



**BRIEFING PAPER**

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# Investigation of Former Armed Forces Personnel who served in Northern Ireland

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# Summary

Operation Banner in Northern Ireland was the longest continuous deployment of Armed Forces personnel in British military history, during which over 250,000 military personnel served.

Between August 1969 and July 2007 1,441 military personnel died as a result of operations in Northern Ireland. 722 of those personnel were killed in paramilitary attacks.

During the same period the British military were responsible for the deaths of 301 individuals, over half of whom were civilians.

In total, around 3,520 individuals lost their lives during the Troubles.

## **Military law and the rules of engagement**

Military personnel are, at all times, subject to both Service law and civilian law, wherever they are serving in the world. As such, Armed Forces personnel are not immune from prosecution for offences committed whilst serving.

For every military operation personnel are issued with a specific set of Rules of Engagement which establish the circumstances and limitations under which personnel can use armed force. They are operation, not Service, specific and are intended to help commanders and soldiers to operate within the law or any political restraints under which they may be operating. They do not, however, have any legal force.

The Rules of Engagement for personnel serving in Northern Ireland were contained in what was commonly referred to as 'The Yellow Card'. The original version of the Card, which extended to 21 distinct rules, was considered too detailed and complex, and was subsequently amended in 1980 to contain just 6 rules. Among them was the directive that only the minimum force necessary was to be used and that firearms should only be used as a last resort. The Card was amended again in 1994, following a court judgement in the case of Private Lee Clegg the previous year.

## **Prosecutions of Armed Forces personnel during the Troubles**

Any fatalities involving the Armed Forces were investigated by the Royal Ulster Constabulary (RUC) at the time and, in some cases, prosecutions were brought against military personnel.

In most cases those fatalities were a direct result of operations and "centred around the key issue of whether the soldier had the right to open fire in the particular circumstances pertaining at the time". This resulted in a number of convictions, although in the majority of cases the Director of Public Prosecutions for Northern Ireland directed that there was no case to answer, or the defendants were acquitted at trial.

## **Good Friday Agreement and "On the Run"**

The 1998 Good Friday Agreement made no provision for the investigation or prosecution of former members of the Armed Forces,

focusing instead upon the early release of prisoners affiliated to paramilitary organisations. There was no amnesty for crimes which had not yet been prosecuted.

From 2000 to 2014, the UK Government operated an administrative scheme by which individuals suspected of terrorism crimes in Northern Ireland could find out whether they were at risk of arrest or prosecution if they returned to the UK. The collapse of a trial in 2014 led to a judge-led review. The [report of that review](#) criticised the scheme for systematic failings, but emphasised that “letters of comfort” did not constitute an amnesty or immunity from prosecution.

### **Investigation of deaths related to the Troubles**

In 2006 the Historical Enquiries Team (HET) was set up by the Government as part of the Police Service of Northern Ireland (PSNI) in response to judgements at the European Court of Human Rights related to the investigation of deaths in which State involvement was alleged. Those judgements found various shortcomings which amounted to breaches of Article 2 of the European Convention on Human Rights relating to the protection, by law, of the right to life.

The role of the HET was to examine all deaths attributable to the security situation that occurred in Northern Ireland between 1968 and the Belfast Agreement in 1998.

The HET looked into cases on a chronological basis, with some exceptions: previously opened investigations, those with humanitarian considerations, investigations involving issues of serious public interest and linked series of murders.

In 2012 the Minister of Justice for Northern Ireland commissioned Her Majesty’s Inspectorate of Constabulary (HMIC) to inspect the role and function of the Historical Enquiries Team. The inspection focused on whether the HET’s approach to reviewing cases involving the security forces conformed to current policing standards and policy; if it adopted a consistent approach to all cases and if the HET’s review process met the requirements that would ensure its compliance with Article 2 of the ECHR. The subsequent report of the HMIC was highly critical of the HET and in 2013 the PSNI announced that it would review **all** military cases relating to the period 1968 up until the Good Friday Agreement was signed, in order “to ensure the quality of the review reached the required standard”.

### **The Legacy Investigations Branch**

As a result of budget cuts to the Police Service of Northern Ireland, the HET was disbanded in September 2014. In its place the PSNI stated that a much smaller Legacy Investigations Branch (LIB) would be formed.

The LIB continues to review all murder cases linked to the Troubles. That review does not examine cases chronologically but uses a case sequencing model, which looks at forensic opportunities, available witnesses and other investigative material when deciding which cases to tackle first. The PSNI has stated that it does not prioritise military cases, which account for approximately 30% of its workload.

Any decision by the LIB to prosecute is referred to the Director of Public Prosecutions for Northern Ireland. The MOD, and the British Government, is entirely independent of this process.

There has been significant criticism, on all sides, of the process by which legacy investigations have been, and continue to be, undertaken. Concerns have been expressed over the credibility and reliability of evidence and witness statements that may be over 40 years old and the re-opening of investigations that had already concluded. Most notable has been the widespread perception that investigations have disproportionately focused on the actions of the armed forces and former police officers, which account for 30% of the LIB's workload but only form 10% of the overall deaths during the Troubles.

### **Recent prosecutions**

The perception that investigators are unfairly targeting cases involving military personnel has been confounded by decisions over the last few years by the Director of Public Prosecutions for Northern Ireland to bring prosecutions against a number of former Army personnel. To date, six military personnel have been charged with offences related to the Troubles, including one former soldier (Soldier F) who is being prosecuted in relation to the events of Bloody Sunday.

However, the PPS for Northern Ireland has also sought to make clear that of the 26 prosecution cases brought by the PPS since 2011, 21 of those cases have involved republican and loyalist paramilitaries. Five of those cases are currently ongoing.

### **Addressing legacy issues**

Addressing legacy issues, including the investigation of deaths, was a key part of the [Stormont House Agreement](#) reached in December 2014.

That agreement set out various detailed measures, including the establishment of a new independent Historical Investigations Unit (HIU). That unit will take forward investigations into outstanding deaths from the Troubles, including outstanding cases from the HET process and the legacy work of the LIB and the Police Ombudsman for Northern Ireland. Families may also have other, previously completed, cases considered for criminal investigation by the HIU if there is new and credible evidence which was not previously available to the HET/LIB. In respect of its criminal investigations, the HIU will have full policing powers and will work through its case load in chronological order. It must complete its work within five years and it will be overseen by the Northern Ireland Policing Board. Any decisions to prosecute will be taken by the Director of Public Prosecutions.

### **Public Consultation**

On 11 May 2018 the Northern Ireland Office launched a public consultation: [Addressing the legacy of Northern Ireland's Past](#). The consultation takes forward the proposals set out in the Stormont House Agreement in relation to the Historical Investigations Unit (HIU).

Prior to the consultation's publication, there was political and media speculation that it would include a statute of limitations to prevent the prosecution of former soldiers for offences connected to the Troubles in Northern Ireland. This idea was supported by some Conservative MPs, including former Defence Secretary Gavin Williamson, but strongly opposed by Sinn Féin and the Irish Government. The Northern Ireland Human Rights Commission advised the Government that any such statute would amount to an amnesty and could be in breach of international law. The DUP leader, Arlene Foster, also raised concerns that a statute of limitations could lead to a general amnesty for all of those involved in the Troubles, including terrorists.

However, the consultation, as published, did not contain proposals for a Statute of Limitations or any form of amnesty. But it did welcome views on alternatives to the institutions that have been proposed. The Defence Select Committee has been critical of the consultation's failure to include a comprehensive section on alternative approaches, a number of which were set out in the Committee's report into Northern Ireland in 2017.

The public consultation ran until October 2018 and is currently awaiting a response from the Government.

The MOD's recent announcement of its intention to consult on legislation providing legal protection to Service personnel and veterans for alleged offences committed more than 10 years previously that have already been investigated, will not apply to Northern Ireland. It will only apply to those alleged offences committed outside of the UK.

The Defence Committee has also launched a new inquiry on the protection of veterans engaged in all conflicts and not just limited to Northern Ireland, which will look specifically at the concept of a Statute of Limitations.

# 1. Background

The specific focus of this briefing paper is the investigation, and in some cases prosecution, of former British Armed Forces personnel who served in Northern Ireland during The Troubles.

