



DEMOCRATIC UNIONIST PARTY

RESPONSE TO GOVERNMENT CONSULTATION

ON

‘ADDRESSING THE LEGACY OF NORTHERN IRELAND’S PAST’

5th October 2018

EXECUTIVE SUMMARY

The Democratic Unionist Party has major concerns over elements of the draft Bill proposed by the Northern Ireland Office, and without significant amendment, anticipate it will not meet the objective of properly addressing the legacy of Northern Ireland's past.

The DUP has stood against a rewriting of our history and efforts to introduce an amnesty. In contrast we have always sought to keep open the prospect of justice for those who have lost loved ones. The Government's latest proposals are being viewed through the lens of two decades of offence and outrage felt by innocent victims, and where the definition of a victim continues to be unjust and unacceptable.

The DUP considers the best opportunity for justice to come from an investigatory team with full police powers. It is important that any new structures would be proportionate given 90% of deaths were caused by terrorists, and there should be an end to witch hunts against those in the forces of law and order who acted bravely, honourably and appropriately.

We consider the status quo to be unacceptable, with innocent victims inexplicably the only group currently not seeing some level of progress with investigations.

New UK-wide legislation to improve the definition of a victim would be necessary in our view to transform the context and offer the best prospect of success for any new arrangements.

INTRODUCTION

The Democratic Unionist Party welcomes this opportunity to respond to the consultation paper published by the Northern Ireland Office, and to comment upon the proposals it contains and some related matters regarding the legacy of Northern Ireland's troubled past.

The decades of terrorism that Northern Ireland endured, euphemistically often referred to as the Troubles, and the approach to it, remains perhaps the most controversial aspect of politics here.

DUP APPROACH

The DUP believes justice cannot be set aside, but must be done and seen to be done. At all times we have sought to respond to and prioritise the needs of victims.

The failure of the Belfast Agreement to adequately address the needs of innocent victims, whilst facilitating the early release of the terrorist prisoners caused immense hurt to victims. This was further compounded by Government formally abandoning attempting to extradite IRA prison escapees, efforts to grant a terrorist amnesty at Westminster and then comfort letters for those on the run. Twenty years later the Government is still trying to put in place structures to address this unjust imbalance. As a society, we must acknowledge the suffering of each victim and meet their individual needs. We should strive to secure justice for victims and work to ensure others don't suffer similarly in the future.

DUP Ministers used devolution to quadruple the level of funding previously provided under Direct Rule, oversee fundamental reform of support services and instigate a new Mental Trauma Service. We have attempted to rectify the definition of a victim and developed legislative proposals on a pension for severely disabled victims.

VICTIM DEFINITION

We have found that consideration of the consultation proposals by the public is coloured by the dissatisfaction they feel over an unfair and inaccurate context or environment created by the status quo. The most straightforward example of this is the definition of a victim.

We met with many individual victims and several groups representing victims' organisations during the course of this consultation, and the victim definition was raised with us as their key issue, almost universally by those we engaged with.

We consider the 2006 definition of a victim and survivor to be unacceptable. In our opinion, there is a clear distinction in law between a terrorist perpetrator and their innocent victim. To equate the two is morally wrong and indefensible. We have previously tabled legislative proposals to change the definition of a victim. The Government should bring forward plans now to change the definition of a victim so there is a clear distinction made between perpetrators and victims. We believe this could improve the existing climate and context and offer the best prospect of new bodies proving successful.

The Secretary of State writes in the foreword of the consultation document: *"A Conservative Government will reject any attempts to rewrite the history of the past that seeks to justify or legitimise republican or loyalist terrorism or which seeks to displace responsibility from the people who perpetrated acts of terrorism"*.

A perpetrator of an unlawful act cannot at the same time be a victim of the act they have perpetrated. Someone who pulled the trigger or planted a bomb should not be treated in the same manner as their innocent victims.

This matter is fundamental to victims' views. In our consultation with a number of victims' organisations, we were struck again by extremely powerful testimony illustrating the depth and rawness of hurt and insult they feel at their loved one being placed in the same category as terrorist perpetrators.

CONTEXT

We would wish to state clearly that we consider the current arrangements for dealing with the past to be equally unacceptable. There is a clear imbalance, with a disproportionate focus on the activities of the Armed Forces and the Police. This includes the work of the Legacy Investigation Branch of the PSNI, the various ongoing Inquiries, the Police Ombudsman, the Public Prosecution Service and the so-called ‘Legacy Inquests’.

