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Contact: Clare Ovey
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Date: 29/04/2016

DH-DD(2016)546

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Meeting:	1259 meeting (7-9 June 2016) (DH)
Item reference:	Communication from a NGO (Pat Finucane Centre (PFC)) (21/04/2016) in the McKerr group of cases against the United Kingdom (Application No. 28883/95) and reply from the authorities (28/04/2016)

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion :	1259 réunion (7-9 juin 2016) (DH)
Référence du point :	Communication d'une ONG (Pat Finucane Centre (PFC)) (21/04/2016) dans le groupe d'affaires McKerr contre Royaume-Uni (Requête n° 28883/95) et réponse des autorités (28/04/2016) ***(anglais uniquement)***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

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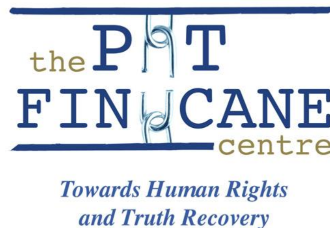
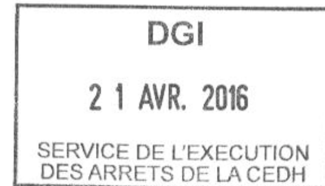


Towards Human Rights and Truth Recovery



The Pat Finucane Centre
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Derry
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BT48 0LZ

21 April 2016

Via email to: Clare.BROWN@coe.int

Dear Ms. Brown,

The Pat Finucane Centre (PFC, Derry/Armagh, Northern Ireland) in conjunction with Justice for the Forgotten (JFF, Dublin) wish to make the following Rule 9 submission to the Committee of Ministers on its supervision of the following cases relating to security force actions in Northern Ireland:

Jordan v the United Kingdom, judgment final on 4 August 2001
Kelly and Ors v the United Kingdom, judgment final on 4 August 2001
McKerr v the United Kingdom, judgment final on 4 August 2001
Shanaghan v the United Kingdom, judgment final on 4 August 2001
McShane v the United Kingdom, judgment final on 28 August 2002
Finucane v the United Kingdom, judgment final on 1 October 2003
and
Hemsworth v UK, judgment final on 16 October 2013
McCaughey & Others v UK, judgment final on 16 October 2013

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 believe that all participants to the conflict have violated human rights.

The PFC asserts that the failure by the British state to uphold Article 7 of the Universal Declaration of Human Rights, "all are equal before the law and are entitled without any

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discrimination to equal protection of the law", is the single most important explanation for the initiation and perpetuation of violent conflict.

We provide an advocacy, advice and support service to families, bereaved/injured as a result of the conflict, who wish to engage with statutory agencies including the (now-defunct) Historical Enquiries Team (HET), the Office for the Police Ombudsman of Northern Ireland (OPONI) in Northern Ireland, and An Garda Síochána in the Republic (through JFF).

The aim of our work is to assist families establish the facts surrounding the death/s of their loved one/s or injuries sustained. We are also engaged, on both sides of the border, in working with individual families in a project known as the Recovery of Living Memory Archive (RoLMA).

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.

We respectfully submit this Rule 9 submission for consideration at the 1259th meeting of the Ministers' Deputies in June 2016.

The PFC has, in conjunction with the Committee on the Administration of Justice (CAJ), made previous Rule 9 communications to the Committee of Ministers on the same group of cases in relation to what are now called the "package of measures" agreed by the UK.

We now wish to point out to the meeting that, in December 2014, London published the Stormont House Agreement (SHA), arising from talks involving the political parties in the Northern Ireland power-sharing Executive and the British and Irish Governments.

The SHA proposed new institutions to deal with the legacy of the Northern Ireland conflict, including a new "Historical Investigations Unit" (HIU) to conduct Article 2 compliant investigations into conflict-related deaths.

The SHA also proposed other measures to maintain and make legacy inquests Article 2 compliant, but the hopes that hundreds of families had that all this would, at last, lead to progress were put on hold when implementing these proposals was blocked.

Laws which were to have completed passage through Westminster to set up the SHA institutions have been derailed by the British government belatedly inserting an undefined ministerial "national security" veto over onward disclosure to families from HIU investigations (see more below)

In addition, although there was a recent heartening review (and subsequent overarching plan by the Lord Chief Justice for Northern Ireland) intended to speed up the approximately 55 outstanding legacy-inquests in an Article 2 compliant manner over the next five years – the UK government is resisting any release of the required financial resources.