It does not look at the wider issues raised in the recent consultation on addressing Northern Ireland's past; nor does it discuss the political situation in Northern Ireland or the wider issue of combat immunity.

## 1.1 Operation Banner (August 1969 – July 2007)

Operation Banner was the longest continuous deployment of Armed Forces personnel in British military history.

Initially deployed in response to the breakdown in public order, which the Royal Ulster Constabulary (RUC) were unable to contain, in 2006 the British Army described Operation Banner as "effectively a large-scale instance of military assistance to the civil power".<sup>1</sup>

Maintaining public order was subsequently the focus of operations during the early years of the campaign.<sup>2</sup> However, by the 1980s the objectives of the campaign had largely shifted to counter terrorist operations, in order to address the threat posed by the Provisional IRA. The three key tenets of Army policy at that time were reassurance and deterrence (or what were referred to as 'Framework' Operations)<sup>3</sup> and attrition, which largely focused on the overt arrest and conviction of terrorists.

Over the 38-year history of the operation over 250,000 Regular personnel were deployed, in addition to tens of thousands of members of the Ulster Defence Regiment and its successor the Royal Irish Regiment Home Service Force (HSF).<sup>4</sup> At the peak of the campaign in the summer of 1972 28,000 soldiers were deployed across the Province.

From 2004 the MOD began the gradual process of drawing down its presence in Northern Ireland.<sup>5</sup> Following a statement from the IRA in

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<sup>1</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>2</sup> Largely conducted by the British Army, but with essential support from the Royal Navy, Royal Air Force and other Government Agencies.

<sup>3</sup> The term 'framework operations' was developed in the 1980s to describe the routine activities of the uniformed Army, including vehicle check points (VCP), routine patrolling, searches and manning observation posts.

<sup>4</sup> The UDR was raised in April 1970 in response to the Hunt Committee report of Autumn 1969, which recommended splitting police and military functions and so disbanding the part-time Ulster Special Constabulary (the B Specials). The UDR was part of the Army, and almost exclusively part-time. Its role was principally that of static security guards, local patrolling and control of vehicle movement. By 1971 it had an establishment of 4,000 personnel and was capable of large scale operations. In 1976 the decision was taken to raise one full-time company per battalion of the UDR. In 1992 the UDR merged with the Regular Royal Irish Rangers to form the General Service (GS) and Home Service (HS) battalions of the Royal Irish Regiment. The HSF was stood down in 2007.

<sup>5</sup> HC Deb 17 June 2004, c50-51WS; Ministry of Defence, *Delivering Security in a Changing World: Future Capabilities*, Cm6269, Session 2003-04;



August 2005 that it was ending its armed campaign the Government announced a plan to establish a peacetime garrison comprising no more than 5,000 personnel and located in no more than 14 bases by August 2007. The Home Service battalions of the Royal Irish Regiment were also disbanded.<sup>6</sup>

## Casualties

Between August 1969 and July 2007 1,441 military personnel died as a result of operations in Northern Ireland. 722 of those personnel were killed in paramilitary attacks. At the height of the campaign in 1972, 102 British soldiers died or were killed – the largest number in one year since the Korean War.<sup>7</sup>

### UK Armed Forces deaths in Northern Ireland

Deaths of UK Armed Forces personnel as a result of operations in Northern Ireland, 14 August 1969 to 31 July 2007

	Terrorist action	Other	Total
<b>Army</b>	<b>692</b>	<b>689</b>	<b>1,381</b>
Regular Army	477	337	814
Royal Irish Regiment	7	60	67
General Service	1	3	4
Home Service	6	57	63
Ulster Defence Regiment	197	284	481
Territorial Army	9	8	17
Other non-regular Army	2	0	2
<b>Naval Service</b>	<b>26</b>	<b>8</b>	<b>34</b>
Royal Navy	5	3	8
Royal Marines	21	5	26
<b>Royal Air Force</b>	<b>4</b>	<b>22</b>	<b>26</b>
<b>Total</b>	<b>722</b>	<b>719</b>	<b>1,441</b>

**Notes:** Figures are for in-service personnel and do not include ex-service personnel who may have been targeted by Terrorists; includes deaths that occurred outside of Northern Ireland but deemed to be the result of Irish Terrorism; 'Other' deaths include accidents, natural causes, assaults, coroner confirmed suicide or open verdicts, and cause not known; Regular Army excludes Royal Irish Regiment; Royal Irish Regiment was formed 1 July 1992 when Ulster Defence Regiment merged with The Royal Irish Rangers; Ulster Defence Regiment formed 1 August 1970 and disbanded 30 June 1992.

**Source:** MOD, Freedom of Information, Reference: FOI Smyth 02-01-2013-160507-018

<sup>6</sup> A structured plan for the phased reduction of troops to peacetime levels was subsequently published in March 2006. A copy of the normalisation plan was placed in the House of Commons Library (ref: DEP06/697)

<sup>7</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

300 officers of the Royal Ulster Constabulary were also killed in terrorist attacks during the Troubles. A further 4 were killed by the security forces as a result of 'friendly fire'.<sup>8</sup>

During the same period the British military were responsible for the deaths of 301 individuals, of whom 121 were Republican terrorists, 10 were loyalist terrorists and the remainder were civilians.<sup>9</sup>

In total, around 3,520 individuals lost their lives during the Troubles.<sup>10</sup>

## 1.2 Application of military law to serving personnel

Military personnel are, at all times, subject to both Service law<sup>11</sup> and civilian law, wherever they are serving in the world. As such Armed Forces personnel are not immune from prosecution for offences committed whilst serving.

Jurisdiction over offences committed solely against Service law lies with the Service authorities. Concurrent jurisdiction with the civil justice system exists for all other offences, with the exception of certain offences committed in the UK, including treason, murder, manslaughter, treason-felony, rape and war crimes, which lie wholly within the jurisdiction of the civil authorities.

### Rules of Engagement

For every military operation personnel are issued with a specific set of Rules of Engagement (RoE) which establish the circumstances and limitations under which personnel can use armed force.<sup>12</sup>

Rules of Engagement are operation, not Service, specific. They have no legal force, but are directives intended to help commanders and soldiers to operate within the law or any political restraints under which they may be operating. They are based upon international legal obligations regarding the use of force such as the *Geneva Conventions 1949* and the *Laws of Armed Conflict*, and embrace the principles of proportionality, distinction, humanity and military necessity. They are also subject to constant review.

RoE are also not routinely published by the Government for reasons of operational security. During a debate on 1 December 2015 the then Armed Forces Minister, Penny Mordaunt, stated:

Our rules of engagement—as opposed to our static doctrine—are tailored to specific missions and will include policy, legal and operational guidance. They are typically given in a series of permissions and prohibitions that must be followed during a particular operation. We do not put the rules of engagement in the public domain, because it would give our opponents a

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<sup>8</sup> [The Royal Ulster Constabulary George Cross](#)

<sup>9</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>10</sup> *ibid*

<sup>11</sup> As set out in the *Armed Forces Act 2006* and the [Manual of Service Law](#)

<sup>12</sup> A definition of RoE is provided in chapter 5 of the [Joint Service Manual of the Law of Armed Conflict](#)

considerable advantage if they understood that aspect of our operations.<sup>13</sup>

Despite being restricted, copies of RoE often appear, however, in the public domain.

### **Northern Ireland**

The Rules of Engagement for personnel serving in Northern Ireland were contained in what was commonly referred to as 'The Yellow Card'. In line with Government policy, copies of the Yellow Card were marked 'restricted' and in answer to a parliamentary question on 15 January 1990 the Government confirmed that "As it is an operational instruction, it would not be appropriate to publish it".<sup>14</sup>

However, the contents of the Yellow Card became public knowledge, largely as a result of various court cases and were reproduced in a number of publicly available documents.<sup>15</sup> In more recent times copies have also been disseminated on the [internet](#).

The Army described the yellow Card as "effectively the Rules of Engagement for most operational circumstances".<sup>16</sup> It was subject to continuous review and scrutiny and was amended on several occasions. Initially the Card "contained 21 distinct rules but was considered to be too detailed and complex to be readily intelligible and suitable for use by most ordinary soldiers".<sup>17</sup> In its 2006 assessment of Operation Banner the British Army suggested that "since it was written with legal purposes in mind it was not generally found to be user friendly; at least in the early days".<sup>18</sup> The document was subsequently revised and the 1980 version only contained 6 rules.

