

**Northern Ireland Affairs Committee - Consultation on Legacy Proposals 2020**

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## **Northern Ireland Affairs Committee - Consultation on Legacy Proposals 2020**

### Executive Summary

- NIRPOA welcomes the new Government initiative on the basis of the published information and looks forward to seeing greater detail of the proposals.
- NIRPOA stands by its previous evidence to NIAC and submission to the NIO in relation to the 2018 SHA proposals.
- Whilst remaining clear that we do not as a matter of principle favour the idea of amnesty for criminal offences, we welcome the proposals to establish lawful and practical criteria for launching new investigations or re-investigations in relation to historical incidents where a death has occurred.
- We welcome the disappearance of the unlawful and improper proposals regarding so-called 'non-criminal police misconduct'.
- We welcome the discussion which is now taking place on the issue of 'context' and 'memory'.
- We welcome the emphasis on the needs of victims and urge the Government to recognise the wide variety of types of victim and types of need.
- We welcome the more realistic approach to legacy issues which is implied by the announcement and urge the Government to avoid creating expectations which may be undeliverable.
- We recommend that the functions which have been proposed for the Historical Investigations Unit be made the responsibility of an expanded and upgraded version of the PSNI's Legacy Investigation Branch with appropriate independent oversight.

### Introduction

This paper has been prepared by the Northern Ireland Retired Police Officers Association (NIRPOA – the Association) in response to the invitation issued on 29<sup>th</sup> April 2020 by the Northern Ireland Affairs Committee (NIAC – the Committee). NIRPOA has a membership of some 3,800 retired members of the Royal Ulster Constabulary George Cross (RUCGC) and the Police Service of Northern Ireland (PSNI). NIRPOA represents them and their families and attends to the general welfare interests of all retired police officers, whether members of the Association or not. For a number of years now the Association has increasingly found itself obliged to represent the interests of its members and the wider policing family in relation to legacy issues.

In June 2018 NIRPOA made a written submission to NIAC on the then Northern Ireland Office (NIO) draft legislation by which it was proposed to implement the Stormont House Agreement (SHA). In August 2018 the Association made a formal written response to the NIO's invitation to engage in the consultation process prior to further development of the legislative proposals. The second Association document was a fuller and more developed version of the first, but the arguments that we adduced were

similar. The Committee has copies of both. On 30<sup>th</sup> October 2019 two members of the Association gave verbal evidence to the Committee at Westminster. At the request of the Chairman of NIAC the Association then supplied additional written evidence (1<sup>st</sup> November 2019) concerning the manifest incompatibility of the proposed legislation with relevant articles of the European Convention on Human Rights (ECHR).

From the cited written and verbal submissions it will be clear that the Association had very grave concerns about the proposed legislation, to much of which we were resolutely opposed. We do not resile in any way from those views and we very much welcome the apparent change in emphasis which appears to be heralded by the statement made by the new Secretary of State for Northern Ireland (SOS) on 18<sup>th</sup> March 2020. As the situation has now changed (as indeed has the membership of the Committee) we are pleased to offer our views on the current proposals: but it must be said that we feel that we are somewhat short of information on the detail of exactly what is proposed.

The new development may be a welcome recognition not only that the current arrangements for dealing with legacy issues are not working well for everyone but also that the 2018 proposals seemed doomed to make things worse rather than better. We have already described at length the defects in those proposals and we will not revisit our arguments here. The new proposals rightly seek to address the concerns of victims and survivors but must in our view do so without endangering the long-standing principle of equality before the law for all.

In view of current discussions on national legislation regarding the criminal liability of military veterans it now seems clear that it may be possible in law to give a more appropriate level of emphasis to context; and we believe that this should also apply when considering legacy issues in Northern Ireland. We will elaborate on this aspect below, but a recognition of the importance of context should not be understood to equate to any compromise of our oft-stated position in relation to the appropriateness of investigating credible allegations of criminal behaviour by serving or retired police officers.

