

**Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland**

*Jordan v the United Kingdom, judgment final on 4 August 2001*  
*Kelly and Ors v the United Kingdom, judgment final on 4 August 2001*  
*McKerr v the United Kingdom, judgment final on 4 August 2001*  
*Shanaghan v the United Kingdom, judgment final on 4 August 2001*  
*McShane v the United Kingdom, judgment final on 28 August 2002*  
*Finucane v the United Kingdom, judgment final on 1 October 2003*

*and*

*Hemsworth v UK, judgment final on 16 October 2013*  
*McCaughey & Others v UK, judgment final on 16 October 2013*

**January 2020**

## Introduction

The Committee on the Administration of Justice (CAJ) was established in 1981 and is an independent non-governmental organisation affiliated to the International Federation of Human Rights (FIDH). Its membership is drawn from across the community.

This Rule 9 communication is for consideration at the 1369th meeting (March 2020) of the Ministers' Deputies.

CAJ has regularly made (most recently in July 2019) Rule 9 communications to the Committee of Ministers on the 'McKerr group of cases' concerning the actions of the security forces in the 1980s and 1990s in Northern Ireland.

These submissions have charted the evolution of the 'package of measures' agreed to by the UK further to the above judgments, and their proposed replacement with measures agreed by the UK and Ireland, and political parties in the Northern Ireland Executive, under the December 2014 Stormont House Agreement (SHA).

We note that the Committee last issued an Interim Resolution in these cases in 2009 and we strongly urge it to pass a further resolution in consideration of the unimplemented individual and general measures which we outline below.

We also call upon the Committee to keep under active consideration the invocation of its power to issue infringement proceedings against the UK for its delay in fully implementing the judgments in these cases under Article 46(4) of the Convention, if there is not rapid progress in implementing the Stormont House Agreement and resolutions to the individual measures.

Of particular note is the UK's continued wilful failure to hold an Article 2 ECHR compliant public inquiry into the murder of Pat Finucane, despite a commitment to do so before the Committee of Ministers and an apology by a former Prime Minister for the 'shocking levels of collusion' in this murder. The UK has also not abided by the Committee's deadline of 1 December 2019 to clarify how it will ensure an Article 2 compliant investigation is now conducted.

The Committee of Ministers last examined the execution of these cases during its 1355th meeting, (23-25 September 2019) and adopted Decisions as follows: (in summary):<sup>1</sup>

As regards *individual measures*

- Recalled profound regret that the investigations and related litigation in the cases of **McKerr, Shanaghan, Jordan, Kelly and Others and McCaughey and Others** have still not been completed;
- Recalled the decision (2015) to resume consideration of reopening the **Finucane** case once the domestic litigation had concluded; noted the UK Supreme Court ruling of 27 February 2019 finding an Article 2 compliant investigation had not taken place and called on the UK to submit concrete information by 1 December 2019 as to how the UK will conduct an Article 2 compliant investigation, and to consider the request for reopening consideration at the March 2020 meeting;

As regards *general measures*

- **Historical Investigations Unit (HIU)** reiterated ‘serious concerns’ about the delay in the establishment of the HIU and other legacy institutions from the 2014 Stormont House Agreement (SHA) underlining it is imperative that the authorities ensure ECHR-compliant investigations can be conducted given the passage of time;
- **HIU/ SHA legislation** Noted the publication of a summary of responses to the [2018 SHA] consultation, and a commitment from the UK to implement the SHA, noting that this must be consistent with international legal obligations. Regretting however there was no clear timetable for implementation, and calling for the legislation to be introduced in a manner which will secure ECHR Article 2 compliance;
- **Legacy Inquests funding:** strongly encouraged the authorities to ensure that the funding announced by the NI Department of Justice in February 2019 was rapidly released to ensure the establishment of the Legacy Inquests Unit, to ensure legacy inquests can be concluded without further delay;
- **Legacy inquests disclosure:** sought further information on measures taken to ensure in particular the Police and Ministry of Defence comply with their legal obligations to disclose information to the coroners service;
- **Police Ombudsman:** recalled the ongoing role of the Ombudsman pending the establishment of the HIU and encouraged ‘all necessary measures’ including providing resources to ensure the Ombudsman can undertake ECHR-compliant legacy investigations, and sought details on the review by the Criminal Justice Inspection into delayed police disclosure to the Ombudsman, affecting cases including Shanaghan;