In its report for 1992-93 the Standing Advisory Commission on Human Rights outlined what it considered the most significant of these rules:

3.9 The most significant of these rules for present purposes are as follows:

#### **General Rules**

1. In all situations you are to use the minimum force necessary.  
FIREARMS MUST ONLY BE USED AS A LAST RESORT.

#### **Challenging**

3. A challenge MUST be given before opening fire unless:
- a. to do so would increase the risk of death or grave injury to you or any other person;
  - b. you or others in the immediate vicinity are being engaged by terrorists.

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<sup>13</sup> HC Deb 1 December 2015, c69WH

<sup>14</sup> HC Deb 15 January 1990, c23

<sup>15</sup> For example, Helsinki Watch reproduced a copy of the Yellow Card in its 1991 report *Human Rights in Northern Ireland*. A copy of that report is available in the House of Commons Library (Research Section HA 941.60824)

<sup>16</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>17</sup> Eighteenth Report of the Standing Advisory Commission on Human Rights, Report for 1992-1993, HC 739, Session 92/93, Para 3.8

<sup>18</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

## Opening Fire

5. You may only open fire against a person:

a. if he\* is committing or about to commit an act LIKELY TO ENDANGER LIFE AND THERE IS NO OTHER WAY TO PREVENT THE DANGER. The following are some examples of acts where life could be endangered, dependent always on the circumstances:

(1) firing or being about to fire a weapon

(2) planting, detonating or throwing an explosive device (including a petrol bomb)

(3) deliberately driving a vehicle at a person and there is no other way of stopping him\*

b. if you know that he has just killed or injured any person by such means and he does not surrender if challenged and THERE IS NO OTHER WAY TO MAKE AN ARREST.

Rule number 6 also reads:

If you open fire you should:

a. fire only aimed shots,

b. fire no more rounds than are necessary,

c. take all reasonable precautions not to injure anyone other than your target.<sup>19</sup>

The Card was amended again in 1994, following a court judgement in the case of Private Lee Clegg in 1993.

In its 2006 assessment of Operation Banner the British Army suggested that:

It was intended that so long as soldiers adhered to the contents of the Yellow Card then they would be acting within the law...

However, it was widely acknowledged that the Yellow Card had no legal force and in the opinion of the Standing Advisory Commission on Human Rights:

The operational rules for the use of lethal force by soldiers and policemen are considerably more detailed and more restrictive than the test laid down in the Criminal Law Acts. But they have no formal legal force and cannot therefore be taken to override or even to assist in the interpretation of the statutory test.<sup>20</sup>

The Commission concluded that:

It is clear that in case of any conflict between the two sets of rules the legal standard must prevail in any civil or criminal proceedings arising out of a disputed incident.

## Prosecutions of Armed forces personnel during the Troubles

Any fatalities involving the Armed Forces were investigated by the Royal Ulster Constabulary (RUC) at the time and, in some cases, prosecutions were brought against military personnel. According to the British Army's

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<sup>19</sup> As re-produced in Helsinki Watch, *Human Rights in Northern Ireland*, 1991, p.155

<sup>20</sup> Eighteenth Report of the Standing Advisory Commission on Human Rights, Report for 1992-1993, HC 739, Session 92/93,

2006 assessment of Operation Banner those cases “were very few – a dozen or so serious cases, over more than 30 years”.<sup>21</sup>

In most cases those fatalities were a direct result of operations<sup>22</sup> and “centred around the key issue of whether the soldier had the right to open fire in the particular circumstances pertaining at the time”.<sup>23</sup>

This resulted in a number of convictions (for example, R v Thain 1984; R v Clegg 1993,<sup>24</sup> and R v Fisher and Wright 1995), although in the majority of cases the Director of Public Prosecutions for Northern Ireland directed that there was no case to answer, or the defendants were acquitted at trial.<sup>25</sup> According to the Army’s 2006 assessment:

The basis on which these directions were given or acquittals made was, broadly, that the soldier had acted reasonably in the circumstances pertaining at the time; and this was the case even if the soldier had in fact been mistaken.<sup>26</sup>

Other commentators have suggested that the high number of cases not brought to trial or where defendants were acquitted was because there was, as the law stood at the time, no alternative between a murder charge or no charge at all where force had deliberately, as opposed to accidentally, been used.<sup>27</sup> The Standing Advisory Commission on Human Rights observed:

there is no satisfactory way of dealing with cases in which the current rules may have been broken. The formal legal rule as laid down in *The Attorney-General for Northern Ireland’s Reference No 1 of 1975* (above) is that where unreasonable force is deliberately used when some force would have been justified only a charge of murder is permissible. This makes it very difficult for the prosecuting authorities to justify making a charge in many cases, in that there is no realistic prospect of securing a conviction of murder against a soldier or policeman who has used unreasonable force except in the most flagrant cases. This is borne out by the fact that where such charges have been laid they almost invariably result in an acquittal.<sup>28</sup>

This debate is discussed in greater detail in the Eighteenth Report of the Standing Advisory Commission on Human Rights 1992-1993. A 1991 report, *Human Rights in Northern Ireland*, by Helsinki Watch

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<sup>21</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>22</sup> One case, however, involving the murder of two Catholic farmers in 1972, was not linked to operations and in 1981 those military personnel responsible were convicted of murder.

<sup>23</sup> Ibid

<sup>24</sup> Clegg was released on licence in 1995 but subsequently acquitted of murder at a retrial in 1999.

<sup>25</sup> Appendix One of the Standing Advisory Commission on Human Rights report for 1992-1993 has a table of prosecutions and their outcomes, correct to July 1993. The case R v Elkington & Callaghan, which is listed as pending in the table, also resulted in an acquittal.

<sup>26</sup> British Army, *Operation Banner: An Analysis of Military Operations in Northern Ireland*, Army Code 71842, July 2006

<sup>27</sup> The charge of manslaughter was still brought in those cases where a shooting was accidental (for example in R v Davidson 1981).

<sup>28</sup> Sixteenth report of the Standing Advisory Commission on Human Rights, Report for 1990-91, HC 488, June 1991

also discusses the issue of limitations on the charges which could be brought.<sup>29</sup>

### 1.3 The 1998 Good Friday Agreement

The Belfast Agreement, also known as the Good Friday Agreement (GFA), was reached following multi-party negotiations and signed on 10 April 1998. Principally concerned with British-Irish relations and the restoration of devolved institutions to Northern Ireland, the GFA also made allowance for 'the reduction of the numbers and role of the Armed Forces deployed in Northern Ireland to levels compatible with a normal peaceful society'.

One section also covered Republican and Loyalist 'Prisoners', compelling both the Irish and UK Governments to:

put in place mechanisms to provide for an accelerated programme for the release of prisoners, including transferred prisoners, convicted of scheduled offences in Northern Ireland or, in the case of those sentenced outside Northern Ireland, similar offences (referred to hereafter as qualifying prisoners). Any such arrangements will protect the rights of individual prisoners under national and international law.<sup>30</sup>

Paramilitary prisoners "affiliated to organisations which have not established or are not maintaining a complete and unequivocal ceasefire", however, would not benefit from the arrangements, although the intention was to keep that aspect under review.

Furthermore, both Governments were to:

complete a review process within a fixed time frame and set prospective release dates for all qualifying prisoners. The review process would provide for the advance of the release dates of qualifying prisoners while allowing account to be taken of the seriousness of the offences for which the person was convicted and the need to protect the community.<sup>31</sup>

Legislation to give effect to these arrangements was enacted by the *Northern Ireland (Sentences) Act 1998*.<sup>32</sup>

Between 1998 and 2012, the Sentence Review Commission received a total of 636 applications from prisoners, of which 506 applications were granted release.<sup>33</sup>

The GFA did not include any mechanism for dealing with unresolved killings – either by terrorists, the police or British Army – during the Troubles, nor did it provide an amnesty for crimes which had not yet been prosecuted.

