NORTHERN IRELAND OFFICE

LEGACY POLICY TEAM

CONSULTATION

ADDRESSING THE LEGACY OF NORTHERN IRELAND’S PAST

RESPONSE

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Introduction

This is an individual response to the Northern Ireland Office’s (‘NIO’) consultation, on addressing the legacy of Northern Ireland’s (‘NI’) past.

I refer to my chapter, ‘The Past: drawing a line?’, in Jeffrey Dudgeon, ed., *Legacy: what to do about the past in Northern Ireland?* (Belfast, 2018). I here develop some of the ideas in that essay. That book is based upon presentations given in Belfast on 3 March 2018 at Malone House, shortly before the consultation.

I structure this response as a series of arguments, and answer the NIO’s questions at the end. I do not support the government proceeding with the draft Northern Ireland (Stormont House Agreement) bill (‘the draft bill’), in the United Kingdom (‘UK’) parliament.

Argument One: no political agreement

There is no political agreement, or rather insufficient consensus, for the draft bill (whether amended or not) being legislated into law.

The Belfast agreement, uniquely, was approved by a referendum in NI in May 1998. During the subsequent twenty years, all the milestones in the so-called peace process (including the 2006 St Andrews agreement) were London initiatives supported by Dublin. There was never a political consensus, broader than – from 2006 – the democratic unionist party (‘DUP’) and Sinn Féin. In time, that became about the two largest parties remaining in office at Stormont (2007-17), a voluntary coalition of sorts which broke down between January 2017 and February 2018[[1]](#footnote-1).

*Reasons*

The draft bill was inspired by Richard Haass, a United States foreign policy expert with little knowledge of NI.[[2]](#footnote-2) His approach to political negotiation was to construct a package with something for everyone who asked, especially Sinn Féin.

It is clear that, following Eames/Bradley in 2009[[3]](#footnote-3), Haass/O’Sullivan wanted to take the past away from the police service of Northern Ireland (‘PSNI’) and the police ombudsman for Northern Ireland (‘PONI’), and to corral it in one or more time-limited institutions.

The origins of the draft bill are Richard Haass (and Meghan O’Sullivan’s) proposed agreement of 31 December 2013 (39 pages).[[4]](#footnote-4) Appointed by the first minister and deputy first minister, Peter Robinson and Martin McGuinness, Haass and O’Sullivan were asked that summer to chair an executive panel on parades, flags and the past. A five-party consensus was implied as necessary, in order to get recommendations through the NI executive.[[5]](#footnote-5) The chair and vice-chair proposed, regarding the past (no reference is made here to parades and flags) four new bodies, one of which would consolidate the investigation of all troubles killings. There was no executive agreement on 31 December 2013, or subsequently, regarding the past.

The 2013 proposed agreement came back on 23 December 2014 as the so-called Stormont House agreement (there were in fact two documents: the Stormont House agreement [14 pages]; and a UK government financial package to Northern Ireland [5 pages]). On the past, the Haass/O’Sullivan alphabet soup of initials was reheated: an oral history archive (‘OHA’); a historical investigations unit (‘HIU’); an independent commission on information retrieval (‘ICIR’); and an implementation and reconciliation group (‘IRG’). The idea of a legacy commission was expanded to four bodies, in a completely disproportionate manner, and without respect to civil society doing what it does best, while the state observed the principle of subsidiarity.

The Stormont House agreement was the work of the UK and Irish governments. There was no five-party consensus. It is clear that Sinn Féin bought into the package. Whether the DUP favoured the legacy proposals was less clear; it was probably attracted by the finance and welfare proposals, and the section on institutional reform.

It is significant, though little noted, that there was no progress on legacy after the Stormont House agreement. In September 2015, the NIO published a summary of a draft bill.