This is replicated in the office of the Police Ombudsman for Northern Ireland who is similarly starved of resources. The office's total annual budget of £8.3m is just 0.8% of the overall justice budget in Northern Ireland and represents just 1.13% of the policing budget.

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As an NGO which routinely advocates on behalf of families affected by these matters, we are more than aware of how bereaved relatives are suffering as a result.

It is now a truism within the sector in which we work that the British government appears to be relying upon what have become known colloquially as "The Three Ds".

These "Ds" are:

1. Deny.

On very many occasions, where there are grounds for believing crimes have been committed by state agencies, such as the police, the British government denies the claims. Often, unless families manage to locate official papers in public archives, this is as far as they can get in investigating the deaths of their loved ones (see below for obstacles put in families' way in obtaining documents from the Public Records Office of Northern Ireland, PRONI).

We can cite many examples of salient facts being deliberately withheld from families and would, here, give just one example of four families whose loved-ones were shot dead by a serving police officer.

This fact was, however, withheld from the courts, the families and the public and it was only when the (now-abolished) Historical Enquiries Team discovered papers in the Royal Ulster Constabulary archive that it became an established fact.[1]

If, however, outright denial fails as a tactic, and families somehow gain enough new evidence to justify a new inquest, or a judicial review or other legal mechanism, then the families find the British government relies upon a second "D", namely:

2. Delay.

There are inordinate delays in providing disclosure to, for example, inquest hearings. An NI High Court judge, Lord Justice Weir recently said the British Ministry of Defence was "thumbing their nose"[2] at coroners.

In another case of which we are aware[3], a family has attended no fewer than 30 preliminary hearings. At many of these, where lawyers for the bereaved family are requesting disclosure of documents, state agencies are repeatedly granted postponements, citing a lack of resources to redact the relevant documents.

On this vexed and contentious issue of available resources, Lord Justice Reg Weir, recently stated in court that the British Ministry of Defence (MoD) is: "… busy all over the world fighting wars and it's about to buy some new submarines with nuclear warheads - so it's not short of money".[4]

This makes the resources issue one of priority, not absolute lack of available means.

Lord Justice Weir has also said that disclosure by the state of relevant details to families and their lawyers "...is not an option - this is an international obligation on the State".[5]

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He then added that London's use of "lack of resources" as an attempted justification to evade its obligations under international human rights laws: "...doesn't suggest any great intent on the part of government to comply with their obligations".[6]

Lord Justice Weir was also critical of the practice within the Police Service of Northern Ireland (PSNI) of delaying disclosure stating that it was "disgraceful" that not a single sheet of paper had been disclosed to the next-of-kin in relation to one inquest.[7]

Still on the issue of availability of resources, Nils Muižnieks, Commissioner for Human Rights, Council of Europe, speaking in Belfast, 6 November 2014, addressed the issue of "resource constraints" in the following terms:

"It is clear that budgetary cuts should not be used as an excuse to hamper the work of those working for justice. Westminster cannot say 'well we will let the Northern Irish Assembly deal with this, this is under their jurisdiction'. The UK Government cannot wash its hands of the investigations, including funding of the investigations.

"These are the most serious human rights violations. Until now there has been virtual impunity for the state actors involved and I think the Government has a responsibility to uphold its obligations under the European Convention to fund investigations and to get the results.

"The issue of impunity is a very, very serious one and the UK Government has a responsibility to uphold the rule of law. This is not just an issue of dealing with the past, it has to do with upholding the law in general."[8]

The third "D", and perhaps the most cynical, is:

3. Death. Many of the disputed killings with which the families we work are concerned took place in the 1970s. This means that many of the mothers and fathers of those killed have already died. Spouses and even some children of the deceased are now reaching the ends of their own lives.

Last week, two of my colleagues attended the funeral of a woman whose father was killed in 1974 and who had struggled for over forty years to find the truth behind the attack. The HET was able to reveal, from information concealed in RUC archives, that several of those involved were former members of the security forces in NI.