The new proposals also present an opportunity to reconsider methods for creating some sort of official record or archive relating to the past. Whilst it is not at the forefront of the Association's considerations, this issue is clearly one which gave rise to considerable public concern. It seemed to many that insufficient care had been taken in drafting the 2018 proposals to ensure that self-serving and self-exculpatory narratives would be prevented from dominating; and it even appeared possible that terrorist narratives might be allowed to become a legitimate record of the past.

Another widespread concern with the 2018 proposals was that they would create expectations which could never be fulfilled. It may well be that there already existed hopes and even unfounded expectations that actions by the Government or other public authorities could deliver in important areas which are variously described as truth, justice, reconciliation and closure. Any new programme must of course be ambitious and it must seek to secure public support, but that support should not be sought at the expense of an open and candid approach by Government to the practical realities of dealing with historical matters.

The new proposals appear to envisage dealing with two distinct elements of legacy through one body. We say that careful thought needs to be given to whether it is feasible and appropriate to ask a single unified body to address issues as diverse and complex as criminal investigation and information recovery. If such an approach is to be adopted then it should only be undertaken after a rigorous analysis of the experience and hard lessons learned by the Historical Enquiries Team (HET), the

office of the Police Ombudsman for Northern Ireland (PONI) and the PSNI's Legacy Investigation Branch (LIB), for it is only on that basis that a precise statement of what it is hoped to achieve with the new body may be formulated.

Such analysis must necessarily consider funding, personnel and training issues, timescales and criteria for identifying success or failure. There will of course also be political considerations which will need to be addressed boldly if any practical success is to be achieved. In addressing the specific questions posed by the Committee we set out below our views on how the practical aspects of this might be handled.

*Whether the Government's proposed approach will meet the needs of victims, survivors and their families:*

A first step towards meeting the needs of victims, survivors and their families would be to recognise that this constituency covers a large and diverse range of individuals and groups. The real and perceived needs of such individuals vary significantly, even within identified groups. Any genuine effort to 'meet the needs' of such people would be a worthy undertaking, but its complexity should not be underestimated.

There are of course the well-known and well-rehearsed political arguments about what constitutes a 'victim', but even if those arguments were to be amicably resolved there would remain groups of victims (and survivors and families) who perceived themselves to have merits and interests which differed from those of other groups. This goes beyond the traditional 'sides' or 'communities' in Northern Ireland; it goes beyond whether the groups came from law-abiding sections of society or otherwise; and even within groups - even within families - needs and aspirations can vary. Therefore, as far as it is compatible with the principles of equality before the law, any strategy to meet the needs of victims must be sufficiently flexible to address the concerns of differing individuals. The appropriate balance between compassion, realism and firmness in approach will vary according not only to the facts of the case but also according to whether the victim, survivor or family member is hoping for a new investigation, a prosecution, some factual information or, perhaps as importantly, just to be left in peace.

Of course there will be potential inhibiting factors in delivering for victims, whether by the route of the criminal justice system or by information recovery and dissemination, over which the Government and the legislation will have little control. This could include obstruction by paramilitaries or their sympathisers in Northern Ireland and beyond or by foreign governments. Any such difficulties should not be regarded as a reason for failure to seek to deliver for victims.

If the desire to deliver meaningful information recovery for the benefit of victims, survivors and in particular for families is to be effectively fulfilled then the domestic legislation will need to be supported by treaty obligations which oblige the Government of the Republic of Ireland to play a positive and proactive role. There remains considerable concern within the victim communities here about the manner in which the terrorists were able to shelter personnel and weapons in the ROI and to cross and re-cross the border with apparent ease in order to launch murderous sectarian attacks.