A stream of negative stories have been devised and highlighted to undermine the credibility and integrity of the Armed Forces and the Police, and continuation of the status quo will lead to further re-writing of the narrative of the ‘Troubles’. The truth however is that the armed forces should be praised for their valour and service in extremely difficult circumstances.

When one considers that the terrorists were responsible for 90% of murders in Northern Ireland, an outcome which puts the spotlight solely on the Armed Forces and Police would be an absolute travesty and an insult to the memory of all the innocent victims. Furthermore in relation to the less than 10% of killings to which state forces are linked, Colonel Tim Collins wrote recently: *“Almost all shootings by the security forces were within the legal duty of policemen and soldiers to discharge their weapons in self-defence or in defence of those who it was their duty to protect”*.

We also believe caution needs to be exercised over the ever-growing promotion of a state vs non-state view of the ‘Troubles’. Such thinking is simplistic and entirely inaccurate, overlooking the fact that the overwhelming and consistent view of all sections of the community including governments, politicians, civil society and churches was that the violence was morally unacceptable. Prof Arthur Aughey recently warned against *“an official sanctioning of the Black taxi tour version of Northern Ireland’s past”*.

Setting the terrorist campaigns in proper context is essential and hence we believe the Government should consider the development of an authoritative, evidence-based account of the period to provide fairness and accuracy. The Stormont House Agreement contained reference to developing a historical timeline. This commitment could be enhanced to provide for an authoritative historical account, or it could be established separately. It need not require the setting up of a Commission as has occurred in other parts of the world, and would most likely be carried out more quickly and cost-effectively otherwise.

It is important that we learn from the past, and that myths, misunderstandings and mistruths that may have contributed to the violence are addressed so they aren't retained into the future or even reinforced.

Whilst we want to see change and new arrangements implemented to deal with the past, there are a number of observations we would wish to make about the Government's proposals.

Historical Investigations Unit (HIU):

Victims and survivors of terrorism must have the best opportunity for justice. The DUP is of the view that the best way to achieve this is by the establishment of an investigatory team with full police powers to provide full investigations.

Whilst in a normal society the expectation would be that the existing police service is responsible for investigating historic cases, the reality here is somewhat different. The Chief Constable has been very clear that he does not feel he can be expected to police the past and at the same time respond to the present day criminality and security threats. He is adamant that the PSNI does not have the capacity to do both and the priority of the Police is to make today's Northern Ireland a safer place for all.

Furthermore, the High Court has ruled there are cases in which it is not appropriate for the PSNI to investigate, and Her Majesty's Inspectorate of Constabulary's 2015 follow-up inspection of the PSNI Historical Enquiries Team stated: *"If an investigation is to comply with Article 2 of the European Convention on Human Rights, the people responsible for, and carrying out, the investigation must be independent from those implicated in the events. In Northern Ireland, we have learned over two inspections that perceptions are as important as reality. In dealing with such sensitive issues as deaths caused by military and paramilitary agents, it is absolutely essential that, as far as possible, the relevant institutions show themselves to be independent in order to secure and retain the confidence of those affected by their work and of the public at large"*. These realities cannot simply be dismissed.

The precise name of any legacy body is of little importance to us, compared to the work they will conduct. Many were critical of the limited powers of the HET, and we support the new body having full police powers of investigation, including the right to arrest and question terrorist suspects.

It is essential that an HIU is properly resourced to fulfil its important role and that there is full cooperation with the PSNI to ensure they have access to modern evidence gathering techniques and other technical capacity required to conduct thorough investigations. We consider it important that the HIU is able to avail fully of the expertise of those with longstanding and first-hand experience of policing in Northern Ireland including former members of the RUC and PSNI. We will require high levels of accountability and transparency for the work of the HIU, with at least the same scrutiny mechanisms as the PSNI.

It is also imperative that innocent victims are treated fairly and their cases given proper recognition. The work of the HIU must be proportionate and reflect the fact that over 90% of murders in Northern Ireland were carried out by terrorists. There must be no more hierarchy of victims, with preferential treatment given to those killed, often legitimately, by the Armed Forces or Police.