Diagnosed with a terminal illness, she went to her grave just as the Police Ombudsman for NI began his investigation – an investigation which will last at least another two years, itself already delayed by over eighteen months by "resource constraints".

Other elderly parents have died before they got any details of the context in which their children were killed. Still others are infirm and very elderly and may pass on at any time.

The British government appears to be relying on the death of an entire generation of bereaved people, in the hope that their children will be less likely to ask difficult questions.

If so, this is a mistaken policy as it is our firm belief, based on long experience, that the trauma of unexplained violent death, particularly where there is good reason to believe state involvement, passes down through the generations.

We are aware of families where victims' children, now in their 40s, are pledging to continue seeking answers on behalf of their dead parents. Similarly victims' grand-children are taking up the burden of seeking truth.

This will have profound implications for reconciliation in Northern Ireland as mistrust in the administration of justice persists into a new generation with all that implies for political stability.

There is unfortunately a pattern of the present UK government trying to delegate ECHR obligations to the power-sharing Northern Ireland Executive which it knows is both under-resourced and unlikely to collectively agree a way forward.

Your office is invited to ask the UK government to ensure the appropriate release of funds from central government sources to allow the proposed Legacy Inquest Unit to start work in September this year. This, as you will agree, is its international obligation that cannot be discharged by delegating financial responsibility to devolved, regional executives.

We would respectfully raise another issue with the Department under Rule 9, namely new "privileged" proposals on access to historical inquest and court files kept at the NI Public Records Office (PRONI).

Families can still apply for documents under the Freedom of Information Act but the information is far more likely to be redacted and in addition access will take much longer to process.

There has been a recent consultation over the new proposal on how and under what conditions families can gain access to reports of documents such as court files and inquest papers – documents that at one time were public as they related to open court cases, many of which were reported in the press, and cannot therefore be considered "sensitive" or closed.

After the consultation, the "Court Files Privileged Access Rules (Northern Ireland) 2016" was enacted by the Northern Ireland Assembly, taking effect at the end of March 2016.

It codifies into law a mechanism whereby only persons directly injured or bereaved in relation to an incident recorded in a court file held by the Public Records Office for Northern Ireland (PRONI) can seek access to them.

Moreover the access is on a strictly limited basis in that individual family members must sign a legally-binding document that they may not share the details with anyone else in their family, or elsewhere, even with their own lawyers.

Families, in some instances, need these papers in order to see if there are grounds upon which to build a case to take to the NI Attorney General seeking new inquests.

We are not aware of any person coming under threat as a result of such documents being opened to families nor do we know of any incidence when the administration of justice was compromised or anyone's human rights were abused.

We respectfully ask that the Ministers' Deputies seek assurances from the UK government that it will respect the ECHR entitlements of all interested parties to

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legacy information from previous open court processes, especially as it may be needed to vindicate their rights under Article 2.

We also wish to raise the issue of potential conflict of interest as it is now possible that former members of the security forces in NI may be hired to become independent investigators working for the Coroners' office.
We know that documents (released to investigative journalists under the freedom of information act) underlined the importance of the "independence of the individuals carrying out the investigation on behalf of the senior coroner".

Accordingly "former members of the RUC, current or former members of the PSNI or anyone with connections to the military" were to be excluded from eligibility from coroner's investigators posts.

The CAJ recently discovered, however, that by the time the NI Department of Justice had advertised the posts - not only was the independence requirement missing but it was positively contradicted.

One of the job criteria introduced required "extensive experience of managing serious crime investigations in the context of Northern Ireland".

Essentially a requirement precluding former members of the RUC and security forces from taking up such posts into inquests investigating the conduct of the RUC and security forces, had been changed into one favouring former RUC officers.[9]

We would ask if the Ministers' Deputies would consider seeking assurances from the UK government that those involved in Article 2 legacy investigations have no previous or current connection with those under investigation.

There is one final point we would wish to raise, one we see of the utmost seriousness and potentially fatal to the SHA legacy proposals.

The Stormont House Agreement proposed a Historical Investigations Unit (HIU) which would be Article 2 compliant and have full policing powers to inquire into deaths caused during the conflict.

