



Submission to the Committee of Ministers from the Pat Finucane Centre  
(PFC) in relation to the supervision of  
**Cases concerning the action of the security forces in Northern Ireland.**

**Jordan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001**

**Kelly and Ors v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001**

**McKerr v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001**

**Shanaghan v the United Kingdom, judgment of 4 May 2001, final on 4 August 2001**

**McShane v the United Kingdom, judgment of 28 May 2002, final on 28 August 2002**

**Finucane v the United Kingdom, judgment of 1 July 2003, final on 1 October 2003**

**May 2014**

The PFC is a non-party political, anti-sectarian human rights group advocating a non-violent resolution of the conflict on the island of Ireland. We provide an advocacy, advice and support service to families, bereaved and/ or injured as a result of the conflict, who wish to engage with statutory agencies including the Historical Enquiries Team (HET) and the Office for the Police Ombudsman of Northern Ireland (OPONI) in the north of Ireland, and the An Garda Síochána in the Republic, to establish the facts surrounding the death/s of their loved one/s or injuries sustained. This work is part of our Recovery of Living Memory Archive (ROLMA) project funded by Peace III.

We currently provide this service to approximately 200 families across Ireland through three offices in Derry, Armagh and Dublin (in partnership with Justice for the Forgotten). Many of these cases engage Article 2 ECHR issues.

## **The Package of Measures**

PFC submit that the British government's 'Package of Measures' formulated to remedy the finding that they had violated their Article 2 obligations (cited in the above cases) have failed on a number of levels, outlined below.

### **Historical Enquiries Team**

The PFC has engaged critically with the Historical Enquiries Team, on behalf of families since it began reviewing cases in 2006. At least 140 of our cases have either been completed or are on-going. The PFC is firmly of the view that families benefit from 3<sup>rd</sup> party support when engaging with statutory agencies. This has been evidenced in various reports,<sup>1</sup> and in our own experience.

We refer to our previous submission made jointly with CAJ in February 2012 to the Committee of Ministers of General Measures (CM), in which we requested that the Committee reopen scrutiny of the Historical Enquiries Team (HET) in the McKerr group of cases cited above. PFC would again formally request that that the CM resumes scrutiny of the HET with urgency.

In July 2013 Her Majesty's Inspectorate of Constabulary (HMIC) released a report strongly criticising the operational practices and structure of the HET in dealing with historical cases<sup>2</sup>. In particular the HMIC report found that cases involving actions of the state were not dealt with in a manner consistent with the state's Article 2 obligations.

In response, the Chief Constable and the Northern Ireland Policing Board (NIPB) stated that they accept the findings of the HMIC report, and the HET was suspended pending implementation of HMICs recommendations.

It is our view that public confidence and trust in the HET has been irrevocably broken, and a process of resignations and reforms within the HET is not sufficient to regain any measure of credibility among victims or NGOs. We know from speaking to the families that we work with that they have no confidence in engaging with a reconstituted HET post implementation of the HMIC recommendations.

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<sup>1</sup> Commission for Victims and Survivors (2012) Final report, Comprehensive Needs Assessment, Chapter 4. Lundy, Patricia (2012) *Research Brief: Assessment of the Historical Enquiries Team (HET) Review Processes and Procedures in Royal Military Police (RMP) Investigation Cases*. HMIC Inspection of the Police Service of Northern Ireland Historical Enquiries Team, 3<sup>rd</sup> July 2013 and Amnesty International, *Northern Ireland: Time to Deal with the Past*, 12<sup>th</sup> September 2013, London, Amnesty International.

<sup>2</sup> HMIC Inspection of the Police Service of Northern Ireland Historical Enquiries Team, 3rd July 2013.

## **The PSNI and HET**

Of particular concern is Recommendation 15 of the HMIC report that states that “*The Chief Constable should enforce his decision that any case which requires investigation should be referred to the PSNI. He should also introduce systems to provide himself with an assurance that this policy is applied in all cases.*”

It is our observation that PSNI has sought, over several years, to compromise the limited independence enjoyed by the HET at the outset, and that they have succeeded. The introduction of PSNI civilian staff, the PSNI taking control of the budget from Department of Justice, the change in policy in respect of live investigations and the ever increasing percentage of ex PSNI/RUC staff within the HET have steadily eroded the arms-length position of the HET from the PSNI.