#### Administrative scheme for "on the runs"

Between 2000 and 2014, the British Government operated an administrative scheme to deal with the issue of those suspected of

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<sup>29</sup> Helsinki Watch, *Human Rights in Northern Ireland*, 1991, p.79

<sup>30</sup> [Agreement reached in the multi-party negotiations](#), p.30

<sup>31</sup> Ibid

<sup>32</sup> Background is in Library Research Paper 98/65, [Release of Prisoners Under the Northern Ireland \(Sentences\) Bill](#), 15 June 1998

<sup>33</sup> <http://www.sentencereview.org.uk/download/downindex.htm>

terrorist crimes in Northern Ireland, but not in custody. As outlined above, the release of prisoners had been a crucial part of the Northern Ireland peace process. Negotiations between Sinn Féin and the UK Government also led to an administrative scheme designed to cover those suspected of terrorism crimes before the Agreement but who could not benefit from the 1998 Act because they were “on the run”.

Under the scheme, Sinn Féin, the Irish Government and the Prison Service of Northern Ireland submitted individuals’ names to the UK Government. The Police Service Northern Ireland reviewed their cases, and the Director of Public Prosecutions for Northern Ireland and the Attorney General decided whether prosecution was justified. Where they decided that this was not justified, the UK Government issued letters of assurance to those individuals via Sinn Féin.<sup>34</sup> An attempt to put the scheme on a statutory footing failed when the *Northern Ireland (Offences) Bill 2005-06* was withdrawn.<sup>35</sup>

Whilst the scheme was not secret, it was not widely publicised. However, the case *of R v John Anthony Downey*, which was heard in the Central Criminal Court in February 2014, resulted in much information on the scheme becoming public. John Downey had been told in 2007 that he was not of interest to any police force in the UK when in fact he was wanted by the Metropolitan Police Service on suspicion of involvement in the Hyde Park bombing of 1982. This led to the collapse of his trial, and in turn led to the Government asking Lady Justice Hallett to conduct an independent review of the scheme. Her report was published in July 2014.<sup>36</sup>

The Hallett Review Report made it very clear that the letters given to “on the runs” did *not* constitute an amnesty or immunity from prosecution: However, the report did make criticisms of the scheme and its operation:

2.1 There has been a great deal of misunderstanding and misreporting of the administrative scheme, and confusion about the categories of ‘on the runs’ (OTRs).

(...)

2.3 The administrative scheme did not amount to an amnesty for terrorists. Suspected terrorists were not handed a ‘get out of jail free card’.

2.4 The administrative scheme was treated by the UK Government as sensitive and details were not widely publicised. However, the scheme was not classified as ‘secret’.

2.5 The scheme was allowed to evolve and operate without any proper structure or policy in place. This led to considerable scope for error.

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<sup>34</sup> [The Report of the Hallett Review: An independent Review into the On the Runs Administrative Scheme](#), HC 380, 2014-1, paragraph 2.21

<sup>35</sup> See Library Research Paper 05/78 [Northern Ireland \(Offences\) Bill \(Bill 81 of 2005-06\)](#), 17 November 2005 and the oral statement by the then Northern Ireland Secretary, Peter Hain, [HC Deb 11 January 2996 c289](#)

<sup>36</sup> [The Report of the Hallett Review: An independent Review into the On the Runs Administrative Scheme](#), HC 380, 2014-15

2.6 Failings were for the most part systemic rather than attributable to individuals. Opportunities were missed between and within departments and organisations which could have minimised the risk of errors.<sup>37</sup>

More recently, Minister of State for Northern Ireland, John Penrose, has sought to reiterate that those “letters of comfort” issued under the OTR scheme do not provide immunity from prosecution. In a debate on 16 May 2019 he stated:

My right hon. Friend also made a point about the letters of comfort that were issued by a previous Government. I reassure him and other Members that legal reports have been issued on those letters since the cases that he mentioned saying that they are not an amnesty from prosecution. If a case can be made, letters of comfort will not in future be body armour against prosecution. He is right to say that we will have to wait and see how that plays out when or if one of the cases comes to court, but that is the latest and strongest legal situation [...]

I hope the message will go out loud and clear from the Chamber that anyone who thinks they can swan around scot-free as a result of that does not have the legal protection that some people may have thought they did.<sup>38</sup>

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<sup>37</sup> [The Report of the Hallett Review: An independent Review into the On the Run Administrative Scheme](#), HC 380, 2014-15, executive summary, page 7

<sup>38</sup> HC Deb 16 May 2019, c371 and c382



## 2. Investigation of deaths related to the 'Troubles'

The investigation of former British soldiers who served in Northern Ireland during "The Troubles", which is currently receiving a significant amount of media and parliamentary attention, is the result of a process which began over a decade ago.

### 2.1 The Historical Enquiries Team

In 2006 the Historical Enquiries Team (HET) was set up by the Government as part of the Police Service of Northern Ireland (PSNI) in response to judgements at the European Court of Human Rights. These judgements, in the so-called McKerr cases, related to the investigation of deaths in which state involvement was alleged. They found various shortcomings which amounted to breaches of Article 2 of the European Convention on Human Rights relating to the protection, by law, of the right to life.

The role of the HET was to examine all deaths attributable to the security situation that occurred in Northern Ireland between 1968 and the Belfast Agreement in 1998. There were 3,260 deaths attributable to "The Troubles" within this period, arising from 2,555 separate incidents. From its outset, the HET adopted three main objectives:

- 1 To assist in bringing a measure of resolution to those families of victims whose deaths are attributable to "the troubles" between 1968 and the signing of The Belfast Agreement in April 1998;
- 2 To re-examine all deaths attributable to "the troubles" and ensure that all investigative and evidential opportunities are subject to thorough and exhaustive examination in a manner that satisfies the Police Service of Northern Ireland's obligation of an effective investigation as outlined in Article 2, Code of Ethics for PSNI;
- 3 To do so in a way that commands the confidence of the wider community.<sup>39</sup>

The HET looked into cases on a chronological basis, with some exceptions:

- Previously opened investigations: prior to the establishment of the HET in 2005, the PSNI's Serious Crime Review Team (SCRT) had the task of reviewing past cases. The HET subsumed these cases when it took over the responsibility for historical cases and, in the interests of fairness to the families involved, prioritised their reviews;
- Humanitarian considerations: for example, if the relatives of victims are very ill or elderly;
- Involving issues of serious public interest: for example, the cases that are currently being examined by the Committee of Ministers;

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<sup>39</sup> [Inspection of the Police Service of Northern Ireland Historical Enquiries Team](#), HMIC, 2013

- Linked series of murders: the HET will pursue the evidential opportunities presented by each case. If cases appear to be linked, then they will be considered together.<sup>40</sup>

## HMIC inspection of the HET

In 2012, and upon the request of the Chief Constable of the Police Service of Northern Ireland, the Minister of Justice for Northern Ireland commissioned Her Majesty's Inspectorate of Constabulary (HMIC) to inspect the role and function of the Historical Enquiries Team (HET). The inspection focused on whether the HET's approach to reviewing military cases conformed to current policing standards and policy; if it adopted a consistent approach to all cases (i.e. both military and paramilitary cases); and if the HET's review process met the requirements that would ensure it is compliant with Article 2 of the European Convention on Human Rights and Fundamental Freedoms (i.e. independence, effectiveness, promptness, and transparency and accountability).

The [subsequent report of the HMIC](#) was highly critical of the HET and in 2013 the PSNI announced that it would review **all** military cases relating to the period 1968 up until the Good Friday Agreement was signed, in order "to ensure the quality of the review reached the required standard".<sup>41</sup>

## 2.2 The work of the Legacy Investigations Branch

As a result of budget cuts to the Police Service of Northern Ireland, the HET was disbanded in September 2014. In its place the PSNI stated that a much smaller Legacy Investigations Branch (LIB) would be formed. At the time the PSNI acknowledged that "What is clear is that we cannot afford to do all that we currently do and some of what we do will take longer to achieve".

The LIB continues to review all murder cases linked to the Troubles and according to the PSNI that review does not examine cases chronologically but uses a [case sequencing model](#), which looks at forensic opportunities, available witnesses and other investigative material when deciding which cases to tackle first. The PSNI has stated that it does not prioritise military cases.<sup>42</sup>

PSNI figures provided to the Defence Committee in 2017 showed that investigations into killings by the British Army accounted for about 30 per cent of its outstanding legacy workload. Of the total 923 deaths in its remaining caseload at the time, 379 were attributed to republicans, 230 to loyalists and 283 to the security forces. A further 31 were unknown.<sup>43</sup> Of its active caseload, 5 of 14 cases were attributed to the security forces.