Whilst we accept that the HIU must work in chronological order and begin its investigative casework with those cases not previously reviewed by the HET, we propose a unit should be established within HIU and work in parallel to re-examine cases previously dealt with by HET, where the family request this. Any cases that were overlooked by HET, perhaps because of a lack of family contact, should also be investigated by the HIU. More generally, where there is relevant new evidence in any case, then that case should be reopened and re-examined.

We have expressed concerns previously at the Police Ombudsman's involvement in legacy cases, and support an HIU fully taking over the legacy role of the Police Ombudsman (PONI). The Stormont House Agreement is clear (in Paragraph 36) that: *"In respect of the cases from PONI, the HIU will have equivalent powers to that body"*.

Justice McCloskey's subsequent judgment in December 2017 in the judicial review brought by Hawthorne and White is relevant here. He found the Police Ombudsman had exceeded his powers in his report on the investigation of the Loughinisland murders. We strongly believe such work must not extend beyond its statutory basis.

Investigations into retired officers should be for criminal behaviour. It would be an overhaul of established practice for civilians to be pursued for alleged disciplinary matters as public servants, when retired or deceased. Retired officers deserve the same protections to ensure procedural fairness as anyone else. They should be entitled to independent legal advice.

There is no detail on what Government is intending to capture under the term, non-criminal police misconduct, referenced liberally throughout the consultation documents. However a host of offences are already available on the statute books for significant misconduct.

Another judgment with which the Government proposals would appear incongruous is the 2014 Court of Appeal decision in the West Yorkshire Police test case on IPCC powers. It found that

in reporting on a special requirements investigation, the IPCC should confine its conclusions to whether there is a case to answer rather than whether an officer's actions were substantively unlawful.

We are supportive of setting out to define collusion in legislation, thereby excluding low level incompetence being used to claim wrongly that collusion was evident. We were asked by victims' organisations to secure full criminal investigations for the victims of terrorism, and only if there is evidence of criminal behaviour should security force actions necessitate a full investigation.

In relation to HIU work on military cases, it appears to be the Chief Constable's intention to pass across all such cases, in total approximately 300. Conscious of the resource implications, the DUP believes a mechanism should be introduced to sift those cases, with a full investigation conducted only in the limited number of cases where there is evidence of criminal behaviour. We also comment further in this submission on our support for legislation that will provide greater legal protection for the Armed Forces and Veterans so that they can no longer become victims of a witch-hunt, whether because of their service in Northern Ireland or in other parts of the globe.

Those injured in incidents that resulted in deaths during the period covered by the HIU should be entitled to a copy of the report prepared by the HIU, and if prosecutions are brought in these cases, they should also include a charge of attempted murder to cover the crimes committed against those who were injured as well as those who were murdered.

The issue of investigations into other incidents which resulted in individuals being seriously injured is not covered by the proposals from the NIO, but the DUP does not make a distinction in the pursuit of justice between those who suffered serious injuries and families who lost loved ones.

Many of those murdered during the 'Troubles' were killed by terrorist units operating across the border, sometimes with allegations of collusion with Irish state forces. It is therefore essential that the Irish Government publicly commits to and in practice cooperates fully with the HIU and makes available all records held in respect of cases that have a cross border dimension. All state bodies must be compelled to comply and it is appropriate that the same

language is used in this regard in legislation in the Irish Republic as is the case in the UK jurisdiction.

There is little evidence of the Smithwick Inquiry having had much impact despite its devastating findings. We believe the Garda Síochána should establish a unit to investigate legacy cases with full police powers.

Independent Commission on Information Retrieval (ICIR):

The Independent Commission on Information Retrieval cannot be considered an alternative to other justice mechanisms. Everyone must co-operate fully with the HIU.

The Democratic Unionist Party did not request this type of mechanism and we remain highly sceptical that it can be of real benefit to innocent victims. We recognise some will wish to pursue the retrieval of information about the circumstances resulting in the murder of their loved ones. We remain to be convinced that the various terrorist organisations will cooperate in a meaningful way to provide detailed and truthful information about why individuals were targeted for murder.

In fact, we are constantly told that the terrorist groups did not keep records, in contrast to the state who have extensive records about all cases. It is therefore important that a format is agreed for written reports produced by the ICIR in response to requests for information, so the state is not required to release vast volumes of paperwork, whilst the terrorists offer a few notes on a scrap of paper.