The current reconsideration of the proposed legislation presents an opportunity for the Government to examine the validity of some of the received mantras concerning what victims, survivors and their families 'need' or indeed actually want; and whether previous efforts in this field have been relevant or helpful. Why should it be assumed, for example, that processes which require the continual re-examination of matters which have been raked over in minute detail on numerous previous occasions will meet

the needs of victims? If there is genuine new evidence and some prospect that this may lead to the identification and even conceivably the prosecution of offenders then all well and good; but all too often such renewed investigations have been instigated by sectional interests rather than genuine victims and using spurious reasons. Frequently there is a notable absence of any credible evidence or even reasonable suspicion of any criminal offence. The purpose of such new investigations is not to bring criminals to justice but rather to seek to cast doubt on the integrity or the efficiency of the security forces. We will consider a better approach to the legitimacy of reopening investigations in the relevant section below.

In terms of producing information for families or for public consumption our views on the difficulties of HET and the fiascos of PONI have been expressed elsewhere. Now may be the time to produce a system which is consistent both with the provisions of the European Convention on Human Rights and with United Kingdom (UK) case law. That would mean, *inter alia*, that family reports would relate to the outcomes and not the methodology of earlier police investigations; that the confidentiality of criminal investigations would continue to be respected and not abandoned on the grounds of temporal remoteness; that unconvicted individuals would not be named or otherwise identified; that secret intelligence would not be disclosed; and that vague theories or imaginative hypotheses would not be reported as if they were facts.

In broader terms the Government will also need to consider how to balance the needs of victims against the interests of our society as a whole and the needs of future generations. The idea of total transparency - that the more we all know about the past the better - and the frequent coupling of the words 'truth' and 'reconciliation' as if the one leads to the other may be popular concepts in some quarters but they are by no means unchallengeable. Indeed it could be argued that, whilst fact is generally more helpful than rumour in promoting community reconciliation, in our particular circumstances and with our history this is not a given. Quite apart from the fact that different groups appear to have a different view of our history it is also possible that some revelations about our recent history and the individual tragedies which occurred could have disruptive rather than healing effects even within, let alone between, our various communities and factions. The Government will also be aware that there are factions present and active here for whom reconciliation is not actually considered to be a desirable goal.

*What steps the Government can take to ensure that the proposed new legacy body is independent, balanced and open, and complies with the Belfast/Good Friday Agreement and ECHR commitments:*

Whilst there has certainly been concern about the adequacy and effectiveness of the current institutions and our attempts as a society to address legacy issues through our current processes, it is incumbent on the Government to consider the origins of this 'concern'. In many cases it derives from the legitimate anxiety of victims, survivors and families to see justice done to the perpetrators of crimes or to be provided with information about the circumstances of a death or other incident. In some cases it derives from the frustration of investigators arising from the closing of avenues of investigation due to the loss or deterioration of forensic evidence, the death, illness or memory failure of witnesses or the obstruction of suspects and their fellow travellers. But it must also be recognised that there is a widespread perception that in many cases it is a bogus concern raised by political factions, sectional Non-Governmental Organisations (NGOs) and misguided academics and Government 'advisers' seeking to use the law and the institutions as tools in pursuit of their own agenda. If the institutions do not provide the outcomes which these elements want then the law will be exploited (through Judicial Review, the Court of Appeal etc) without consideration of

cost; individuals will be hounded out of public office; and the institutions will be deemed to be unfit for purpose.

Care should also be taken in relation to the terminology which is used when reviewing submissions. There are various groups which purport to represent victims and there is a Victims' Commissioner. But some of these groups appear to have a sectional interest. And an examination of the statement of the umbrella group Innocent Victims United (IVU) of 24<sup>th</sup> April would suggest that the Victims' Commissioner does not enjoy the unqualified support of a significant constituency within the victim lobby.

Therefore it is necessary to consider exactly what is failing in our current arrangements and to address that. It should not be assumed that the PSNI's Legacy Investigation Branch is incapable of playing a lead role in any new arrangements. Nor should it be assumed that a properly accountable PONI operating to ECHR and UK case law standards is incapable of dealing with current complaints against police or allegations of criminal behaviour by police officers. A new and additional body, along the lines of the ill-starred Historical Investigations Unit (HIU) as envisaged by the 2018 proposals, may not in fact be required.