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<sup>40</sup> Ibid, p.109

<sup>41</sup> PSNI statement on [Legacy Investigations](#), 8 December 2016

<sup>42</sup> Ibid

<sup>43</sup> Police Service of Northern Ireland Legacy investigation Branch, [Submission to the Defence Select Committee, IFB0003](#), 2017

Any decision by the LIB to prosecute is referred to the Director of Public Prosecutions for Northern Ireland. The MOD, and the British Government, is entirely independent of this process.

There has been significant criticism, on all sides, of the process by which legacy investigations have been, and continue to be, undertaken. Concerns have been expressed over the credibility and reliability of evidence and witness statements that may be over 40 years old and the re-opening of investigations that had already concluded.

Most notable is the widespread perception that investigations have disproportionately focused on the actions of the armed forces and former police officers, given the criticism that was levelled at the HET in 2012 over its handling of military cases. On 23 January 2017 then Northern Ireland Secretary, James Brokenshire, stated:

Responsibility for policing and justice matters in Northern Ireland has been devolved to the Northern Ireland Executive since April 2010. All decisions on prosecutions are taken independently of Government and in accordance with the Code for Prosecutors.

As I have made very clear in a number of statements, I am concerned that the existing mechanisms for investigating incidents which occurred during the Troubles are disproportionately focused on the actions of the Armed Forces and former police officers, rather than the terrorists who were responsible for 90 per cent of deaths. This is wrong and it has to change. That is why this Government supports the full and faithful implementation of the Stormont House Agreement, which would see a move to a new system that would, under legal obligations, operate in ways that are fair, balanced and proportionate. The proposed new institutions, set out in the Stormont House Agreement, have a number of important advantages over the system currently in place in Northern Ireland, including that they will consider deaths in chronological order. This will ensure that outstanding investigations into terrorist murders, including the murder of 185 soldiers, are investigated and evidential leads are pursued.<sup>44</sup>

In its 2017 report, the Defence Select Committee observed that of the outstanding caseload of the LIB “investigations into former army personnel account for a minority of LIB cases”, yet “they still amount to a disproportionately high number of investigations (30% of investigations) when compared to the total level of killings attributed to the Army (10%)”.<sup>45</sup>

## Recent prosecutions of former soldiers

The perception that investigators are unfairly targeting cases involving military personnel has been confounded by decisions over the last few years by the Director of Public Prosecutions for Northern Ireland to bring prosecutions against a number of former Army personnel. At the time of writing, six former military personnel are facing prosecution for offences committed during the Troubles, in five separate incidents.

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<sup>44</sup> PQ60651, 23 January 2017

<sup>45</sup> Defence Select Committee, Investigations into fatalities in Northern Ireland involving British military personnel, HC 1064, Session 2016-17, para. 15

It has been suggested in the media that approximately 400 retired British soldiers had been sent letters by the PNSI asking for information to help police in their investigations in remaining cases.

### **Cunningham case**

In March 2015 the LIB re-opened the case into the death of John-Pat Cunningham, who was shot dead by an army patrol in 1974. Former soldier, Dennis Hutchings, formerly of the Life Guards Regiment, was charged with attempted murder in April 2015, while the PPS carried out a full review of all the available evidence in the case.

The case had previously been investigated in 1975, and again by the HET in 2011. On both occasions the case was dismissed.

However, it was re-opened by the LIB as a result of the criticisms surrounding the work of the HET and the decision in 2013 to review all military cases.

In November 2015 [the decision](#) was taken by the PPS to prosecute Mr Hutchings for attempted murder. When the [trial opened](#) in March 2017 the judge at Armagh Magistrates' Court ruled there was insufficient evidence to return Hutchings for trial for attempted murder, although evidence was sufficient for committal to trial for attempting to cause grievous bodily harm with intent.

In May 2017, however, the Director of Public Prosecutions for Northern Ireland reinstated the charge of attempted murder and directed that the trial would also proceed without a jury. An [application](#) to have the trial heard in front of a jury was subsequently rejected in December 2017 by Belfast Crown Court, which ruled that the "administration of justice might be impaired if the trial were to be conducted with a jury".

A further application to halt the prosecution of Mr Hutchings on the grounds of unavailability of evidence, a delay in mounting the prosecution and an alleged breach of promise relating to the original decision not to pursue charges, was rejected by Belfast Crown Court in May 2018. Mr Justice Colton stated that, while he was concerned about mounting a prosecution four decades after the event, he was satisfied the defendant would receive a fair trial and that the defence would have the opportunity to challenge any issues it had with the quality of the prosecution case during trial.<sup>46</sup>

In September 2018 Mr Hutchings was granted leave to appeal to the Supreme Court over the decision to hold a non-jury trial. That case came before the [Supreme Court](#) on 14 March 2019. A [Judgement](#) in that case was given on 6 June 2019, in which the Court dismissed the appeal. The Judgment stated:

It is important to focus on the need for a fair trial. Trial by jury is, of course, the traditional mode of trial for serious criminal offences in the United Kingdom. It should not be assumed, however, that this is the unique means of achieving fairness in the criminal process. Indeed, as the Court of Appeal's statements in *Jordan* show, trial by jury can in certain circumstances be

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<sup>46</sup> "Former British soldier to stand trial over John Pat Cunningham killing amid Troubles", *Irish News*, 10 May 2018

antithetical to a fair trial and the only assured means where those circumstances obtain of ensuring that the trial is fair is that it be conducted by a judge sitting without a jury.

35. So-called “Diplock trials” took place in Northern Ireland between 1973 and 2007. No one suggests that this mode of trial failed to deliver fairness of process, by reason of the fact that the trial took place before a judge sitting without a jury.<sup>47</sup>

Following the Supreme Court ruling, a trial date is now expected to be set.

### **McCann case**

In December 2016 the Public Prosecution Service of Northern Ireland announced that two former Army personnel are to be prosecuted for murdering an IRA Commander, Joe McCann, in 1972.

An investigation was originally conducted by the Royal Ulster Constabulary in 1972, and on the basis of available evidence the decision was taken not to prosecute anyone.

In 2013 a report by the HET concluded that his killing was unjustified and in March 2014 the Attorney General for Northern Ireland referred this case to the Director of Public Prosecutions, following a request for a fresh inquest. That resulted in a formal review of this specific case by the PPS, and following an investigation [the decision](#) was taken in December 2016 to prosecute the two former British soldiers for murder.

A preliminary hearing at Belfast Magistrates Court in March 2018 ruled that the soldiers (referred to as Soldiers A and C) have a case to answer and are to stand trial for murder. The trial had been expected to begin in January 2019. However, following a decision by the Director of Public Prosecutions for Northern Ireland to hold a trial without a jury, the trial date had been put back, provisionally to September 2019, pending the outcome of the Supreme Court ruling in the Cunningham/Hutchings case. The Supreme Court’s dismissal of that case (see above) on 6 June 2019 means that the trial in the McCann case is now expected to go ahead in September.

An anonymity order relating to the defendants remains in place.

### **McAnespie case**

On 19 June 2018 the Public Prosecution Service for Northern Ireland [announced that charges of gross negligence manslaughter would be brought](#) against a former soldier in relation to the death of Aidan McAnespie at a military checkpoint in 1988.

David Holden, a former Grenadier Guardsman, was originally charged with manslaughter, but the charges were subsequently dropped based upon the evidence available at the time.

In 2008 the HET reviewed the case, and questioned the version of events as reported, although no new evidence had been uncovered that warranted the case being referred to the PPS.

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<sup>47</sup> The Supreme Court, Judgement (2019) UKSC 26, para 34-35.

In January 2016 the PPS announced its intention to review the decision to drop the charges in the original case following a referral of the case by the Attorney General for Northern Ireland upon the request from Mr McAnespie's family for a fresh inquest into the circumstances of the shooting.

In a [statement](#) the PPS commented:

The process considered all of the available evidence including a fresh ballistics report and it has been concluded there is sufficient evidence to prosecute the suspect in connection with the shooting of Mr McAnespie.

At the time of writing, a court date has not yet been set.