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<sup>1</sup> [CM/Del/Dec\(2019\)1340/H46-30](#)

## Summary of Developments since last submission

### Stormont House Agreement legislation

- Following the December 2019 UK General Election the incoming government legislative programme (“Queens Speech”) committed to the “prompt implementation of the Stormont House Agreement”;
- However, in parallel with this the same document also committed to amending the domestic legislation that incorporates the ECHR to prevent “inappropriate application” before its commencement (Human Rights Act 1998, commenced 2000). This provision explicitly relates to seeking to domestically dis-apply the procedural duties under Article 2 to prevent ‘inappropriate’ investigations into the security forces for conflict related deaths and as such would conflict with the UK’s obligations under the ECHR, as well as the SHA and Belfast / Good Friday Agreement (which commits to incorporation of the ECHR in Northern Ireland law);
- On the 9<sup>th</sup> January 2020 the British and Irish Governments published their *New Decade, New Approach (NDNA)* agreement to restore the Northern Ireland Government which led to the restoration of the institutions. The NDNA commits to the introduction of the SHA legislation into the UK Parliament ‘within 100 days’; an ‘intensive process’ with the NI parties and Irish government is also agreed to obtain ‘broad consensus’ presumably on any changes to the legislation. It appears this process has however not commenced;
- The SHA was concluded in December 2014, the delayed consultation on draft legislation was initiated in May 2018. 17,000 responses were received. A summary of responses to the consultation was published in July 2019, largely expressing support for the SHA institutions and opposing a military amnesty. Whilst areas of broad consensus have emerged for some changes the UK is yet to clarify what changes, if any, it is intended to make prior to introduction into the UK Parliament;
- During the passage of UK legislation in 2019 regarding extending the timeframe for the establishment of NI government, amendments were added by legislators supportive of a military amnesty requiring the NI Secretary of State to ‘report on progress’ towards a general ‘statute of limitations’ or other mechanism, and on NI Attorney General Guidance differentiating a presumption of prosecution on the basis as to whether a deadly weapon was lawfully supplied. The Secretary of State however reported to Parliament that the proposals were not viable;
- During the election there was also a debate within the two main Unionist parties on removing provisions (equivalent to the current powers of the Police Ombudsman) for HIU investigations to include examination of grave or exceptional past police misconduct relating to a death;

## Legacy Inquests

- A review of outstanding legacy inquests has been carried out by the Presiding Coroner and a Legacy Inquest Unit is to be operational by April 2020, following the belated release of funding. Clarification is needed on what steps are being taken by the Ministry of Defence and Police Service of Northern Ireland to promptly discharge their disclosure obligations to these inquests given the excessive delays experienced to date;

## Police Ombudsman

- Following the resumption of the NI power sharing institutions a new Minister of Justice has been recently appointed. A key pressing issue is the provision of adequate funding for the Police Ombudsmans legacy work, which is currently chronically underfunded leading to continued excessive delays;
- The Criminal Justice Inspection NI are undertaking their review of delayed disclosure by the PSNI to the Ombudsman in cases, including Shanaghan, and now expect to publish this review during or before March 2020;

## Individual Measures

- *Finucane* - the UK failed to provide concrete information by 1 December 2019 on how it intends to conduct an Article 2-compliant investigation following the Supreme Court findings. Geraldine Finucane has been forced to litigate once again and was granted leave to judicially review the unlawful delay in implementing the Supreme Court judgment;
- *Kelly & Ors* - civil proceedings initiated by the next of kin are ongoing. A review of the inquest proceedings was heard on 31 January 2020 though no hearing date has been scheduled;
- *Shanaghan*- the next of kin continue to wait for the provision of the Police Ombudsman's report and have still not been provided with the HET report;
- *McKerr* - In September 2019 the inquest was reviewed by the Presiding Coroner Mrs Justice Keegan as part of a wider review of all inquests. A High Court judge is to be appointed in April 2020 to case manage this series of cases towards hearing;
- *Jordan* - There has been no decision provided on whether the Public Prosecution Service will prosecute two police witnesses in the inquest for perjury;
- *McCaughey* - an application was lodged with the ECtHR on 14 June 2018 and a decision on admissibility is still awaited;

## **The Stormont House Agreement legislation**

The Stormont House Agreement (SHA) between the British and Irish Governments and the five Northern Ireland political parties in the NI Executive was published in December 2014.