In the absence of more detailed information it is difficult to assess whether the new proposals are compliant with ECHR. We are aware of those who have argued that in respect of the obligations of the UK under ECHR there are inadequacies in regard to Article 2. We are also aware that there have been counter-arguments. Those who favour the current proposals can point to case law which suggests that there is absolutely no reason in law why the PSNI could not investigate legacy cases. In *Bracknell v UK* in 2007 the European Court of Human Rights (ECtHR) held that the PSNI was institutionally independent of the RUCGC. That must surely apply *a fortiori* in 2020 and the future. All parties on the Policing Board presumably serve there because they believe that the PSNI can investigate current crime in a manner which is independent and balanced. If there is no perceived bias in relation to current matters how can there be in relation to matters which took place before PSNI investigators even joined the force? A recent Court of Appeal finding has reinforced the credibility of the independence of the Chief Constable.

The Belfast/Good Friday Agreement (the Agreement) has formed the basis for many developments in Northern Ireland during the past two decades. We are not aware of anything in the current proposals that would not be 'compliant' with its provisions. We would point out however that we fully supported the creation of the independent system for investigating complaints against police that arose from the Agreement. And we would further point out that the grotesque failings in the office of PONI which subsequently arose were the product of (i) certain office-holders arrogating to themselves unlawfully powers which were never envisaged either by the Agreement or by the enabling legislation and (ii) secret political dealings which were never put to the police or to the public for consultation or consent. We therefore suspect that in respect of the Agreement 'compliance' as a consideration will in any case be, or become, secondary to political expediency.

In previous public comment (in relation to the 2018 proposals) the Chairman of the Police Federation for Northern Ireland (PFNI) has expressed concern at the prospect of the creation of a system of parallel policing within the jurisdiction of Northern Ireland which would be implicit in the creation of the HIU or any similar body. We sympathise with this concern. It can of course be argued that in principle PONI represents a form of parallel policing, but this is to address a specific issue of independence and is consistent with policing models elsewhere.

We are aware that the present Chief Constable has little enthusiasm for taking on sole responsibility for legacy matters; and this is understandable. In his relationship with the Policing Board to whom he is accountable this would be a complication and potentially even a source of difficulty. It might make it more difficult to pursue the desirable goal of depoliticising policing here. However if the challenge were to be approached with the standard of professional and impartial policing which is expected, and which is already evident in the handling of terrorism, sectarianism and organised crime, then practical success and public confidence could be achieved.

It would be demanding in terms of personnel, forensic capacity and supervision. But not only are these issues not insuperable, it could be argued that they are better addressed 'in house'. At some stage and in some way the resources for new investigations and new family reporting systems are going to have to be found. There is no surplus of detectives or forensic capability in Great Britain and no enthusiasm amongst mainland chief constables for sharing their scant resources. Surely it makes sense to use local knowledge and expertise, and to save money on travel, accommodation and other allowances, by developing a capability within the PSNI? In the world which emerges from the current Covid-19 virus crisis Government money will naturally be in short supply for criminal justice purposes; but whatever system is chosen, it will be funded by the UK taxpayer whether the money be administered by Whitehall or by Stormont.

This may be an appropriate time for the Government to revisit just how many cases it proposes to deal with - and with what system of prioritising those cases. It can then make a rough assessment of how long this will take and how much it will all cost. It seems to us to be unlikely that any calculation will produce the conclusion that it will be better to bring in for the resultant task a large number of untrained women and men with no local knowledge, no contextual appreciation and at a significant cost (for relocation expenses) – even if they can be found.