Then, on 17 November 2015, the NIO issued: *A Fresh Start: the Stormont agreement and implementation plan* (67 pages). This contained an introduction by Peter Robinson and Martin McGuinness. *A Fresh Start* failed to deal at all with the past: ‘Despite some significant progress[,] a final agreement on the establishment of new bodies to deal with the past was not reached. The Government continues to support these provisions of the Stormont House Agreement and to provide better outcomes for victims and survivors. We will now reflect with the other participants on how we can move forward and achieve broad consensus for legislation.’[[6]](#footnote-6)

And that is where matters lay until the draft bill appeared on 11 May 2018, with responses required by 10 September 2018 – a four-month period over the summer.

Argument Two: nothing on ‘on the runs’

I refer to my book: *Tony Blair and the IRA: the ‘on the runs’ scandal* (London, 2016). Under the Belfast agreement, 229 republican prisoners were released early. That left 228 so-called on the runs (OTRs). Under the NIO’s administrative scheme (2000-14), some 187 of the OTRs secured so-called comfort letters.

*Reasons*

Those letters, I submit, continue to have effect. It matters not what the NIO says. The key question is: would a judge, in England and Wales or NI, rule that it would be an abuse of process, as Mr Justice Sweeney did, in the John Downey case in London in February 2014, if any of those other recipients were prosecuted?

There is only one way to eliminate this risk. I refer to: schedule one. This contains a draft Northern Ireland (Ministerial Letters) bill. If the NIO is determined to proceed on the basis of a level playing field, then these draft clauses would have to be added to a government bill.

Argument Three: no statute of limitations

If, as is likely, the NIO is not prepared to legislate regarding the OTR comfort letters, that then raises a question posed by military interests and supporters in parliament: what about a statute of limitations for former soldiers?

*Reasons*

 The idea of a statute of limitations for military personnel has a wider UK background, related in particular to the second Iraq war (2003-11). Following the striking off of a dishonest radical solicitor, Phil Shiner, the government closed the Iraq historic allegations team (‘IHAT’), on 30 June 2017.

This question of a statute of limitations assumed significance in NI, when the defence select committee at Westminster reported on 26 April 2017, on *Investigations into fatalities in Northern Ireland involving British military personnel.[[7]](#footnote-7)* The committee, chaired by Julian Lewis MP, considering the government’s existing legacy policy for NI, went further and recommended: a statute of limitations for former soldiers (plus the police, outside its remit); and a ‘truth recovery process’, so the UK could remain within the provisions of international law.

On 1 November 2017, Richard Benyon MP secured a first reading for his private members’ Armed Forces (Statute of Limitations) bill. The text of the short bill provides effectively for a ten-year amnesty. The second reading debate is listed for 23 November 2018.

On at least two occasions (13 November 2017 and 25 January 2018), the government indicated that questions of a statute of limitation and amnesty would form part of the NI legacy consultation.[[8]](#footnote-8)

This was to reckon without Sinn Fein. On 21 November 2017, Michelle O’Neill and Gerry Adams accused the prime minister of ‘bad faith’ while visiting Downing Street.[[9]](#footnote-9) On 7 March 2018, the former claimed that Sinn Féin has killed off a statute of limitations.

Julian Lewis MP put it back on the agenda, in the defence committee’s submission to the consultation of 12 June 2018, only to have the secretary of state for NI try and kill off the idea in her letter of 4 July 2018.

On 20 August 2018 – launching the *News Letter*’s stop the legacy scandal – Colonel Tim Collins (assuming, as I do, the continuing effectiveness of the OTR letters), came up with a big idea: parity of esteem with republican terrorists; retired military and police officers should now seek exactly the same from the government – a comfort letter stating they were not under investigation. I include the Collins’ article as a hyperlink: schedule two.

Argument Four: no new powers for the police ombudsman

There is good reason to believe that the NIO is dealing with a double problem: one, the destruction of the PSNI’s historical enquiries team (‘HET’), by a radical academic’s contentious legal analysis[[10]](#footnote-10); and the PONI’s extravagant construing – which the NIO failed to prevent - of its statutory powers as permitting extensive historical investigations.[[11]](#footnote-11)

However, it is likely that the HIU will be, less the HET run by criminal investigators, and more the PONI’s historical investigations directorate staffed by police critics.