Your most recent assessment of how the UK government is complying with Council of Ministers' judgements (December 2015) says, inter alia, vis-à-vis the HIU:

"+ be an independent body with both a criminal and non-criminal misconduct investigative function to take forward outstanding Troubles-related deaths which occurred between 1996 and 10 April 1998;
+ have dedicated family support staff to involve the next-of-kin from the beginning and provide them with support and other assistance throughout the process;
+ have policing powers and specific powers to obtain full disclosure of all information from the United Kingdom Government and all relevant bodies;
+ be empowered to recruit such employees as appear to it be appropriate without a prohibition from recruiting persons who have previously served in policing or security roles in Northern Ireland".

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There is another provision, however, which is outside the terms of the Stormont House Agreement and which we fear may result in families losing all confidence in the proposal and it is that the HIU:

+ **be required to refer decisions on the disclosure of any information which might prejudice national security to the United Kingdom Government, which may prevent disclosure if necessary** (emphasis added).

It is this provision which is holding up any progress towards implementing the institutions proposed in the SHA and resulted in legislation has not been introduced to date.

Two previous submissions under Rule 9, from the CAJ (May and November 2015) record in detail the developments in relation to the December 2014 Stormont House Agreement (SHA) which, among other institutions included provision for the HIU as "an independent body to take forward investigations into outstanding Troubles-related deaths".

The UN Human Rights Committee in July 2015 called on the UK to establish and fully put the HIU into operation "as soon as possible" and to "guarantee its independence in a statute; secure adequate and sufficient funding to enable the effective investigation of all outstanding cases and ensure its access to all documentation and material relevant for its investigations." [10]

A draft copy of the UK's proposed legislation has been widely leaked in the media, departing dramatically from the SHA by inserting a power, vested in the Secretary of State with no appeal, to redact and withhold from families any material from the findings of HIU investigations on undefined ground of "national security".

The CAJ points out that this draft contained "detailed national security exemptions never before seen in UK legislation, using the concept of 'sensitive' information. The draft bill provided for this category of 'sensitive' material to include any information which hypothetically could prejudice UK 'national security' interests, but also extends to any information which was supplied by the security and intelligence services, or any intelligence information from the police or military".

Moreover, the draft bill contains a mandatory duty on any "Relevant Authority" (government, military, police, ombudsman, ministers, and security/intelligence agencies) to **pre-classify** any information they have as "sensitive information".

The relevant authority may also identify information held by **another** relevant authority as "sensitive information". So even if the police decided some information they held was not to be treated as 'sensitive' a minister or the security services could overrule them.

There is also a mandatory duty on the HIU to identify any information it holds falling within the category of "sensitive' information".

This means the person who makes decisions on what is "sensitive" information is disclosed to families in relation to findings of investigations will be a government minister. Should a member of the HIU, past or present, disclose sensitive information to a family without the permission of the Secretary of State, they commit a criminal offence for which they could face up to two years in prison.

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In stark contrast, there is no parallel offence created if public authorities fail to disclose requested documents to the HIU.

After further talks between the British and Irish governments and the NI parties, a new SHA-implementation agreement was published on the 17 November 2015 entitled "A Fresh Start".

While it covered all other elements of the SHA, it excluded agreement on all the SHA legacy institutions.

There is wide consensus in NI that the main barrier to agreement was the UK government's insistence on maintaining this ministerial national security veto within the legislation.

The Minister for Foreign Affairs for the Republic of Ireland, Charlie Flanagan TD has publicly stated:

"The issue that remains unresolved is the issue of disclosure and national security and I don't believe it's acceptable that the smothering blanket of national security should on all occasions be used in the manner you've seen in Northern Ireland over a number of years."[11]

On 18 November 2015, Pablo de Grieff, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, issued preliminary observations and recommendations at the end of a ten-day visit to the UK.

He spent several days in NI meeting NGOs and families and, in his concluding remarks, he noted that "the legacies of the past have not been successfully or comprehensively addressed on any of these four dimensions (truth, justice, reparations and guarantees of non-recurrence).'

He also recommended that:

"Any future arrangements for truth-disclosure and for justice will need to take on board the fact that none of the stakeholders can assume the position of neutral arbiters of 'the troubles' and therefore will have to incorporate procedures to guarantee both the reality and the appearance of independence and impartiality."