We submit that implementation of HMIC Recommendation 15, which would move any investigation from the HET to C2 of the PSNI would further undermine the independence and effectiveness requirements of article 2 compliant investigations.

Those who were bereaved as a result of violence by the state have indicated that they would have no confidence in a PSNI investigation into the death of their loved one. We submit that such an investigation would not meet the independence requirement outlined in the Jordan case that states that “*for an investigation into alleged unlawful killing by State agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events.*<sup>3</sup>”

In a large number of cases we deal with, including both state and non-state violence cases, there was an inadequate flawed RUC investigation into the death at the time. The majority of these families have stated that they would not accept a PSNI investigation into the death of their loved one as they do not accept the PSNI is sufficiently independent from the RUC, who failed in their investigatory duty in the first instance.<sup>4</sup>

Further, families of those killed by the British Army in the early 1970s whose death was “investigated” by the RMP as a result of an illegal delegation of the RUCs policing duties<sup>5</sup>, see the RUC as complicit in the failure to properly investigate and prosecute those responsible for their loved one’s death.

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<sup>3</sup> Jordan v UK (2001) 24746/94

<sup>4</sup> See [www.patfinucanecentre.org](http://www.patfinucanecentre.org) under Individual Cases –John Patrick Cunningham also Kathleen Thompson

<sup>5</sup> See Kerr.J, In the High Court of Justice in Northern Ireland, Queen’s Bench Division (Judicial Review), In the Matter of an Application by Mary Louise Thompson For Judicial Review, Ref:KERA3639T

In support of this view, we endorse the finding outlined in the CAJ publication entitled “Does the PSNI have the “Article 2” level of independence to investigate potentially unlawful killings where agents of the state may have been involved?” This article states

*“This paper has sought to bring together law and evidence relating to the independence of the PSNI in Article 2 terms if called upon to investigate killings where states agents may have been involved. Our conclusion is that it does not have the requisite level of independence from any of the State security forces that were engaged in the conflict. ....This conclusion points to the need, already argued by CAJ, for an independent, Article 2 compliant agency to investigate all cases of unresolved death arising out of the conflict.”<sup>6</sup>*

It is our submission that PSNI involvement in the investigation of legacy cases would result in an unprecedented confrontation with families and NGOs with the PSNI, and would result in endless litigation. It would have a seriously detrimental effect on the climate within which current policing operates.

HMIC have recommended that the HET should implement an independent audit process to verify that the HET staff have the benefit of all appropriate intelligence material held by the PSNI<sup>7</sup>. The HMIC report noted that

*“the HET’s intelligence unit is staffed largely by former employees of with the RUC or the PSNI. Staff in the PSNI intelligence branch, some of whom are former RUC special branch officers, are gatekeepers for intelligence being passed to the HET. The assembling of relevant intelligence material plays a central role in the review process and in any subsequent investigation.”*

PFC submit that the use of “appropriate intelligence” within the HMIC Recommendation 11 allows for intelligence “gatekeepers”, as described by HMIC, to limit the intelligence information that is passed to the HET. We also reject the use of former RUC special branch officers having a key role in the dissemination of intelligence that plays a “central role” in any review or reinvestigation process.

#### **PSNI and OPONI**

The Office of the Police Ombudsman for Northern Ireland states the following on its website

*“This Office provides an independent, impartial system for the handling of complaints about the conduct of police officers. We will deal with those complaints in a manner which is free from any police, governmental or sectional community interest and which is of the highest standard.<sup>8</sup>”*

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<sup>6</sup> <http://www.caj.org.uk/contents/1240>. Accessed 09.05.14

<sup>7</sup> HMIC Report, Recommendation 11, July 2013.