The PONI has come under serious judicial challenge in NI.[[12]](#footnote-12) It would only be fair that he should now be given an additional statutory duty: to investigate the deaths of the three hundred police officers killed by terrorists during the troubles, plus those killed since the Belfast agreement.

Argument Five: the NIO’s questions

I provide the following answers to the NIO’s consultation questions:

1 reform

2 please see 14 below

3 no

4 no

5 -

6 no

7 -

8 no

9 no

10 -

11 no

12 no

13 no

14 please see paras 2 and 32

15 ?

16 ?

17 no

Conclusion

Sinn Féin has made the running on legacy, before and during the consultation on the draft bill.

The DUP will have the opportunity to: one, seek to kill off the OTR letters with amendments such as proposed here or; alternatively, two, champion Colonel Tim Collins’ proposal of 20 August 2018.

The party’s MPs have, on two separate parliamentary occasions, spoken – seemingly - in favour of a statute of limitations, either on a NI or UK basis.[[13]](#footnote-13)

The political conundrum is: Sinn Féin, which would like to protect the OTRs, does not want, and does not want to be seen, to be assisting the security forces in any way; and the DUP, which wants to be seen defending soldiers and police officers, does not want, and does not want to be seen, to be assisting republican (and loyalist) terrorists.

 SCHEDULE ONE

A

BILL

TO

Prohibit reliance in criminal proceedings on certain ministerial letters referring to the prosecution of terrorist suspects connected with the affairs of Northern Ireland.

BE IT ENACTED by the Queen’s most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows: -

 Northern Ireland

Subject to subsections (2) and (3), no defendant may rely on a ministerial letter addressed to him, in any criminal proceedings in Northern Ireland (not including those provided for additionally in section 2), where he is charged with a scheduled offence.

No defendant is prohibited from making an abuse of process application, and from relying on the existence of ministerial letters in general.

The prosecution is prohibited from relying on a ministerial letter addressed to that particular defendant.

 Republic of Ireland

Subject to subsections (2) and (3), no defendant may rely on a ministerial letter addressed to him, in any criminal proceedings in Northern Ireland, where he is charged with an offence under the Criminal Jurisdiction Act 1975 (which provides for extra-territorial offences in the Republic of Ireland).

No defendant is prohibited from making an abuse of process application, and from relying on the existence of ministerial letters in general.

The prosecution is prohibited from relying on a ministerial letter addressed to that particular defendant.

 England and Wales

Subject to subsections (2) and (3), no defendant may rely on a ministerial letter addressed to him, in any criminal proceedings in England Wales, where he is charged with a terrorist offence connected with the affairs of Northern Ireland.

No defendant is prohibited from making an abuse of process application, and from relying on the existence of ministerial letters in general.

The prosecution is prohibited from relying on a ministerial letter addressed to that particular defendant.

 Scotland

Subject to subsections (2) and (3), no defendant may rely on a ministerial letter addressed to him, in any criminal proceedings in Scotland, where he is charged with a terrorist offence connected with the affairs of Northern Ireland.

No defendant is prohibited from making an abuse of process application, and from relying on the existence of ministerial letters in general.

The prosecution is prohibited from relying on a ministerial letter addressed to that particular defendant.

 Extradition

Subject to subsections (2) and (3), no defendant may rely on a ministerial letter addressed to him, in any extradition proceedings, under part 1 or part 2 of the Extradition Act 2003.

No defendant is prohibited from submitting that there is a bar to extradition, and from relying on the existence of ministerial letters in general.

The prosecution (acting on behalf of a receiving state) is prohibited from relying on a ministerial letter addressed to that particular defendant.

Human Rights

This section applies where a court is required to determine whether there has been an abuse of process, which –

violates a person’s right to a fair trial under article 6, and

as a result would be unlawful under section 6 of the Human Rights Act 1998.

In considering the public interest in general, the court must (in particular) have regard to the considerations listed in subsection (3).

There are the following particular public interests -

a public interest in criminal prosecutions proceeding;

a public interest in defendants having a fair trial;

a public interest in vindicating the article 2 rights of victims.