The SHA provided for a new set of institutions to deal with the legacy of the Northern Ireland conflict, including a new 'Historical Investigations Unit (HIU)' to conduct Article 2 compliant investigations into conflict-related deaths and an Independent Commission for Information Retrieval (ICIR) and an Oral History Archive. The SHA also provided for measures to maintain and make legacy inquests Article 2 compliant.

The significant delays in the UK moving to progress the SHA legislation are referenced in our previous submissions. In summer 2018, until October 2018, draft legislation was finally subject to public consultation. In July 2019 the UK issued a document summarising the views of consultees.<sup>2</sup> This document however does not set out the UK's response to the consultation, in terms of how it intends, if at all, to amend the draft Bill in light of the consultation responses. Rather it is limited to general analysis on the views of consultees.

In the September 2019 meeting the Committee of Ministers reiterated 'serious concerns' about the delay in the establishment of the HIU and other legacy institutions under the SHA. The Ministers Deputies:

....strongly encouraged the authorities to act on this commitment, to provide an estimated timetable for the next steps and to ensure that the legislation introduced to Parliament will guarantee the Historical Investigations Unit's independence in both law and practice and enable it to conduct effective investigations which are sufficiently accessible to the victims' families in full compliance with Article 2 of the Convention;<sup>3</sup>

Since this time the UK has committed to introducing the SHA legislation by April 2020, but new and significant threats to the HIU being established in a manner in which it can conduct ECHR Article 2 compliant investigations have also emerged.

### ***Commitments to introduce SHA Legacy Bill into the UK Parliament***

A new UK Conservative government entered office following the UK General Election on the 12 December 2019. On the 19 December 2020 the new Government set out its legislative programme, this committed to 'prompt implementation' of the SHA.

In a section on "The Armed Forces", a subsection entitled "Historical allegations/Vexatious litigation" provides the following commitment:

- To deal with NI legacy issues we will seek the prompt implementation of the Stormont House Agreement in order to provide both reconciliation for victims and greater certainty for military veterans.

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<sup>2</sup> Northern Ireland Office '[ADDRESSING THE LEGACY OF NORTHERN IRELAND'S PAST: Analysis of the consultation](#)' responses, July 2019

<sup>3</sup> CM/Del/Dec(2019)1340/H46-30, paragraph 6.

However the next paragraph, in contradiction, goes on to state:

- In parallel with the Stormont House Agreement institutions we will tackle the inappropriate application of the Human Rights Act to issues that occurred before it came into force.<sup>4</sup>

In the Northern Ireland section of the document the following statement is made:

The Government remains fully committed to finding a solution for dealing with the legacy of the Troubles which works for everyone. Following our consultation on the Stormont House institutions, the UK Government is engaging with the main parties in Northern Ireland, MPs in Westminster and wider society across Northern Ireland on the issues raised in the consultation to enable us to reach a broad consensus. The Government will then move as quickly as possible to set out detailed, balanced and fair proposals on the best way forward, to implement the Stormont House Agreement.<sup>5</sup>

In summary the UK commits to implementation of the SHA but also to making revised proposals, as to its implementation. This appears to reference unspecified changes to the SHA prior to introduction. Clearly however it is deeply concerning that there is a stated intention to amend the Human Rights Act 1998- the UK's domestic implementation legislation for the ECHR, to dis-apply its duties prior to the year 2000 when it came into force. The context for this is precisely to limit the domestic application of the procedural duties under ECHR Article 2 to investigate deaths at the hands of the military.

The government has provided no evidence whatsoever of 'inappropriate application' of the ECHR, or of 'vexatious' litigation. In addition to conflicting entirely with the SHA and UK duties under the ECHR any such legislative amendment would also constitute a clear breach of the 1998 Belfast/Good Friday Agreement (GFA). The GFA commits the UK to incorporating the ECHR into Northern Ireland law without any arbitrary cut off date as follows:

The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.<sup>6</sup>

### ***The New Decade, New Approach (NDNA) agreement***

On 9 January 2020 the British and Irish Governments published NDNA following negotiations with the NI political parties as an agreed basis for which the power-sharing

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<sup>4</sup> [THE QUEEN'S SPEECH 2019, Background Briefing Notes, Prime Ministers Office 19 December 2019](#), page 128

<sup>5</sup> As above, page 125.