*“The Police Ombudsman’s Office is required by law to strive to deliver a police complaints system in which the public and police officers can have confidence..... Our vision is to provide excellence in the independent and impartial investigation of police complaints, which builds confidence and improves policing for the community.”<sup>9</sup>”*

PFC is concerned that the PSNI is seeking to undermine the perceived and real effectiveness of the OPONI through public and private rejection of the findings of the OPONI in a number of high profile legacy cases. These cases include the report into the McGurk’s bar bombing<sup>10</sup> and the Omagh bombing<sup>11</sup>. More recently the actions of the PSNI in response to the Good Samaritan bombing<sup>12</sup> has reiterated our concern that the PSNI is seeking to destroy confidence in the OPONI ability to conduct historical investigations into police wrong-doing.

### **Good Samaritan Bombing**

The Police Ombudsman’s report into the Good Samaritan case was published in July 2013 and upheld the Dalton family’s complaints that the RUC failed in their duty to advise the local community or its leaders of possible IRA activities in the area, they failed in their responsibility to uphold Mr Dalton’s right to life under Article 2 and they failed properly investigate the death of Mr Dalton and Mrs Lewis<sup>13</sup>.

The OPONI report details the almost complete lack of co-operation between retired police officers and the OPONI. In February 2014 the NI Retired Police Officers Association issued a judicial review challenging the report of the OPONI in the “Good Samaritan” case, as well as the legal remit of the OPONI to make findings that there has been breaches of the ECHR<sup>14</sup> even though the OPONI

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<sup>8</sup> [www.policeombudsman.org](http://www.policeombudsman.org). Accessed 08.05.14

<sup>9</sup> <http://www.policeombudsman.org/modules/pages/about.cfm>. Accessed 08.05.14

<sup>10</sup> Statement by OPONI into the circumstances surrounding the bombing of McGurk’s Bar on 04.12.71. Published by OPONI on 21.02.11.

<sup>11</sup> Statement by OPONI on her investigation of matters relating to the Omagh bombing on 15 August 1998. Published by OPONI 12.12.01

<sup>12</sup> Public Statement by the Police Ombudsman under Section 62 of the Police (Northern Ireland) Act 1998 Relating to the complaints by the relatives of a victim in respect of the events surrounding the bombing and murders at 38 Kildrum gardens on 31 August 1988. Published by OPONI 10.07.14

<sup>13</sup> The OPONI could not substantiate the fourth complaint that the bomb was left in situ in order to protect an agent. However this element is being re-examined by OPONI in light of details outlined by NIRPOA in their rebuttal document. The Executive Summary of this document is accessible on <http://www.nirpoa.org/wp-content/uploads/2013/10/Exe-summary-Good-neighbour-s.pdf>. Accessed 09.05.14

<sup>14</sup> *In the matter of an application by David Turkington on his own behalf as a representative of the Northern Ireland Retired Police Officers’ Association and in the matter of a decision of the Police Ombudsman for Northern Ireland [2014]* NIQB

Historical Investigations Directorate was established as part of the “package of measures” to meet the British government’s Article 2 obligations arising from the McKerr cases.

Through the judicial review and the extensive, factually incorrect rebuttal issued by the NIRPOA late last year, PFC learned that the NIRPOA have asked their members to no longer co-operate with OPONI investigations into legacy cases.

The NIRPOA also complained that the OPONI report failed to contextual policing circumstances in Derry in 1988, when the bombing took place. Through the OPONI report and discovery in preparation for the judicial review, it became clear that the RUC District Commander in Derry at the time, David Turkington, who was in a position to provide context to the OPONI, would not co-operate with the investigation<sup>15</sup>. At the time of writing Mr Turkington is chairman of the retired police officers association.

Following the publication of the OPONI report, PSNI Deputy Chief Constable Judith Gillespie apologised to the families of those killed, stating *“For police officers, whose duty it is to protect life, there is a deep and sincere sorrow for the loss of the lives of Eugene Dalton, Sheila Lewis and Gerard Curran. To their friends and families, on behalf of the Police Service I am truly sorry for the loss of their loved ones.”<sup>16</sup>*

PFC however, has had sight of the private response by the PSNI to the OPONI in response to their findings in this case. In a letter dated 31<sup>st</sup> May 2013 from Judith Gillespie to the Police Ombudsman Michael Maguire, she states

*“There will clearly be a difference of opinion between that expressed in your report, that police ought to have known that a bomb was in the vicinity of 38 Kildrum Garden, and the opinion held by PSNI that this only became clear with hindsight. Whilst this is not a comment on factual accuracy, it goes to the heart of your findings.”<sup>17</sup>*

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<sup>15</sup> The case was rejected by the High Court on 06.05.14 as the proceedings were lodged outside the requisite 3 month time limits. The judge also criticised NIRPOA for failing to notify the Dalton family that they were issuing proceedings, resulting in further trauma to the family.