Providing information to the ICIR must not render an individual immune from prosecution and in all circumstances, those guilty of terrorist criminality should be vigorously pursued. We commend efforts to ensure the ICIR has been carefully firewalled to prevent the leakage of any information that could or would prejudice a criminal legal case. No other mechanism must affect the ability of a victim ultimately to obtain justice.

Oral History Archive (OHA):

We welcome the initiative to give innocent victims a voice and to help them tell their stories. For too long, it has been difficult for innocent victims to gain such recognition and many have felt forgotten about and left behind, whilst others feel intimidated and deterred from speaking out because of fear of reprisal.

Every effort must be made to encourage and support innocent victims to take part in this project so that we have a balanced and proportionate record of what happened to people during the period of the 'Troubles'. We envisage this also including material from those such as prison officers, first responders, paramedics and nurses.

As well as personal contributions we believe the Government should consider the development of an authoritative evidence-based account of the period. We will be releasing another document on this in the near future.

We value the impressive archive of the Linenhall Library and recognise the experience and expertise of this library and also the Ulster Museum.

Implementation and Reconciliation Group (IRG):

Justice, truth and reconciliation are important for our Party and its members and we will of course continue to pursue this, whilst supporting efforts to build good community relations across Northern Ireland. If the Government decides to proceed with these proposals, we will monitor their implementation closely to ensure fairness and impartiality. An IRG shouldn't be an expensive body and should restrict itself to its remit in law. It should not duplicate other work and must deal sensitively with the issues, but we remain to be convinced of its value. In relation to the work of the IRG, we would wish to see representatives of innocent victims appointed to this body to ensure that they have a voice and a say in the implementation of the proposed legacy bodies and the work to build reconciliation.

Any academic report should be contained tightly within the parameters laid out, and not expansive. There is reference to involving the Economic and Social Research Council, and it may be appropriate that the Arts and Humanities Research Council should have a role in commissioning and overseeing the IRG's academic studies. To maximise public confidence, any academic team must be appointed with the full agreement of the IRG.

Real reconciliation must address the truth, not seek to facilitate organisations or individuals to excuse away their actions. The consultation paper makes reference to core principles and aims for approaching the past outlined in the Stormont House Agreement: *“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”*. The DUP would be supportive of those principles being genuinely reflected and delivered through effective legacy structures for Northern Ireland.

Additional Legacy Issues:

- We believe that innocent victims in Great Britain should also have access to these legacy bodies in pursuing justice and truth for their loved ones.
- The DUP introduced a Ten Minute Rule Bill at Westminster earlier this year on a pension for severely injured victims, and we support such a provision with the strong caveat that this should not be made available to perpetrators injured as a result of their terrorist activities.
- The Secretary of State's foreword to the consultation document refers to "*different views on how to address the legacy of the past in Northern Ireland, such as those expressed in the April 2017 report published by the House of Commons Defence Committee*". That report 'Investigations into fatalities in Northern Ireland involving British military personnel' referred to a proposed statute of limitations to "*apply to soldiers and police officers who have previously been the subject of full police investigations*" (Paragraph 40). That condition of having been investigated tends to be ignored in any commentary, perhaps partly since the recommendation at the end of the report is briefer and less explicit.

We understand consideration was given to including a statute of limitations proposal in this consultation but the DUP believed this was not the right place for such a discussion as it risked overshadowing many other important matters. The statute of limitations issue is much broader than Northern Ireland with advocates arguing it should encompass the entire remit of the British Army in theatres around the world. Such an issue would always be for Westminster to determine rather than the Northern Ireland Assembly, on a UK-wide basis, and the DUP is supportive in principle of exploring such legal protections for the armed forces, whilst being clear that we would not countenance any amnesty.

- The DUP supports the full implementation of the Armed Forces Covenant in Northern Ireland and high quality provision for veterans. We recognise the particular challenges still faced on a daily basis by veterans who live within the community in Northern Ireland.

- Given that a significant number of people, including former members of the armed forces and police, suffer from post-traumatic stress disorder and other mental trauma linked to their service, we instigated and continue to support the establishment of a properly resourced Mental Trauma Service. It is important that arrangements are made to ensure safe access for former security force members who would wish to avail of this service.