<sup>6</sup> Belfast/Good Friday Agreement 1998, UK Treaty Series 51 (2000), Rights, Safeguards and Equality of Opportunity Section, paragraph 4.



government in Northern Ireland would be restored. Consequently the devolved Northern Ireland Assembly and Executive have now been re-established.

The NDNA document contained the following SHA commitment:

As part of the Government's wider legislative agenda, the Government will, within 100 days, publish and introduce legislation in the UK Parliament to implement the Stormont House Agreement, to address Northern Ireland legacy issues. The Government will now start an intensive process with the Northern Ireland parties, and the Irish Government as appropriate, to maintain a broad-based consensus on these issues, recognising that any such UK Parliament legislation should have the consent of the NI Assembly.<sup>7</sup>

There is therefore a commitment to introduce the SHA bill into the UK Parliament by April 2020. At the time of writing it does not appear that an 'intensive process' with NI parties as regards any changes to the SHA legislation has been initiated.

There are two possible scenarios in relation to this matter.

Firstly any changes to the draft SHA bill could take place uncontroversially and helpfully in line with proposed amendments brought up during the consultation exercise in areas where there was broad consensus. This included matters such as greater discretion for the HIU as regards which cases it could investigate, or changes to the location of the SHA Oral History Archive away from the Public Records Office for Northern Ireland. Such changes could strengthen the SHA and, in relation to the investigative function, ECHR compliance.

Secondly however proposals have emerged which would undermine and frustrate the purpose of the SHA and render it non-ECHR compliant in conflict with the UK's international obligations as emphasised in the most recent CM Decision.

There are three sources of concern to this regard.

*1: UK Government amendments impacting on the SHA:*

There are proposals from the UK Government itself (not least the proposal to amend the temporal application of the Human Rights Act 1998) that would interfere with ECHR compliance to the extent that it would engage the investigative powers of the HIU.

There have also been regular vows from UK Ministers, including the Prime Minister to end 'unfair' and 'vexatious' prosecutions against members of the armed forces in NI Legacy cases.<sup>8</sup> It is not clear to which such statements are essentially rhetorical flourishes towards advocates of a military amnesty which have no practical effect (as clearly there are no 'unfair' or 'vexatious' prosecutions). To the contrary any changes to the prosecutorial system, which has been reformed further to the GFA and McKerr Group of cases, would

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<sup>7</sup> Northern Ireland Office '[New Decade New Approach](#)' 9 January 2020, UK Commitments Annex A, paragraph 16.

<sup>8</sup> See for example: <https://www.politicshome.com/news/uk/political-parties/conservative-party/boris-johnson/news/109065/fresh-tory-pressure-boris>



reverse the reforms of the NI peace settlement and general measures taken further to the present group of cases and undermine UK compliance with both.

## *2: Proposed changes from NI Unionist Parties*

Another source of potential change that would weaken the ECHR compliance of the SHA is coming from the two NI Unionist parties who negotiated the SHA. The Ulster Unionist Party (UUP) having initially not opposed the SHA, and committing to give it a ‘fair wind’<sup>9</sup> subsequently changed its position to actively oppose the SHA. The UUP has made the SHA a significant electoral issue, including during the recent UK General Election.<sup>10</sup>

The larger Democratic Unionist Party (DUP) has however to date supported the SHA. The DUP position however appears to be rapidly changing in recent weeks from a position supporting the SHA as a ‘good deal for victims’<sup>11</sup> to calling for SHA deal to be ‘revisited.’<sup>12</sup>

The push for revisiting has in particular focused on calls for the HIU remit to investigate the security forces to be restricted.

In particular there has been a focus on the HIU powers in the SHA bill to ensure the unit could continue to include within the scope of its investigations grave and exceptional Police misconduct relating to a death. This is currently the case with the Police Ombudsman’s powers. Misrepresenting such powers as ‘new’ to the HIU the UUP has long opposed such provisions, the DUP has now also taken this position.<sup>13</sup> Should the HIU legislation be amended to this end the HIU would ultimately have fewer powers, and hence be less effective, than the present the Police Ombudsman’s office.