On the matter of national security he noted:

"Although everyone must acknowledge the significance of national security concerns, it must also be acknowledged that particularly in the days we are living in, it is easy to use 'national security' as a blanket term. ...In particular, national security, in accordance with both national and international obligations, can only be served within the limits of the law, and allowing for adequate means of comprehensive redress in cases of breaches of obligations."[12]

There are no on-going formal inter-party talks to resolve this issue but we hope the UK government will reconsider its position which is not ECHR compliant.

Reconsideration would require specifying criteria for non-disclosure to families, and the decision-making mechanism for doing so. As well as there being a number of options on

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both, it appears to us that the only two criteria for non-disclosure would be: 1) the inclusion of information in family reports that would risk individuals lives and 2) information on legitimate, legal, security force methodologies still in use.

Your office may wish to ask the UK what process it will initiate to get over this barrier in implementing the SHA legacy proposals and legislation, ensuring restrictions on disclosure are ECHR-compliant, including legal certainty over ECHR-compatible non-disclosure criteria, and right of review by a competent independent body that commands widespread public support in NI.

Thank you for accepting this Rule 9 submission.

Yours,

Paul O'Connor
Project Co-ordinator
The Pat Finucane Centre

Clare Brown,
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[1] See Lethal Allies, Anne Cadwallader (Mercier Press, Cork, October 2013)
[2] http://www.irishnews.com/news/2016/01/29/news/mod-accused-of-thumbing-nose-at-coroners-during-ira-inquest-398735/
[3] Family identity kept confidential
[4] http://www.belfasttelegraph.co.uk/news/northern-ireland/mod-is-not-short-of-money-for-work-on-inquests-into-historic-killings-judge-34404763.html
[5] http://www.irishlegal.com/3501/lord-weir-presses-mod-on-funding-for-disclosure-work/
[6] http://www.belfasttelegraph.co.uk/news/northern-ireland/mod-is-not-short-of-money-for-work-on-inquests-into-historic-killings-judge-34404763.html
[7] Ibid
[8] http://www.caj.org.uk/files/2015/01/30/No._66_The_Apparatus_of_Impunity_Human_rights_violations_and_the_Northern_Ireland_conflict,_Jan_2015_.pdf
[9] See Magic Tricks at the Department of Justice? Coroners ask for investigators independent of the RUC but the job advert requires NI policing experience: CAJ asks Justice Minister for explanation. http://www.caj.org.uk/contents/1393
[10] UN Human Rights Committee, ICCPR, Concluding Observations on the UK's Seventh Periodic report, July 2015, paragraph 8
[11] Charlie Flanagan critical of national security 'smothering blanket' Irish News 27 November 2015, http://www.irishnews.com/news/2015/11/27/news/flanagan-critical-of-national-security-smothering-blanket--334991/?param=ds441rif44T
[12] Preliminary observations and recommendations by the Special Rapporteur on his visit to the United Kingdom of Great Britain and Northern Ireland, London, 18 November 2015, http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16778&LangID=E

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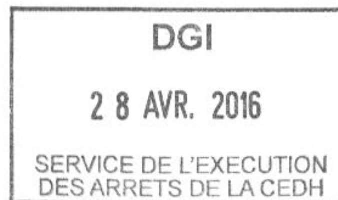

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Ms Corinne Amat
Directorate General
Human Rights and Rule of Law
Department for the Execution of
Judgments of the European Court of
Human Rights
Council of Europe

Date: 28 April 2016

Dear Ms Amat,

Subject: Case McKerr v. United Kingdom (Application No.28883/95 – Judgment of 4 May 2001, final on August 2001)

Thank you for your correspondence to Laura Dauban, Deputy Permanent Representative of the United Kingdom to the Council of Europe.

The Rule 9 correspondences from the Pat Finucane Centre (PFC) and Relatives for Justice (RFJ) of 21 and 22 April, respectively, raise a number of linked matters which I will take together in this letter. These two Rule 9s highlight issues including: the progress of legislation to establish new institutions for addressing the past in Northern Ireland; progress on the reform of legacy inquests; access to historical files at the NI Public Records Office; and the resourcing of the Police Ombudsman.

Simon Marsh's recent Rule 9 communication (of 26 April) and the previous update to the McKerr Action Plan, which was submitted to the secretariat on 13 April, describe the UK Government's position on some of these issues in more detail, in particular, reform of legacy inquests and the resourcing of the Police Ombudsman.