### **Bloody Sunday Prosecution**

In the [Annual Report and Accounts for 2016-17](#) the PSNI confirmed that 18 prosecution files relating to former soldiers of the Parachute Regiment involved in Bloody Sunday had been submitted to the Public Prosecution Service in December 2016.<sup>48</sup>

On 14 March 2019 the DPP for Northern Ireland announced that one former soldier (referred to as Soldier 'F')<sup>49</sup> would be prosecuted for murder and attempted murder. In the remaining cases, involving 16 former soldiers and 2 alleged Official IRA members, it was concluded that the Test for Prosecution had not been met.

In a statement the PPS commented:

It has been concluded that there is sufficient available evidence to prosecute one former soldier, Soldier F, for the murder of James Wray and William McKinney; and for the attempted murders of Joseph Friel, Michael Quinn, Joe Mahon and Patrick O'Donnell.

In respect of the other 18 suspects, including 16 former soldiers and two alleged Official IRA members, it has been concluded that the available evidence is insufficient to provide a reasonable prospect of conviction. In these circumstances the evidential Test for Prosecution is not met.<sup>50</sup>

A [summary of the reasons not to prosecute](#) in the majority of the Bloody Sunday cases was released by the PPS following their announcement.

However, the PPS also went on to state that the decisions related solely to actions undertaken on Bloody Sunday and that "Consideration will now be given to allegations of perjury in respect of those suspects reported by police".<sup>51</sup>

At present it is unclear when the case of Soldier 'F' may come to court.

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<sup>48</sup> The [Saville Inquiry](#), which was established in 1998 to re-investigate the incident, was made public in 2010. That Inquiry concluded that the killing of 13 people at a civil rights march by the British Army in 1972 was unjustified. While the findings of the Inquiry are inadmissible in court, it nevertheless opened up the possibility of prosecutions.

<sup>49</sup> The Saville Inquiry granted anonymity to all military witnesses who gave evidence to that inquiry. The PPS concluded that these reporting restrictions should remain in place.

<sup>50</sup> Public Prosecution Service for Northern Ireland, [News Release](#), 14 March 2019

<sup>51</sup> *ibid*

### **Hegarty case**

In July 1972 15-year old Daniel Hegarty was shot and killed by a member of an Army patrol on duty in the Creggan area of Londonderry during an operation to re-establish control of a number of sectarian “no-go areas” that had been established in Belfast, Londonderry and other urban centres, what was known as Operation Motorman.<sup>52</sup>

Following an initial investigation, in July 1973 the decision was taken by the Director of Public Prosecutions for Northern Ireland not to prosecute the soldier involved. A further decision not to prosecute was taken by the DPP in 2008 following a review of the case by the Historical Enquiries Team.

In 2011 the Attorney General for Northern Ireland directed that a fresh inquest be held into the death of Daniel Hegarty.<sup>53</sup> At the subsequent hearing the Coroner received testimony from a ballistics expert which suggested that an offence may have been committed and therefore, the Coroner referred the case back to the DPP in December 2011. Again, the decision was taken in March 2016 that the Test for Prosecution had not been met. However, that decision was subsequently quashed by the Divisional Court in May 2018.<sup>54</sup>

Following a further review of the case by the DPP, which included fresh evidence presented after the 2018 Court ruling, the PPS for Northern Ireland [announced](#) on 15 April 2019 its intention to prosecute a former soldier (identified as “soldier B”) for the murder of teenager Daniel Hegarty and for wounding with intent with respect to a second youth, Christopher Hegarty, during the same incident.

In a statement the DPP commented:

As with all cases, I have also carefully considered whether the public interest requires prosecution through the courts. Particular consideration was given to Soldier B’s ill health, regarding which an updated medical report was obtained. In line with our Code for Prosecutors, I have concluded, given the seriousness of the charges, that the Public Interest Test for Prosecution is also met.<sup>55</sup>

It is not yet known when the case may come to court.

### **MOD response**

As noted above, legacy investigations in Northern Ireland, and any subsequent decision by the DPP to prosecute, are entirely independent of the British Government and the Ministry of Defence.

In response to these recent prosecution decisions the MOD has stated:

This process is entirely independent of Government and so it’s inappropriate for us to comment. We understand the strain these proceedings place on our people, both serving and veterans, and

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<sup>52</sup> An overview of Operation Motorman is available in a series of [Cabinet Office papers](#) available at the National Archive.

<sup>53</sup> The original inquest in October 1973 recorded an open verdict.

<sup>54</sup> A summary of the judgement is available [online](#).

<sup>55</sup> Public Prosecution Service Press Release, 15 April 2019

will stand by them – funding all their legal costs and providing pastoral support.<sup>56</sup>

The MOD has established an Operational Legacy Support Team (OLST) within the Army Personnel Services Group, in order to provide support and advice to veterans and serving personnel on matters relating to legacy operations in Northern Ireland, Iraq and Afghanistan. In answer to a Parliamentary Question on 14 May 2019 the MOD provided more information on the OLST:

Within the Army's Personnel Services Group (APSG), the Operational Legacy Support Tea, coordinates welfare and pastoral support to Army veterans and serving personnel who are subject to historical investigations. APSG has drawn together all stakeholders (including those in the Ministry of Defence, the appropriate Regimental Headquarters and Associations, the Confederation of Service Charities and ABF-The Soldiers' Charity) to ensure coherent pastoral support to veteran, under the primacy of the MOD's Veterans UK. This is incorporated into the recently announced UK-wide Veterans' Strategy and is supported by £10 million of funding overall. I am confident that this demonstrates that the Department has a clear strategy and is meeting its obligations to veterans subject to historical investigations, whilst also protecting the Army's reputation for future generations of soldiers.<sup>57</sup>

Detailed information on the legal and welfare support that is being made available is online at [Operational legacy investigations and inquests – help for veterans.](#)

## Recent prosecutions against paramilitary personnel

In response to accusations that military personnel have been unfairly targeted by the PSNI in its legacy investigations, the PPS for Northern Ireland has sought to make clear that cases remain active with respect to alleged offences involving republican and loyalist paramilitaries, as well as those involving military and police personnel.

In its [statement](#) on the most recent case for prosecution in April 2019 the PPS set out the following:

- Since 2011 the PPS has taken prosecutorial decisions in 26 legacy cases.
- 13 of those cases relate to alleged offences involving republican paramilitaries:
  - There have been prosecutions in 8 of those cases.
  - Proceedings are still active in 3 of those cases.
  - Of the 5 cases that have concluded, two resulted in convictions, two cases were discontinued,<sup>58</sup> and one resulted in acquittal.
- 8 of the 26 cases related to alleged offences involving loyalist paramilitaries:

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<sup>56</sup> MOD, Defence in the Media, 22 March 2017

<sup>57</sup> PQ 252560, Northern Ireland, 14 May 2019

<sup>58</sup> One following the death of the defendant.



- The decision to prosecute was taken in 4 of those 8 cases.
- Two cases resulted in a conviction; while the other two cases are currently active.
- Five cases involved former military personnel (see above).

## 3. Addressing legacy issues

### 3.1 Implementing the Stormont House Agreement

Addressing legacy issues was a key part of the [Stormont House Agreement](#) reached in December 2014. Participants in the negotiations on that agreement stated that any approach to the past should respect the following overarching 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.<sup>59</sup>

To this end, the agreement set out various detailed measures. Among them was the establishment of a new independent Historical Investigations Unit (HIU)<sup>60</sup> to take forward investigations into outstanding deaths from the Troubles. That would include outstanding cases from the HET process and the legacy work of the LIB and the Police Ombudsman for Northern Ireland.<sup>61</sup> Families may also have other, previously completed, cases considered for criminal investigation by the HIU if there is new and credible evidence which was not previously available to the HET/LIB. In respect of its criminal investigations, the HIU will have full policing powers and will work through its case load in chronological order. It must complete its work within five years and it will be overseen by the Northern Ireland Policing Board. Any decisions to prosecute will be taken by the Director of Public Prosecutions.

### 3.2 Debate in the House

Since 2017 there have been a number of debates in the House on the investigation of legacy cases, both in Northern Ireland and elsewhere.

All of those debates raised concerns over the perceived unfairness of investigations into former Armed Forces personnel in Northern Ireland, the credibility and reliability of evidence and witness statements that may be over 40 years old, the re-opening of investigations that had already concluded and the pros and cons of introducing a Statute of Limitations on alleged offences.