In relation to *legislative consent* from the Northern Ireland Assembly, there is a constitutional convention that UK Parliament bills that would legislate on matters within the competence of the NI Assembly, ‘usually’ seek the consent of the Assembly. The SHA legislation includes provisions that would be within the competence of the Assembly. However, to the extent the SHA bill is required to take forward human rights legal duties under the ECHR and UN treaties, its content would fall under the one exemption to the process of seeking legislative consent, namely legislation that is required to implement international obligations.<sup>14</sup> In addition the UK’s approach to legislative consent is entirely inconsistent. The UK has argued (successfully) in the UK Supreme Court that the convention

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<sup>9</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-30678834>

<sup>10</sup> See for example: <https://www.newsletter.co.uk/news/opinion/doug-beattie-the-dup-should-now-join-us-in-rejecting-legacy-proposals-1-9045384>

<sup>11</sup> <https://www.newsletter.co.uk/news/latest-news/dup-stormont-house-agreement-is-a-good-deal-for-victims-1-6980407>

<sup>12</sup> <https://www.belfasttelegraph.co.uk/news/northern-ireland/dups-bid-to-revisit-2014-legacy-deal-ignites-a-storm-of-criticism-38918721.html>

<sup>13</sup> <https://www.newsletter.co.uk/news/crime/dup-rules-out-its-support-for-legacy-plan-to-pursue-ex-ruc-officers-for-non-criminal-misconduct-1-9158231>

<sup>14</sup> For details see: [Is it Westminster’s role under the Belfast/Good Friday Agreement to legislate on Northern Ireland abortion law? CAJ Briefing Note, May 2018](#)

is not legally binding and has recently passed Brexit legislation that where the NI Assembly had expressly not given legislative consent.<sup>15</sup>

The present arrangements on cross community voting in the Assembly (which are not fully in line with the GFA that only envisaged ‘vetoes’ over provisions that offended human rights) mean it is likely that either unionists or nationalists could prevent legislative consent.

It is not clear whether the express reference in the NDNA to that the SHA legislation ‘should’ have the consent of the NI Assembly signals an intention of the UK government to only proceed with the SHA legislation if consent is granted by both unionists and nationalists in the Assembly. In the alternative the UK may choose to simply note any vote and legislate regardless to meet its international obligations.

### *3: proposals to introduce a de facto military amnesty*

There is a significant section of members of the UK Parliament, predominantly from the governing Conservative party, who have long advocated for various forms of *de facto* amnesty for the UK military in NI legacy cases. Proposals for a ‘Statute of Limitations’ were detailed in our previous submission. The UK government acknowledged a statute of limitations for the military only would conflict with international law. The Secretary of State therefore ruled out support for such a proposal.<sup>16</sup>

Despite this position, and the stated support for the SHA, Conservative and DUP MPs in July 2019 voted to amend other legislation in the UK Parliament to work towards the objective of the introduction of measures that would provide a level of immunity from prosecution for the security forces. The Northern Ireland (Executive Formation) Act 2019, obliged the Secretary of State to publish a report on progress towards forming an NI Executive. This provision was amended in the UK House of Commons to include two extra reporting duties, namely (in summary):

- Report on protecting the security forces from ‘repeated’ investigation through a presumption of non-prosecution where there is not compelling new evidence through a Statute of Limitations or by another legal mechanism;
- Report on progress towards developing prosecution guidance by the Attorney General for Northern Ireland in respect of certain Troubles-related incidents differentiating where the alleged offender had been lawfully or unlawfully ‘supplied’ with a weapon;<sup>17</sup>

<sup>15</sup> <https://www.irishtimes.com/news/ireland/irish-news/ni-assembly-votes-to-reject-brexite-withdrawal-deal-1.4145723>

<sup>16</sup> Troubles legacy: Karen Bradley rules out statute of limitations BBC News 1 October 2018.

<https://www.bbc.co.uk/news/uk-northern-ireland-45701869> see also <http://eamonnmallie.com/2018/09/exclusive-sos-karen-bradley-writes-for-eamonnmallie-com-on-legacy-of-the-troubles/>

<sup>17</sup> Section 3 <http://www.legislation.gov.uk/ukpga/2019/22/contents/enacted>

Reports on progress towards forming an Executive and other matters

A cornerstone of the current reformed justice system is that prosecutorial decision making is vested in an independent Director of Public Prosecutions (DPP) and that prosecutorial decisions are made on the basis of the Statutory Code for Prosecutors. The Statutory Code for Prosecutors is issued by the DPP (not the Attorney General for Northern Ireland [AGNI] nor either legislature.)<sup>18</sup>