Further to the arguments which have been adduced above in relation to independence and balance we would refer to the suggestions which have been made by the PFNI concerning the appointment of an 'outside' Head of Unit for the LIB in the rank of Deputy Chief Constable, answerable to the Chief Constable of the PSNI and the Policing Board. There are also well-tried mechanisms for using lay advisors in major (and potentially difficult or contentious) police investigations which have proved to be effective in maintaining public confidence elsewhere.

This model would also readily accommodate the concept of a Legacy Commissioner. We recommend that the Legacy Commissioner should be a person of high judicial standing with a small personal secretariat and a range of functions and responsibilities on legacy matters. In relation to the present issues the Legacy Commissioner would act as the arbiter of whether or not the threshold of compelling new evidence had been reached in order to justify or trigger a new investigation or reinvestigation of a case. He or she would also check all family reports for thoroughness and adherence to ECHR standards prior to release. This would help to secure public confidence in the institutions.

In addition it should be pointed out that the 2018 proposals lacked any mechanism for a member of the public or the subject of an investigation to make a complaint about the conduct of the HIU. (This serious failing and gross breach of ECHR provisions remains in place in respect of PONI after 13 years of fruitless attempts by the Association to have this abuse addressed by the Government). If future legacy investigations were to be undertaken as we recommend by a department within the PSNI such as the Legacy Investigations Branch then all personnel would be subject not only to the law but also

to PSNI police and civilian staff rules on ethics and to an independent complaints mechanism (through the office of PONI).

*The differences between the Government's new proposals and the draft Stormont House Agreement Bill;*

The revised proposals appear to acknowledge more realistically what might be achieved in the aftermath of a significant and prolonged terrorist campaign (or 'armed conflict') and after such a long passage of time by a process which relies so heavily on the criminal justice system as the primary means by which to address the needs of victims.

The proposals offer a switch in emphasis to information recovery, while preserving access to an investigatory process in certain specified circumstances. The criteria (for those who seek a new investigation) must make sense - the supposed availability of significant fresh and compelling evidence which holds the reasonable prospect of an eventual successful prosecutorial outcome. Whilst there are unlikely to be many such cases, it is agreed that developments in investigative techniques (in particular in terms of forensic science) may help. It is even conceivable that a witness who was previously unknown or who was reluctant to give evidence may be found or may come forward. It is also accepted that some investigations were not carried out to the standards which would be expected today, due to the restrictions on the activities of police and civilian support staff (particularly at crime scenes) which were imposed by the prevailing security conditions: but in the vast majority of cases it is very unlikely that a new investigation after several decades will produce a better outcome in the absence of genuine and significant new developments.

The new proposals differ from the SHA Bill, and significantly improve upon it, in that they do not appear to seek to perpetuate the ritual by which it was possible to generate an investigation or re-investigation on the basis of a vague and unsubstantiated claim that someone 'believed' that there had been some unspecified 'misconduct' on the part of some unidentified member of the security forces which has not (yet) been adequately investigated. Often the 'inadequacy' of the investigation merely meant that it had not produced the desired outcome from their point of view.

The purpose of such allegations was never to identify and produce a potential case against criminals but rather (i) to denigrate individual members of the security forces; (ii) to seek to perpetuate the myth of security force 'collusion'; (iii) to prepare the ground for a claim and civil action; (iv) to expose and compromise secret security force methodology; (v) to tie up investigative resources which might be better deployed against the current activities of the criminal gangs; (vi) in the eyes of many, to generate income for local favoured legal practices through the legal aid system (the amount of which cannot be disclosed to the tax-paying public for supposed 'security' reasons); and (vii) to undermine the morale of serving and retired members of the security forces. Material which was generated by such 'investigations' could be exploited for propaganda purposes without any of the constraints which are normally imposed by considerations of 'due process'.