Interpretation

 In this Act –

“ministerial letter” means a private letter written on behalf of the Prime Minister or the Secretary of State for Northern Ireland to a criminal suspect, stating that at the date of the letter he was not wanted for questioning by the Royal Ulster Constabulary/Police Service of Northern Ireland or any other police service in the United Kingdom,

“public interest” means affirming the human rights of all (especially where there is a conflict), and only interfering with a human right where it is justified,

“scheduled offence” is as defined in section 65 of the Terrorism Act 2000.

Short title, commencement and extent

This Act may be cited as the Northern Ireland (Ministerial Letters) Act 2018.

Subsection (1) and this subsection come into force at Royal Assent. All other provisions shall come into force in accordance with provisions made by the Secretary of State by order.

Subject to subsections (4) to (6), this Act extends to the whole of the United Kingdom.

Sections 1 and 2 shall extend to Northern Ireland only.

Section 3 shall extend to England and Wales only.

Section 4 shall extend to Scotland only.

SCHEDULE TWO

<https://www.newsletter.co.uk/news/opinion/legacy-scandal-security-forces-must-be-protected-from-witch-hunt-to-appease-ira-says-tim-collins-1-8607419>

1. The resignation of a dying Martin McGuinness on 9 January 2017, and Arlene Foster’s refusal to agree restoration with Gerry Adams’ successor, Mary Lou McDonald, on 14 February 2018: a double veto! [↑](#footnote-ref-1)
2. Richard Haass, *A World in disarray: American foreign policy and the crisis of the old order* (New York, 2017) has one passing reference to NI, to the implication of 9/11 for the IRA (p. 122). [↑](#footnote-ref-2)
3. *Report of the Consultative Group on the Past,* 23 January 2009, which recommended a five-year legacy commission. [↑](#footnote-ref-3)
4. *An agreement among the parties of the Northern Ireland executive on parades, select commemorations, and related protests; flags and emblems; and contending with the past.* [↑](#footnote-ref-4)
5. This was certainly the view of Haass/O’Sullivan: factsheet on the draft agreement of 31 December 2013; statement of chair and vice-chair, 8 January 2014. [↑](#footnote-ref-5)
6. Press release, 17 November 2015. [↑](#footnote-ref-6)
7. HC 1064, 2016-17 session, 26 April 2017. [↑](#footnote-ref-7)
8. Defence select committee, *Third Special Report of 2017-19*, HC549, p. 3, 13 November 2017; HC Hansard, vol. 635, col. 222WH, 25 January 2018. [↑](#footnote-ref-8)
9. *News Letter,* 21 November 2017. [↑](#footnote-ref-9)
10. Patricia Lundy, ‘Can the past be policed?’, *Journal of Law and Social Challengew,* 11, p. 109; HMIC, *Inspection of the Police Service of Northern Ireland Historical Enquiries Team*, 2013; Sir Hugh Orde, evidence to NI affairs committee, HC1194, Q251-2, 9 April 2014; *Belfast Telegraph,* 22 January 2016. [↑](#footnote-ref-10)
11. Police (Northern Ireland) Act 1998 part 7 & schs. 3 and 5; Police (Northern Ireland) Act 2000 ss 62-66; Police (Northern Ireland) Act 2002 s 13; RUC (Complaints etc.) Regulations 2001, SI 2001/184, regs. 5, 7, 8 & 10. [↑](#footnote-ref-11)
12. Hawthorne & White v PONI [2018] NIQB 5; Austen Morgan, ‘When to recuse and when not’, *Commonwealth Lawyer,* 27, 3, p. 48. [↑](#footnote-ref-12)
13. On 23 February 2017, on the occasion of a DUP opposition day, Gregory Campbell; Nigel Dodds; Sir Jeffrey Donaldson; Ian Paisley; Gavin Robinson; Jim Shannon; David Simpson; and Sammy Wilson. On 25 January 2018, in Westminster Hall, discussing the defence select committee report: Emma Little Pengelly; Gavin Robinson; and Jim Shannon. [↑](#footnote-ref-13)