In *Shanaghan v the UK* the Court concluded the DPP was institutionally independent at the time, but went on to state that *“where the police investigation procedure is itself open to doubts of a lack of independence and is not amenable to public scrutiny, it is of increased importance that the officer who decides whether or not to prosecute also gives an appearance of independence in his decision-making.”*<sup>19</sup> A General measure on the giving of reasons for prosecutorial decision was closed in 2007 following the adoption of the statutory Code for Prosecutors.<sup>20</sup>

To progress the first envisaged provision of a presumption for non-prosecution for members of the security forces where there is not ‘compelling’ new evidence would usurp the function of decision making in the Code for Prosecutors. The provision also appears to confuse and conflate the investigative and prosecutorial functions. This evidential threshold is also higher than the *Brecknell* threshold.<sup>21</sup>

In relation to the second provision the AGNI confirmed to CAJ he is not currently preparing such Prosecutorial Guidance.<sup>22</sup>

On 4 September 2019, the Secretary of State issued his first report to Parliament on the subject. This distanced government from the proposed suggestion of re-instating the Attorney General for Northern Ireland into the prosecutorial process. The report states:

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(1)The Secretary of State must, on or before 4 September 2019, publish a report explaining what progress has been made towards the formation of an Executive in Northern Ireland (unless an Executive has already been formed)....

(8)The report under subsection (1) must include a report on progress made towards protecting veterans of the Armed Forces and other security personnel from repeated investigation for Troubles-related incidents by introducing a presumption of non-prosecution, in the absence of compelling new evidence, whether in the form of a Qualified Statute of Limitations or by some other legal mechanism.

(9)The report under subsection (1) must include a report on progress made towards developing new prosecution guidance for legacy cases of Troubles-related incidents by the Attorney General for Northern Ireland to take into account whether or not the person who allegedly committed an offence had the means to do so because that person had been lawfully supplied with a deadly weapon, with a presumption in favour of prosecuting in cases where a person who has allegedly committed an offence had the means to do so because that person had been unlawfully supplied with a deadly weapon.

<sup>18</sup> s37 of the Justice Northern Ireland Act 2002

<sup>19</sup> *Shanaghan v United Kingdom* (Application no. 37715/97, 4th August 2001), paragraphs 107-108.

<sup>20</sup> Committee of Ministers Interim Resolution CM/ResDH(2007)73.

<sup>21</sup> Namely evidence/ information / credible allegation relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing ([Brecknell v UK, \[71\]](#))

<sup>22</sup> CAJ correspondence from AGNI 2 August 2019.

Under the Justice (Northern Ireland) Act 2002, the AGNI does not superintend the DPP for Northern Ireland and therefore is not able to either issue prosecution guidance to the DPP or direct the DPP to issue such guidance ... The UK Government has no plans to alter the current division of responsibilities, and independence as between, the DPP and the AGNI.<sup>23</sup>

The AGNI has also presented his own proposals for a separate process, whereby the AGNI himself, or a Legacy Commissioner, would be able to make decisions as to whether criminal investigations, prosecutorial proceedings, or inquests would be able to proceed in relation to the use of force by the security forces prior to the GFA. This, it is proposed, could be progressed by virtue of an amendment to Section 3 of the Criminal Law Act NI 1967 on reasonable self-defence, with the AGNI/Commissioner wielding a veto over police and prosecutorial processes on grounds of lawful use of force.

Any such amendment would roll back the justice reforms of the GFA, UK implementation of General Measures and prevent the HIU from conducting ECHR Article 2 compliant investigations into the security forces. Whilst such proposals do not presently have UK government support there is a risk the SHA bill could be amended prior to introduction, or once introduced into the UK Parliament.

***The Ministers Deputies may wish to seek information from the UK as to what changes, if any, the UK plans to make to the SHA legislation prior to its introduction into the UK Parliament and seek assurances amendments will not be made that would preclude the HIU conducting Article 2 compliant investigations into all cases, including those involving the security forces.***

## **Police Ombudsman**

The Office of the Police Ombudsman continues to be chronically underfunded in relation to legacy work. This leads to long delays in progress on its legacy caseload, a matter that has faced legal challenge.<sup>24</sup> A new Northern Ireland Justice Minister Naomi Long MLA was appointed in January 2020 as a result of the restoration of government in Northern Ireland. The UK had also set aside resources for legacy as part of the SHA. Clearly the resourcing of the Ombudsmans office is a key interim priority to ensure it can conduct timely Article 2 compliant investigations.