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I would refer to those communications in addition to the points I mention in this letter.

National security information and proposed appeals mechanism

As I mentioned in my letter 10 December 2015, it was not possible to reach final agreement on issues related to the legacy of the past during the talks that gave rise to the Fresh Start Agreement. However, a great deal of progress was made on these issues during the negotiations. One of the most difficult outstanding issues in those political talks was onward disclosure of sensitive information by the Historical Investigations Unit (HIU).

The UK Government has made a commitment to full disclosure to the HIU which would give it access to very sensitive information, including information which would, if disclosed generally, damage the UK's national security. The UK Government, like other member states, is subject to a positive duty under Article 2 of the Convention to take appropriate steps to safeguard the lives of those within its jurisdiction. To permit the disclosure of information which would prejudice national security would be incompatible with this duty. The proposed restrictions, based on established precedents, would therefore see the Secretary of State have the ability to prevent disclosure of information where there is a need to protect the national security of the UK and the lives of its citizens.

The key issue that remains to be resolved between the UK Government and NI parties is around the form that an independent, impartial appeal might take regarding decisions on disclosure. The Government has therefore proposed a dedicated appeals mechanism that would allow families or the HIU Director to appeal the Secretary of State's decision directly to a High Court judge. The Government believes that this would be a reasonable way to allow for the protection of information that would put national security at risk while allowing the HIU Director or families to challenge such a decision.

Funding of legacy investigations

It might be helpful to set out in more detail how the UK Government's approach to funding Northern Ireland recognises and provides for the particular challenges it faces. I hope the information included below demonstrates some of the ways in which the UK Government is fulfilling this commitment.

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As you will know, matters relating to policing and justice were devolved to the Northern Ireland Executive in 2010 by the Northern Ireland (Devolution of Policing and Justice Functions Order) 2010. As a consequence responsibility for the funding of the devolved policing and justice bodies now rests with the Northern Ireland Executive.

The budget for the Northern Ireland Executive includes funding from Her Majesty's Treasury in accordance with its funding policy. The Executive also has its own revenue-raising and borrowing powers. Thereafter, all allocation and spending decisions are a matter for the Executive. The UK Government does not exercise any role in such decisions, except in very limited circumstances where specific funding has been provided for specific purposes.

To that end, through the full implementation of the Stormont House and Fresh Start Agreements, the UK Government has committed to make around £2.5 billion of additional spending power available to help the Executive deliver across its priorities. This includes a commitment from the UK Government of an additional £150 million to help fund the proposed new institutions to deal with the past.

The UK Government believes that this represents an appropriately-tailored funding package designed to address the specific needs in Northern Ireland, including the need to investigate the past.

As mentioned in Simon Marsh's Rule 9 response letter (of 26 April) the bid for resourcing the Lord Chief Justice's proposed model for a Legacy Inquest Unit has been submitted to the Northern Ireland Executive. The UK Government has not yet received a proposal from the Northern Ireland Executive, but welcomes the efforts of the Lord Chief Justice to reform the legacy inquest system. The UK Government does not, by convention, take unilateral action on devolved issues (which include Justice and Policing) – these require the consent of the Northern Ireland Executive. The Secretary of State has made clear that proposals for reform of legacy inquests would be carefully considered by the UK Government.

DH-DD(2016)546 : Communication from a NGO (PFC) in McKerr group v. the United Kingdom.
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Next steps on legacy issues, post 2016 Assembly-elections

Since the Fresh Start agreement, the Government has continued to have discussions – with victims and their representatives, and with political parties – to try to find a way to make progress on these issues.

It is expected that consideration of these matters will continue in the context of further discussions on dealing with the legacy of the past in Northern Ireland, after the local May Assembly election in Northern Ireland.

It has been clear from those meetings that there remains a broadly held wish to find a solution to the outstanding issues as soon as possible. I would also like to take this opportunity to re-iterate the Government's belief that the Stormont House Agreement, with its new legacy mechanisms and inquest reform, represents the best opportunity for dealing with the legacy of Northern Ireland's troubled past more effectively than current processes.

The UK Government remains optimistic that with the political will and sufficient consensus, progress on these issues can be made.

Yours sincerely,

Chris Flatt
Deputy Director