<sup>16</sup> DCC Judith Gillespie also stated that it was disappointing that a number of retired RUC officers did not co-operate with the OPONI investigation. <http://www.bbc.co.uk/news/uk-northern-ireland-23238559> Accessed 09.05.14

<sup>17</sup> Letter included in discovery of materials in judicial review case *ibid*.

This correspondence shows that privately the PSNI were rejecting the findings of the report. This has potentially disastrous consequences for future policing operations. Civilian lives could again be put at risk or even lost in order to protect agents/informers in paramilitary organisations.

PFC has provided support and advocacy to the Dalton family for over ten years. Following the publication of the OPONI report in July 2013 the family were relieved that after a long, difficult battle for truth and acknowledgement, their complaints were upheld by the OPONI following the investigation. The actions of the retired officers and the PSNI in response the OPONI report has caused additional hurt and has irrevocably damaged the Dalton family's, and other families confidence in the PSNI.

This failure by the PSNI to accept the legitimacy of OPONI findings is undermining the effectiveness of OPONI as part of the "package of measures."

### **Inquests**

There continues to be a major problem in progressing so-called 'historic' or 'legacy' inquests arising out of the conflict. The delays, usually lasting several years, are invariably the result of the failure of the PSNI Legacy Unit to supply the necessary documentation to the Coroner's Court. This has led to preliminary hearings being repeatedly adjourned and to open criticism of the PSNI by the Chief Coroner, Mr John Leckey<sup>18</sup>.

One of many inquests to be delayed is that into the loyalist murder of Mr Sean Brown on May 12 1997 in circumstances raising concerns of collusion with members of the security forces. On 23 April 2001 the Chief Coroner wrote to the then Chief Constable of the RUC,<sup>19</sup> Ronnie Flanagan, suggesting that there might well be merit in an outside force investigating this murder<sup>20</sup>. The Chief Constable did not reply to this correspondence.

A preliminary hearing, held on 4 May 2006, was adjourned on the basis of information provided to the Coroner that the Prosecution Service was considering a possible prosecution in the case. This information was incorrect.

A full hearing in this case has yet to be held, seventeen years after the murder and eight years after the preliminary hearing referred to above. At a preliminary hearing on May 6 2014 the Coroner directed the PSNI to produce the HET report into the murder within 14 days or face proceedings in

<sup>18</sup> <http://www.belfasttelegraph.co.uk/news/local-national/northern-ireland/inquest-delays-embarrass-coroner-29986110.html> Accessed 12.05.14

<sup>19</sup> The RUC was renamed the PSNI on November 4 2001

<sup>20</sup> Letter from JL Leckey, HM Coroner for Greater Belfast to Pat Finucane Centre 26 January 2006-on file

Belfast High Court. The Brown family believe that the repeated failures by the PSNI to provide documentation has violated their Article 2 right to a prompt and effective investigation through the coronial process.

A further concern relates to the provision by the PSNI of 'legacy workshops' to the Retired Police Officers Association (NIRPOA-see above). These workshops are primarily but not exclusively concerned with legacy inquests. In response to a number of FOI requests the PSNI has claimed that no documentation has been produced in connection with these workshops. Given the recent call by NIRPOA on its members not to co-operate with Police Ombudsman investigations there are concerns that a similar attitude has been adopted towards inquests and the PSNI may be offering legal advice to NIRPOA members that is contrary to the interests of bereaved families in these cases.

In our view it is inappropriate and in violation of the British government's article 2 obligations for the PSNI to be involved in the review or reinvestigation of legacy cases.

**We call on the Committee of Ministers to scrutinise the current and future implementation of "General Measures" by the British government in light of their article 2 obligations under the McKerr cases.**