The Criminal Justice Inspection Northern Ireland (CJI) is conducting a thematic Inspection in relation to the delayed disclosure to the Ombudsman by the PSNI that has resulted in the delay of the conclusion of key Ombudsman investigation reports. CJI have informed CAJ that

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<sup>23</sup> Secretary of State for Northern Ireland “[Report pursuant to sections 3\(1\), 3\(6\), 3\(7\), 3\(8\), 3\(9\) and 3\(10\) of the Northern Ireland \(Executive Formation etc\) Act 2019 - regarding Executive formation; transparency of political donations; higher education and a Derry university; presumption of non-prosecution; Troubles prosecution guidance; and abortion law review](#)” 2019.

<sup>24</sup> For example see: <http://www.irishnews.com/news/northernirelandnews/2020/01/30/news/police-ombudsman-is-to-expedite-an-investigation-into-the-circumstances-surrounding-a-loyalist-pub-murder-1828727/>

they intend to complete the Inspection ‘PSNI disclosure of information to OPONI’ in the current financial year (that is end of March 2020).<sup>25</sup> This issue is further discussed below in relation to the individual measures in Shanaghan.

***The Ministers Deputies may wish to seek information from the UK as to whether adequate resources will now be provided to the Police Ombudsman, and as to progress on ensuring timely disclosure to the office.***

## **Legacy Inquests**

In September and October 2019 the Presiding Coroner, Mrs Justice Keegan, held individual preliminary hearings in to all outstanding legacy inquests. There were 41 hearings with the four ‘Stalker Sampson’ inquests, which includes some of the ‘McKerr Group of cases,’ being heard as one preliminary hearing. Following consideration of submissions made on the state of readiness of each pending legacy inquest, the Presiding Coroner issued a statement<sup>26</sup> in November 2019 setting out how she intended to sequence these legacy inquests as part of a 5 year plan. A thematic approach will be taken to some inquests given ‘concerns expressed by the international human rights community that the wider picture might be missed if we focussed solely on a series of individual inquests’<sup>27</sup>. Case Management Protocol disclosure request letters have been issued in relation to the first five cases to be heard.

Following these Preliminary hearings into legacy inquests, it is anticipated that appropriate structures and processes will be put in place to enable substantive hearings to begin in April 2020.

Inquests that have not been listed for hearing in Year 1 are to be subject to twice-yearly case management reviews (including Loughall - Kelly & Others, Stalker & Sampson case - McKerr) or periodic administrative review as directed by the Presiding Coroner.

While we welcome the active judicial management of legacy inquests and the work of the Legacy Inquest Unit to progress these inquests to hearing we seek clarification that the PSNI, MOD and other relevant bodies are taking all necessary steps to ensure that they are complying their disclosure obligations in a prompt and effective manner.

***We call upon the Ministers’ Deputies to seek confirmation from the State Party what steps it is taking to ensure that all agencies responsible for providing disclosure to the Coroners Courts are complying with this obligation to identify, preserve and disclose potentially relevant material promptly.***

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<sup>25</sup> Chief Inspector of Criminal Justice e-correspondence to CAJ 31 January 2020.

<sup>26</sup> <https://judiciaryni.uk/sites/judiciary/files/media-files/Presiding%20Coroner%27s%20Statement%20in%20relation%20to%20legacy%20inquests%20-%2020%20Nov%202019.pdf>

<sup>27</sup> Pg 3, Ibid

## Individual Measures

### *Finucane*

Despite the Ministers' Deputies' decision in September 2019 calling on the UK authorities to provide concrete information by 1 December 2019 on how they intend to conduct an Article 2-compliant investigation into Mr Finucane's death following the Supreme Court judgment the UK has wilfully failed to comply with this request.

Regrettably, once again Geraldine Finucane has been required to litigate in the Northern Irish Courts. On 31 January 2020 she was granted leave to apply for judicial review regarding the delay by the Secretary of State in deciding upon a mechanism fit to comply with Article 2 ECHR. The Secretary of State cancelled a meeting with Geraldine Finucane, which was planned for 24 January 2020, on 22 January 2020 due to pressures on his diary. A further meeting has been scheduled for 21 February 2020.

Thirty one years after this murder there is an urgent need for a fully independent Article 2 public inquiry into this murder and we call upon the Ministers' Deputies to re-open examination of this case without further delay.