The new proposals are a significant improvement on the 2018 proposals in that, to date, they make no mention of the wholly unacceptable concept of 'non-criminal police misconduct'. Our views on this attempt to pervert all known principles of justice and legal procedure (and indeed ECHR) have been well articulated elsewhere; and we welcome the apparent disappearance of this objectionable, despicable and vindictive attempt to harass retired police officers and besmirch the reputation of the RUCGC.

*Whether and how the Government's proposals will promote reconciliation in Northern Ireland:*

Whilst it may be the received wisdom that it is one of the functions of government in general and of our Government in particular to promote reconciliation there must be doubt as to the extent to which any government can achieve this objective. It is of course a wholly proper ambition for the Government proposals to seek to 'promote reconciliation'. Any judgement on whether or how these proposals might contribute to that aim is hampered by the lack of detailed information concerning the proposals which is currently available.

We believe that several factors are at play in creating the conditions for reconciliation or alternatively in perpetuating suspicion and hostility, even if it does not currently lead to violence. The horrors to which society was exposed will not be forgotten by those who witnessed them; and perhaps they should not. For some this experience may lead to a desire for reconciliation and to avoid a repetition of the mistakes of the past. For others it will have produced an undying bitterness and enmity to perceived enemies.

Different parts of our community will have different narratives; and for the various parties their own narratives are 'true', even though their neighbours a mile away may have a different 'truth'. In some ways the problem for any government in seeking to promote reconciliation is to find a way of addressing the desire of the parties to see their own version of history triumph among the competing narratives as some sort of 'official' version.

On both sides of our community divide there was widespread activity which ranged from passive collaboration to active connivance between terrorists and elements who did not regard themselves as such. This may have been as a result of a mixture of tacit support, low level sympathy or outright intimidation. In any event a feature of future reconciliation might be individual or collective acknowledgement of a failure which extended beyond the various terrorist organisations. Who brought in their children to be 'punished'? Who allowed 'friendly' car hijacks or 'friendly' house takeovers? Who paid protection? Who laundered money? Who gave political support or cover or failed to condemn? Who had family members who were, secretly or otherwise, killers? Who had family members who were informants? The truth may not set everyone free.

What our Government has to recognise is that, within all the myriad versions of who did what and why, there are a number of carefully constructed but false narratives which have a clear political purpose. The Government must therefore ensure that whatever is put in place for the purposes of creating or maintaining a record of the past is supervised by accredited historians and that the product is peer-reviewed.

For some, true reconciliation will be considered only when their primary political objectives have been achieved and their particular historical narrative has been accepted. Provided that our Government recognises this there is no reason why they should not make every effort to promote reconciliation among ordinary people who wish to distance themselves from such manipulation. There are many avenues for suitable activities, including education, intra-community and cross-community projects and funding for other local initiatives.

And of course it must be accepted that, perhaps not as individuals, but as an Association, retired police officers have their own narrative of the last half century. It is at least as valid as that of any other section within society. As one of the primary roles of the police was to prevent and to deal with conflict (at some cost) it follows that the narrative of retired police officers includes a strong desire for reconciliation. Set beside

this is that part of traditional police culture which says, ‘*Fiat justitia, ruat caelum* - let justice be done, though the heavens fall’. That is part of the reason why we continue to oppose amnesty, whether for ourselves or anybody else, in respect of criminal behaviour. Provided that the criteria as suggested by this Government initiative are present, there could be new investigations and even prosecutions – but for the reasons set out above this seems unlikely to be a frequent occurrence.

We do not see the pursuit of justice through the law as being by itself a bar to reconciliation; but if carried out in a partisan and partial manner and against all principles of natural justice and undertakings previously given to serving members of the security forces then it could be. We therefore welcome what appears to be an extension to Northern Ireland of the principles espoused in the legislation to address the concerns of military veterans in relation to overseas campaigns.

As we have stated in the past (for example to Eames/Bradley, to Haass and to NIAC), we believe that if we are to achieve reconciliation here then the history of the last fifty years should be written by historians - and not by politicians, lawyers and polemicists.

