitrary high figure of 10% being the percentage of killings by the British Army which were unlawful (we expect the figure is, in reality, far lower), veterans are actually around 54x more likely to face prosecution in Northern Ireland than Republican paramilitaries.

<sup>2</sup> A review of the 2019 Legacy Inquest Review of Mrs Justice shows that, of a total of 39 inquests scheduled where the death is attributed to a group or individual, 18 inquests relate to deaths attributable to either the Army or police, while only 21 inquests are scheduled into deaths attributable to paramilitary groups (of which only 4 are attributable to Republican paramilitary groups and 17 to loyalist groups). Relying on those same figures used to reach the statistic detailed in the footnote above, if Republican paramilitary killings were the subject of inquests at the same rate as incidents involving the Army and/or the police, we should expect one hundred and seven (107) rather than merely four (4) inquests arising from killings by Republican paramilitaries. Alternatively, if there really are only four (4) possible inquests to be brought in relation to killings by Republican paramilitaries then we should expect the number of inquests relating to killings by the Army or the police to be around one (1).

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20. Similarly, security forces personnel have frequently demonstrated that they are willing to come forward (albeit sometimes anonymously) and give testimony to criminal and coronial investigations. No such cooperation has been forthcoming from the paramilitary constituency. This imbalance does not bode well for the equilibrium of any oral history initiative. If an unconditional SoL is implemented, paramilitaries have even less of an incentive to cooperate. In fact, it could be said that many paramilitaries are already sufficiently disincentivised given that they enjoy *de facto* and effective amnesties under the 1998 Belfast Agreement and the infamous 'On-The-Run Scheme'.
21. The belief that there is any chance that paramilitaries will meaningfully participate in any information sharing or oral history initiative is profoundly misguided and naïve and not something on which HMG policy should be based. Some of the 'iconic' atrocities committed on civilians by paramilitaries involve behaviour in planning and execution that is so debased and dehumanised the only incentive those who committed them would have in coming forward would be to re-traumatise their victims. One must also consider the historical articulation of traditional paramilitary oral history initiatives (through their songs, books and murals and, more recently, legacy litigation) which has distorted history for propaganda purposes and will continue to do so unless met with an alternative, corrective, more appropriate and balanced process/model.
22. Should HMG proceed with the Second and Third Limbs as presently proposed then, again counter to its intent, it will only serve to boost the efforts of those who wrongly seek to lay all blame for the Troubles at the door of the British state and attempt to rewrite the history of the conflict into their own narrative.

## IV. An Augmented NIOP

23. If HMG is intent in pursuing the First Limb, it must modify and enhance its proposals on the Second and Third Limbs to build in a state-backed and legislatively robust Truth and Reconciliation (**T&R**) Program for victims if alleged perpetrators refuse to participate in any information sharing and oral history initiatives. Not only will this justify the First Limb and its proposed SoL but it will ensure the efficacy of the Second and Third Limbs.
24. Jason McCue and Matthew Jury of *McCue Jury & Partners LLP* propose that such a T&R Program should be as follows:
  - a. A physical T&R Centre (**Peace Centre**) is established and staffed with victim advocates, researchers, mediators and litigators who have access to all archival material from the state including police, military and security service information.
  - b. Any victims and survivors (the **Applicant**) may apply to the Peace Centre to ask for confirmation whether a suspect believed to be responsible for the harm and loss they have suffered can be identified and whether the archival materials contain *prima facie* evidence of their culpability.
  - c. If a suspect can be identified (the **Respondent**) and there is *prima facie* evidence of their culpability, the Peace Centre shall set about contacting them to ask if they are willing and would consent to a private reconciliation with the Applicant, hosted by the Peace Centre, in which they would be required to meaningfully and effectively participate under the application of standard T&R methodology.

- d. Should the Respondent consent to enter a reconciliation process with the Applicant then both parties will enter into a binding agreement that, in return for a documented and statement of truth from the Respondent that may be sealed for (X) years, then the Applicant shall waive all rights to bring any private legal action against the Respondent. Meanwhile, the Respondent need not fear any criminal prosecution as a SoL would have been enacted under the First Limb.
  - e. Alternatively, if the Respondent chooses not to consent or fails to participate meaningfully and effectively in the reconciliation process, the Peace Centre shall provide full cooperation -- including disclosing and producing any relevant information and materials -- and funded representation to the Applicant so that they may bring and litigate civil proceedings for damages against the Respondent before an specially constituted tribunal on a fast-track basis. To ensure an equality of arms, such funding and cooperation shall also extend to the Defendant. Funded representation may take the form of Peace Centre appointed advocates.
  - f. To the extent that it is practical, the Peace Centre should prioritise cases based on the number of victims and survivors arising from the associated incident. This should apply even if only one Applicant comes forward. Not only would this provide an economy of scale and efficiently service as many victims as possible but would be most efficient in serving to address unresolved killings by volume and based on an impartial metric.
25. While legislation may be required to provide for the founding, operation and funding of both the proposed Peace Centre and its reconciliation process and procedures, it will not be required to compel Respondents to enter the

reconciliation process. Instead, it need only legislate that if a reconciliation is unsuccessful the parties will receive funding and logistical support from the Peace Centre to litigate civil proceedings. Such framing should neutralise criticism of state interference and the prospect of any judicial review or human rights challenges. All the state is seeking to do is to facilitate private T&R.

26. As stressed at the outset, these are only initial thoughts based on our work on similar issues in other conflict arenas. With due consideration, a mediation-reconciliation-reparation justice model could be readily adapted within the three limbs to not only build on their objectives (and make them effective) but also ensure an enduring peace (which otherwise will not be achieved through the three limbs alone).
27. The establishment and operation of such a Peace Centre/process would be expensive but, one may anticipate, significantly less than the combined cost of state funding representation of parties in legacy litigation (£500 million?), the costs of criminal investigations and prosecutions, and associated court costs. There may also be private sector appetite for funding such. Afterall, what would the cost be of NI sliding back into conflict if an enduring peace is not delivered?
28. By introducing such a scheme, HMG can neutralise the criticism of the First Limb that suspected perpetrators will walk away from their alleged actions without addressing their victims or being subject to sanction.
29. Secondly, such a scheme also provides the incentive to paramilitaries to cooperate in an effective information sharing and oral history initiatives that, at the same time, addresses the need of victims and survivors for some form of closure.
30. Finally, the proposed Peace Centre would not only house these initiatives under one roof but can also be a focus for a true restoration in NI and, over time, be a

centralised and cornerstone asset in recording and communicating an accurate, objective and non-partisan history of the Troubles to future generations.

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***McCue Jury & Partners LLP***