### *Shanaghan*

The next of kin still await the Police Ombudsman's report into the murder of Patrick Shanaghan. The family have engaged with the Police Ombudsman's office following the judgment of *Shanaghan v UK in 2001* and despite repeated assurances, they have never received a completed Article 2 investigation report in any form in relation to this murder.

The Criminal Justice Inspection Northern Ireland (CJI) review into the methods the Police Service of Northern Ireland use to disclose information in respect of historic cases to the Office of the Police Ombudsman for Northern Ireland has delayed disclosure of the report into this death, which was to be made available to the family in early 2019. It is of regret that the next of kin of Patrick Shanaghan, one of many families directly affected by the contents of this review, were not invited by CJI to engage with it. The CJI report which was due to published in October 2019 has been delayed due to the identification of further potential issues with the PSNI legacy disclosure processes to the Police Ombudsman.

In October 2019 the Police Ombudsman notified the next of kin of this further delay advising that the Chief Constable of the PSNI advised her that data held on its legacy computer system had been migrated to a new IT platform. Police Ombudsman investigators have assessed whether that material had been known to them and we have been advised that the Police Ombudsman has insisted that her staff have more direct involvement in the conduct of searches on the new database.

There are serious concerns about the completeness of disclosure made by the PSNI in relation to the Shanaghan case and other legacy investigations to the Police Ombudsman. While assurances have been given that all disclosure has been made this most recent



development has further undermined families' confidence in the PSNI's capacity to fully comply with its disclosure obligations.

The HET was disbanded before delivery of its report into this death given concerns surrounding its independence and effectiveness and the family have requested a copy of the HET report which has not been provided and we ask the Ministers' Deputies to call upon the State to provide this without further delay.

### ***McKerr***

The first preliminary hearing of these inquests, since the inquests were abandoned in December 1994, was held in the autumn of 2007. This followed the judgment of the House of Lords in March 2007 in *McCaughey v Chief Constable PSNI* which finally clarified the obligations upon the Chief Constable of the PSNI to comply with section 8 of the Coroners Act (NI) 1959 in relation to disclosure by police to the Coroner of all documentation in writing held by police touching the death of the deceased. There have been many preliminary hearings since 2007, however the postponed hearing scheduled for December 2018 was the first planned preliminary hearing since Weir LJ reviewed all current inquests in January 2016. In September 2019 the cases were reviewed by the Presiding Coroner Mrs Justice Keegan. On 31 January 2020 she advised that the Lord Chief Justice was allocating a High Court judge in April 2020 to case manage this series of cases towards hearing.

### ***McCaughey***

On 14 June 2018 an application was lodged with the ECtHR in the name of *Sally Gribben v UK*, taken by the sister of Martin McCaughey deceased. The application number is 28864/18. A decision on admissibility is still awaited.

### ***Jordan***

After delivering his verdict in the Pearse Jordan inquest in November 2016, Mr Justice Horner, sitting as Coroner, referred two police witnesses, Officers M and Q to the Public Prosecution Service to consider whether they should face criminal proceedings for perjury. The referral to the Public Prosecution Service of these two officers was made on 5 December 2016. To date there has been no decision yet as to whether these officers will be prosecuted.

In November 2019, following an appeal by the PSNI, the Northern Ireland Court of Appeal reduced the award of damages to the Jordan family for delays in progressing the inquest of the death of Pearse Jordan from £7,500 to £5000.

### ***Kelly & Others***

Civil Proceedings initiated by the next of kin are ongoing, discovery has been provided and specific discovery applications have now been made and remain an ongoing issue. At the conclusion of the specific discovery applications, the case will be listed. However it is understood that there are Public Interest Immunity issues, which will require consideration.



The inquest is still outstanding and the Presiding Coroner has indicated that a High Court Judge is to be appointed to this inquest given the complexity of the issues it raises and as such it requires active case management. The active case management process commenced on 31 January 2020 though no date has been fixed for the hearing of the inquest itself. There are Public Interest Immunity issues arising in this inquest and this will require determination before the proceedings can be progressed.

**We would urge the Ministers' Deputies to keep under consideration invoking infringement proceedings given that 19 years have now passed since the judgments in the McKerr Group of Cases were delivered and the victims and survivors continue to suffer ongoing violations due to the failure of the UK to fully implement these judgments.**

**CAJ, February 2020**