*The potential merits of consolidating the bodies envisaged in the Stormont House Agreement into a single organisation;*

There is an understandable desire within the political, legal and institutional establishment, as well as in many other quarters here, to avoid having to accept responsibility for ‘delivering’ on legacy issues. Everyone will have a reason why they should not be handed this poisoned chalice - and each might be right. It may therefore be unsurprising that one proffered solution is the establishment of a new and separate body to address the issues of investigation, information recovery and family reports. The present proposals do not appear to resurrect the other aspects or pillars of the 2018 draft legislation so our comments will be restricted to the body which appears to be the new and revised HIU.

For the reasons which we have set out above we do not believe that the case has yet been made for the HIU as a distinct stand-alone body. We believe that the functions which have been tentatively designated for it could be adequately and effectively discharged by a properly constituted and properly resourced Legacy Investigations Branch within the PSNI. Quite apart from being more efficient we also believe that such arrangements would be more cost-effective. We believe that this would be constitutionally and legally proper and that it would command significant public support and confidence.

There may be elements who would oppose such an arrangement, arguing that some parts of the community would not have confidence in a body which was incorporated within the PSNI. It would then fall to our Government to seek the support of all parts of the Policing Board in persuading their communities of the merits of the proposal.

*The equity of the Government’s proposed approach to the re-investigation of cases;*

It seems likely that the government’s proposed approach to the re-investigation of cases will provide a much greater degree of equity and fairness than the present arrangements. For far too long the criminal justice process has been used and abused as a vehicle for investigating and re-investigating allegations which are based on no more than propaganda, hearsay and vague insinuations. There was no apparent requirement to form a reasonable suspicion about the conduct of any person. Police investigative powers have been used to inquire into matters in which no substantive

criminal offence was reasonably suspected; and yet when a 'suspect' (a member or ex-member of the security forces) was identified, the usual protections afforded to an accused person in law (for example under the provisions of the Police and Criminal Evidence Act and even under ECHR) were manifestly absent.

It is also notable that the Government's proposals seek to deliver investigations which are effective, thorough and quick, in that only cases in which there is a realistic prospect of a prosecution as a result of there being new and compelling evidence would proceed to a full police investigation. Other cases in which an investigation had already taken place would be regarded as being closed to further investigation. We welcome these new parameters. We suggest that the Government seek at the same time to close off avenues for civil actions which might be based on similarly vague claims or which seek to 'piggy-back' off unwarranted investigations.

In pursuing this laudable path the Government should carefully consider case law and referrals under ECHR. We consider it to be one of the great ironies of ECHR that on the one hand it purports to prohibit the sanctioning of behaviour which, at the time when it took place, was entirely lawful (prohibition on retrospective liability and the guarantee of legal certainty) and yet in the UK we seem to treat cases going back decades before the passing of the Human Rights Act 2000 (HRA) as being somehow subject to the provisions of ECHR.

Whilst some case law might now be challenging this assumption, the Government may wish to avoid the political risk which would be inherent in introducing a cut-off date (of 2<sup>nd</sup> October 2000) this late in the day and instead consider proofing their legislation against certain challenges by setting similar parameters for the courts when applications are made for new or renewed Article 2 investigations. In the same way that new and compelling evidence that might lead to the successful prosecution of an individual or individuals should be required to generate a new police investigation, so also should the prospect of new and compelling evidence that might lead to the overturning of a previous finding (for example by a coroner's court or other judicial body) be required to generate a new Article 2 deliberation.

In relation to the actual investigation of cases we have set above out why we believe that this could properly be a matter for the LIB, which currently has some 1,130 cases as part of its workload. The LIB can provide a professional and, we say, impartial review and investigation service, abiding by case law and codes of conduct and with appropriate supervision and outside oversight as described. Time will be a critical factor as potential evidence further deteriorates and decisions on prioritisation will be necessary. Some cases will inevitably be permanently closed under the proposed criteria and some disappointment will be generated. Nevertheless we believe that this can be done systematically and equitably; and even some of those who may end up feeling let down might accept the rationale behind the decisions.