Detail of those debates is as follows:

- [DUP Opposition Day debate](#), 23 February 2017:

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<sup>59</sup> *Stormont House Agreement*, para 21

<sup>60</sup> Examined in paragraphs 30-40 of the [Stormont House Agreement](#)

<sup>61</sup> This was re-confirmed in the [PSNI statement on legacy investigations](#), 16 December 2016

That this House acknowledges the service and sacrifice of the armed forces and police during Operation Banner in Northern Ireland as well as in other theatres of conflict in Iraq, Kosovo and Afghanistan; welcomes the recent decision to close down the Iraq Historical Allegations Team; and calls on the Government to take steps to ensure that current and future processes for investigating and prosecuting legacy cases, whether in Northern Ireland or elsewhere, are balanced and fair.

- [House of Commons Adjournment Debate, Ballydugan Four](#), 19 April 2017
- [Westminster Hall Debate, Fatalities in Northern Ireland and British military personnel](#), 25 January 2018
- [Westminster Hall Debate, Historic allegations against veterans](#), 15 May 2018
- [House of Commons debate, Veterans and soldiers: statute of limitations](#), 25 June 2018
- [House of Lords debate](#), 5 September 2018:
- [House of Commons debate, Investigation of Veterans](#), 16 May 2019
- [House of Lords debate, Veterans: Investigations](#), 16 May 2019
- [Westminster Hall Debate, Immunity for Soldiers](#), 20 May 2019

## 2017 Defence Select Committee Report

In April 2017 the Defence Select Committee published its report into [Investigations into fatalities in Northern Ireland involving British military personnel](#).<sup>62</sup> While describing the overall process of investigations into fatalities in Northern Ireland as “deeply unsatisfactory” and “morally indefensible” for “former service personnel to be caught in limbo”, the Committee also concluded that former soldiers should be protected by a Statute of Limitations preventing further investigation and prosecution of incidents which occurred between almost 20 and 50 years ago.<sup>63</sup> In order to remain within the provisions of international law, the Committee also recommended that a Statute of Limitations be accompanied by a truth recovery mechanism:<sup>64</sup>

5. Accordingly, we recommend the adoption of Option One—the enactment of a statute of limitations, covering all Troubles-related incidents, up to the signing of the 1998 Belfast Agreement, which involved former members of the Armed Forces. This should be coupled with the continuation and development of a truth recovery mechanism which would provide the best possible prospect of bereaved families finding out the facts, once no-one needed to fear being prosecuted. (Paragraph 52)

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<sup>62</sup> HC 1064, Session 2016-17

<sup>63</sup> Other options presented by the Committee included implementing the Stormont House Agreement; implementing the Agreement and reviewing the Northern Ireland Sentences Act 1988 or ceasing investigations. All were examined in detail in [Section 4 of the Committee's report](#).

<sup>64</sup> The Chairman of the Defence Committee, Julian Lewis, discussed this idea of a ‘truth recovery process’, akin to the Truth and Reconciliation process in South Africa, in the House again in May 2018 (HC Deb 3 May 2018 c500-501)

6. Although it is beyond the strict remit of the Defence Committee, we would encourage the next Government to extend this provision to include former members of the Royal Ulster Constabulary and other former security personnel. It will also be a matter for the next Government to decide, after appropriate consultations, whether the statute of limitations should also cover all Troubles-related incidents. (Paragraph 53) [...]

8. We believe that to subject former Service personnel to legal pursuit under the current arrangements is wholly oppressive and a denial of natural justice. It can be ended only by a statute of limitations. Our expert witnesses agreed that the UK Parliament has it entirely within its power to enact such a statute and we call upon the Government in the next Parliament to do so as a matter of urgency. (Paragraph 55)

The Government's initial [response](#) to the report was published on 26 April 2017:

The Government recognises the significant difficulties with the status quo.

For example, the closure of the Police Service of Northern Ireland's Historical Enquiries Team left hundreds of cases outstanding. Many of these cases still require investigation but there is general agreement that the current mechanisms in place to address outstanding cases need to be more balanced, proportionate, transparent, fair and equitable, and deliver outcomes more quickly. In addition, the Office of the Police Ombudsman for Northern Ireland (OPONI) has a remit to investigate alleged misconduct or criminal action by police in Northern Ireland, including in respect of Troubles-related incidents. The OPONI Historical Investigations Directorate's caseload currently sits at around 400 cases and continues to grow, with some 167 complaints in respect of historical investigations received in the past two years.

The Stormont House Agreement in December 2014 reached broad political consensus to establish four institutions to address the past after eleven weeks of intensive talks between the UK Government, the five largest parties in the Northern Ireland Assembly, and, where appropriate, the Irish Government. The institutions proposed by the Stormont House Agreement are designed to address different aspects of the legacy of the Troubles. The Government believes that these institutions provide the best way to address the legacy of Northern Ireland's past [...]

The institutions proposed by the Stormont House Agreement include the Historical Investigations Unit (HIU)—an independent body to take forward outstanding investigations into Troubles-related deaths. The HIU would take on the outstanding work of the Police Service of Northern Ireland's Historical Enquiries Team and the outstanding legacy work of the Police Ombudsman for Northern Ireland. The initial caseload is estimated at around 1,800 deaths. The HIU would aim to complete its work within five years of its establishment and would be required to act in a way which is balanced, proportionate, transparent, fair and equitable.

A further response was published by the present Government as the [Third Special Report of 2017-19](#), HC 549, 13 November 2017. This gave the following response to the recommendation of a statute of limitations:

While the Government believes that the most effective option to address Northern Ireland's past is to implement the proposals set out in the Stormont House Agreement, the Government acknowledges that others have different views on the best way forward, including approaches such as that proposed by the Committee which do not involve recourse to the criminal justice system.

As such, the Government intends to include within its forthcoming consultation on the draft Northern Ireland (Stormont House Agreement) Bill a section entitled '*Alternative approaches to addressing the past*'. This section of the consultation will discuss alternative ways forward and include a description of the Committee's recommendation. The consultation will invite respondents to give their views on 'the potential effectiveness and appropriateness of alternative approaches such as amnesties and a statute of limitations to address the legacy of Northern Ireland's past'. Following the consultation's conclusion, the Government will consider all views carefully to inform next steps.<sup>65</sup>

In January 2018 the House [debated](#) the Defence Committee's report, in which many of the same arguments were raised. Again, the Minister for the Armed Forces, Mark Lancaster, stated the Government's concerns with maintaining the status quo and its support for implementation of the Stormont House Agreement as "the best way to address Northern Ireland's past in a way that is fair, balanced and proportionate".<sup>66</sup> He also reiterated the commitment to discussing "alternative approaches":

As there are a range of views, and recognising the view of the Committee, the Government have decided to include within the legacy consultation a question on alternative ways of addressing the legacy of the past, such as a statute of limitations or amnesty. While the Government are clear that in their view the best way forward is to proceed with the Stormont House agreement institutions, in the spirit of meaningful consultation, all views will be considered carefully to inform the next steps.<sup>67</sup>

### 3.3 Public Consultation Paper

On 11 May 2018 the Northern Ireland Office launched a public consultation: [Addressing the legacy of Northern Ireland's Past](#). The consultation takes forward the proposals set out in the Stormont House Agreement in relation to the Historical Investigations Unit (HIU) (see above).

#### A Statute of Limitations?

Prior to the consultation's publication, there was political and media speculation that it would include a statute of limitations to prevent the prosecution of former soldiers for offences connected to the Troubles in Northern Ireland. This idea was supported by some Conservative MPs, including former Defence Secretary Gavin Williamson, but strongly opposed by Sinn Féin and the Irish Government.<sup>68</sup> The Northern Ireland Human Rights Commission advised the Government that any such statute [would amount to an amnesty and could be in breach of](#)

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<sup>65</sup> Para 5, p3

<sup>66</sup> HC Deb 25 January 2018, c222WH

<sup>67</sup> *ibid*

<sup>68</sup> <http://www.bbc.co.uk/news/uk-northern-ireland-44042438>

[international law](#). The DUP leader, Arlene Foster, also [raised concerns](#) that a statute of limitations could lead to a general amnesty for all those involved in the Troubles, including terrorists.