*What legislative steps the Government can take to address what have been described as vexatious claims against veterans*

The Association does not represent military veterans; but as individuals many of us had a professional relationship with such men and women and continue to have friendships, while collectively we sympathise with the legal predicament in which some of them find themselves. Their case has been ably made elsewhere and it now looks as though there is some recognition at the level of political decision-makers of the need for Government action.

As previously stated, we are of the view that nobody should be considered to be, or be treated as being, above the law. At the same time it is appropriate that the law should be applied and interpreted with a proper consideration for context where historical matters are being investigated. We do not think that it is right that men and women who were given a very brief explanation of the principles of the Criminal Law Act 1967 as interpreted by the famous 'yellow card' should subsequently be held to account according to the standards of later legislation and in particular according to the exacting and retrospectively-imposed provisions of ECHR.

These young men and women were operating from cramped bases and without adequate rest in conditions of extreme danger. Their comrades were blown up or shot in front of their eyes and rumours, sometimes true, of other atrocities abounded. They reacted to events on the spur of the moment on the basis of procedural and operational guidance which, whether or not in hindsight might appear to be adequate, was all they had. When they were involved in incidents they were debriefed and, dependent on the era and the nature of the incident, interviewed by their supervising officers, the Royal Military Police (RMP) or the RUCGC. Note-making and record-keeping, if carried out at all, was a secondary consideration to getting on with the job in hand. In some cases they appeared in a criminal court or gave evidence to the Coroner's Court. In many cases they were then told that for them the incident was closed.

In these circumstances it is hardly surprising that there is a growing outcry against renewed investigations and new prosecutions of long-retired soldiers who seem confused and distressed by these developments. Although it has been challenged in some quarters, there is also a widespread perception, with which we have some sympathy, that these people are being singled out for unfair treatment when others are being protected for political reasons.

The very delay also serves as a factor which exacerbates the discomfort of the veterans. Such records as were kept may no longer be available. Memory has faded. Military personnel who, unlike their police colleagues, were not trained in law and procedure, want to help investigators and sometimes end up saying things which they think the investigators want to hear because they simply cannot remember the relevant events clearly, if at all.

This difficulty might be highlighted in any court proceedings in which members of the public were able to produce consistent and detailed recollections of controversial and complicated events of nearly fifty years ago, while the soldiers involved stumbled and contradicted themselves and each other. Unless the court or coroner were familiar with the findings of the current received professional scientific peer-reviewed research on memory, this discrepancy might be taken to suggest that the civilian witnesses were being more truthful than the military witnesses, rather than the other way round. This could give rise to injustice and there may well be a judicial and bar training issue here.

For the reasons which we have previously given we do not favour the concept of amnesty, and this must apply equally to military veterans who are reasonably suspected of having committed criminal offences. But there is much to commend the current thinking regarding ways in which the bar to renewed investigations and new or renewed prosecutions or indeed civil actions could be set at a height which would serve to protect the interests of military veterans who may be subject to vexatious claims. Again the criteria should be along the lines of significant new and compelling evidence which may produce a reasonable expectation of a successful prosecution or the overturning of a previous finding – and not some vague allegation of unspecified misconduct or unfounded suggestion that a previous investigation was somehow inadequate.

## Conclusion

The Association welcomes what appears to be a significant change in emphasis in the new Government proposals to address legacy issues and we offer above some suggestions as to how this might work in practice. There is optimism that the mistakes made in the drafting of the 2018 Bill will not be repeated in 2020.

As an Association we have naturally offered suggestions which we believe will be in the interests of our members and of the wider police family. However we also believe that our suggestions, which are geared towards just outcomes for all, whether through criminal justice processes or information retrieval and dissemination, will also be in the best interests of all.