However, the consultation did not contain a Statute of Limitations or any form of amnesty. In the Foreword, the Northern Ireland Secretary states:

Conservatives in government have consistently said that we will not introduce amnesties or immunities from prosecution." This Government has always shared the view that amnesties are not the right approach and believes that justice should be pursued.<sup>69</sup>

Acknowledging the views of the Defence Select Committee in its 2017 report, the consultation did, however, welcome "views from those who might have other ideas, either about how the institutions should work, or about alternatives to the institutions themselves".<sup>70</sup> The Defence Committee was, however, critical of the consultation's failure to include a comprehensive section on alternative approaches, including the options outlined by the Committee in its 2017 report.<sup>71</sup>

Support for some form of statute of limitations is widespread and formed much of the substance of the debate on [historical allegations against veterans](#) in Westminster Hall on 25 May 2018. In an [interview on Radio 5 Live](#) on 3 June 2018, Minister for Defence People and Veterans, Tobias Ellwood, also expressed his support:

There's a consultation, I personally would like to see this considered - but it's not for me to make that judgement.... It does make sense to draw a line at some point to say that investigations have taken place to their conclusion and unless there's compelling evidence put forward to a very high court...we then close the books on that particular matter...

However, there is a consultation taking place, these arguments I think will be put into that consultation and I hope common sense will then prevail.

At the moment you are hearing of the historic allegations team, this Northern Ireland operation, knocking on doors of people who are now in their eighties asking for questions...That cannot be how we should look after our veterans.<sup>72</sup>

Former Minister for the Armed Forces, Sir Mike Penning, who served in Northern Ireland, also stated his support for a Statute of Limitations in an interview with *The Express* in June 2018. He suggested that it was "fundamentally wrong that cases which had already been investigated all those years ago were being reopened" and that "the statute of limitations would be a good example of how we do it".<sup>73</sup>

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<sup>69</sup> This is a view which the Government has also shared in relation to giving immunity to Armed Forces personnel for any offence alleged to have taken place more than 20 years ago whilst engaged in military operations overseas. See [House of Lords Grand Committee of the Armed Forces Bill](#), 3 March 2016, cGC152

<sup>70</sup> Northern Ireland Office, Addressing the Legacy of Northern Ireland's Past, May 2018, Foreword

<sup>71</sup> [Defence Committee submission to NIO consultation](#), 12 June 2018

<sup>72</sup> Pienaar's Politics, 3 June 2018

<sup>73</sup> ["End 'sick' witch-hunt against Army, says MP accused over his own time in Ulster"](#), *The Sunday Express*, 17 June 2018

In response to that media story, a Government Spokesman commented:

It is only due to the courageous efforts of our security forces that we have the relative peace and stability that Northern Ireland enjoys today. We are now consulting on new legacy institutions to replace the current flawed processes and ensure that there is no unfair and disproportionate focus on former members of the Armed Forces and police officers. The welfare of our personnel and veterans is of the utmost importance and we provide legal and pastoral support to any veteran who requires it.<sup>74</sup>

In a commentary piece for *The Daily Telegraph* on 3 August 2018 the Northern Ireland Secretary, Karen Bradley, once again defended the Government's approach stating that it could not support a mechanism that would also offer an amnesty to terrorists.<sup>75</sup>

The Defence Committee has, however, [continued to express concern](#) over the Northern Ireland Office's "closed minded" approach to this issue.

The public consultation on addressing Northern Ireland's past closed on 5 October 2018, after being extended for a short period. At the time of writing the Government is yet to respond.

In answer to a [petition](#), which was debated in the House on 20 May 2019, the Northern Ireland Office recently stated:

This Government is unequivocal in our admiration for the Armed Forces whose sacrifices ensured terrorism would never succeed. However, our approach to the past must be consistent with the rule of law.

Criminal investigations and prosecutions are a matter for the police and prosecuting authorities who act independently of government and politicians.

This Government believes in the rule of law. Where there is evidence of wrongdoing it is right that this should be investigated and, where the evidence exists, for prosecutions to follow. We do not support amnesties or immunity from prosecution.

This Government will always salute the heroism and bravery of the soldiers and police officers who served to protect the people of Northern Ireland, and in too many cases paid the ultimate price. It is only due to the courageous efforts of our security forces that we have the relative peace and stability that Northern Ireland enjoys today. Our security forces ensured that Northern Ireland's future will only ever be decided by democracy and consent, and never by violence. Over 250,000 people served in Northern Ireland during Operation Banner, the longest continuous military deployment in our country's history, the vast majority with courage, professionalism and great distinction. This Government will never forget the debt of gratitude we owe them.

The Government has been clear that the current system for dealing with the legacy of Northern Ireland's past is not working well and is in need of reform. The system to investigate the past needs to change to provide better outcomes for victims and survivors of the Troubles and to ensure that all, including

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<sup>74</sup> Ministry of Defence, *Defence in the Media*, 17 June 2018

<sup>75</sup> "We should never forget that 90 per cent of killings during The Troubles were carried out by terrorists: commentary", *The Daily Telegraph*, 3 August 2018

members of the Armed Forces and police officers, are treated fairly.

That is why across Government we are working on proposals on how to best move forward, to address the legacy of the past. As part of this, we recently carried out a consultation a draft Stormont House Agreement Bill which set out how improvements could be made.

We are carefully considering the large number of responses (over 17,000) to our consultation on this issue and aim to publish our next steps shortly. No final decisions have yet been taken but we are committed to a way forward that works for everyone and is balanced, proportionate, transparent, fair and equitable.

The Ministry of Defence's most recent announcement that it intends to consult on legislation providing legal protection to Service personnel and veterans for alleged offences committed more than 10 years previously that had already been investigated, will not apply to Northern Ireland. It will only apply to those alleged offences committed outside of the UK. On the issue of Northern Ireland, the Defence Secretary said in that statement:

Our obligations to veterans who have served in Northern Ireland remain the same as those who served in other theatres. I have agreed with the Northern Ireland Secretary that my Department will provide formal input to any process taken forward by the Northern Ireland office resulting from the Stormont House Agreement. I understand the importance of making sure this process is fair and has the trust of all sides, supporting the commitments of the UK and Irish governments to the Belfast Agreement and to peace in Northern Ireland.<sup>76</sup>

### **Defence Committee Inquiry into the Protection of Veterans**

In 2018 the Defence Committee launched a [new inquiry on the protection of veterans](#) engaged in all conflicts, and not just limited to Northern Ireland, which will look specifically at the concept of a Statute of Limitations. In doing so, the Committee commented:

The Government has a moral duty to defend those who served in the defence of our country, whether that was in Northern Ireland, Iraq or Afghanistan [...] it simply cannot be right that veterans, who are the subject of investigations at the time of the events in question and subsequently cleared, are now living in fear of re-investigations and the threat of prosecutions.<sup>77</sup>

That inquiry is still underway.

### **Armed Forces (Statute of Limitations) Bill**

A Private Members Bill entitled [Armed Forces \(Statute of Limitations\) Bill](#) was also introduced in the House in November 2017 under the [Ten Minute Rule](#). Initially scheduled to receive its second reading on 15 June 2018, the Bill was not called for debate and is yet to receive a new date for second reading. The Bill is intended to create statutory limitations on court proceedings against current and former members of the armed

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<sup>76</sup> HCWS1575, [Legal protections and support for Armed Forces Personnel and Veterans](#), 21 May 2019

<sup>77</sup> [Defence Committee submission to NIO consultation](#), 12 June 2018



forces for certain alleged offences committed during military operations or similar circumstances.

In introducing the Bill Richard Benyon said the Bill would “bring an end to what has become known as ‘lawfare’”, not just in relation to Northern Ireland but more broadly. He continued:

My Bill would set a statute of limitations beyond which it would be impossible to bring a case against any individual about whom an allegation was made regarding actions he or she took while serving on operations. I would argue that 10 years is the right period for which to legislate. I fully accept that there would have to be caveats and exceptions, and my Bill would define what we mean by operations. A decade gives plenty of time to bring forward legitimate cases in which real wrongdoing has occurred, and it is about the timescale after which evidential trails start to run cold.

As the Bill is not a Government Bill, unless it receives significant support from across the House and from the Government it is unlikely to progress.

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