

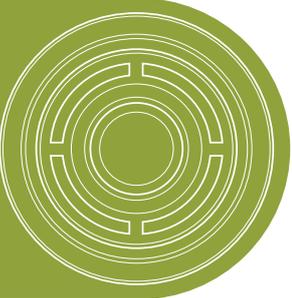


A REVIEW OF THE COST AND IMPACT OF DEALING WITH THE PAST ON CRIMINAL JUSTICE ORGANISATIONS IN NORTHERN IRELAND

November 2013

Criminal Justice Inspection
Northern Ireland
a better justice system for all





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November 2013





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List of abbreviations

CCRC	Criminal Cases Review Commission
CJI	Criminal Justice Inspection (Northern Ireland)
CSR Period	Comprehensive Spending Review Period
CVSNI	Commission for Victims and Survivors Northern Ireland
DoJ	Department of Justice
ECHR	European Convention on Human Rights
FSNI	Forensic Science Northern Ireland
HET	Historical Enquiries Team
ICLVR	Independent Commission for the Location of Victims Remains
MCRT	Major Crime Review Team
MIT	Major Investigation Team (in the PSNI)
NICTS	Northern Ireland Courts and Tribunals Service
NILSC	Northern Ireland Legal Services Commission
NIPS	Northern Ireland Prison Service
NGOs	Non-Governmental Organisations
OPONI	Office of the Police Ombudsman for Northern Ireland
PBNI	Probation Board for Northern Ireland
PPS	Public Prosecution Service for Northern Ireland
PSNI	Police Service of Northern Ireland
SCB	Serious Crime Branch (in the PSNI)
VSS	Victims and Survivors Service
YJA	Youth Justice Agency



Chief Inspector's Foreword

Dealing with the past is an important and emotive subject which attracts competing and polarised views. In the absence of political consensus, it was inevitable that much of the burden would fall on the criminal justice system and there have been ongoing concerns that this will impact on its capacity to deal with present day issues.

We accept that there is both a legal and moral responsibility on the criminal justice system to ensure that all crimes are fully investigated to provide answers to victims, survivors and families, and where possible bring offenders to justice. I believe that this report is a timely reminder of the impact such actions are having on the criminal justice agencies and the overall system.

The criminal justice system has by in large absorbed the financial costs of legacy issues which have been factored into present and future budgeting. However there are significant consequences for some specialist areas that have an impact on how current criminal justice issues are being handled. Delay and having to balance competing priorities are the result, and these in turn can become a negative influence on public confidence in the overall system.

This report provides clarity on the financial costs and highlights the disproportionate responsibility that is currently being borne by a relatively small number of individuals and teams who undertake this work on behalf of the criminal justice agencies.

It finds that the criminal justice agencies are managing to deal with legacy issues, however the almost daily commentary would suggest that their performance is not meeting the needs and expectations of all of the victims and their families.

We acknowledge the significant efforts being made to deal with the past and suggest a small number of areas for improvement to support the work of the criminal justice agencies.

This inspection was led by Derek Williamson. I would like to thank all those who provided assistance and contributed to the report.

Brendan McGuigan
Chief Inspector of Criminal Justice
in Northern Ireland

November 2013



Executive Summary

As a result of widespread debate concerning the costs and impacts of dealing with Northern Ireland's troubled history (the past), and concerns of a serious detrimental effect on the current work and effectiveness of many criminal justice organisations, Criminal Justice Inspection Northern Ireland (CJI) set out in this inspection to review the position.

For a variety of reasons, it was considered important that there should be a more precise understanding of the current and projected costs and impacts of dealing with the past insofar as they relate to criminal justice organisations.

It was apparent from the outset that the costs and impacts of dealing with the past are clearly wide ranging and, in addition to observable costs, for example in policing, take account of the wider aspects of dealing with the past. Examples here include, dealing with legacy inquests, prosecutions and all their associated costs as well as other perhaps less apparent costs such as in legal aid, appeals and prisons.

While there are some significant unknowns and some qualifications, Inspectors estimated the current costs of dealing with the past on criminal justice organisations to be in excess of £30m (in the current financial year). In the following five years at current estimates, plus circa 2.7% inflation, the cost will exceed £187m. An individual breakdown of the costs for each of the core criminal justice organisations is presented immediately following this executive summary (see Table 1).

Going forward, Inspectors assessed that the costs of dealing with the past are likely to see small increases in the short to medium term. That is assessed to be so given two factors which are the inflationary costs and secondly, the numbers of cases yet to be assessed or completed by the Historical Enquiries Team (HET) and the Office of the Police Ombudsman for Northern Ireland (OPONI), coupled with the nature of some of these cases where the evidence, for example, of assisting offenders might become a factor. However, in the longer term, as work on the numbers of the most serious and high profile cases is completed, the costs and impacts may reasonably be expected to decrease. However, this situation could be regarded as fluid, bearing in mind the undetermined number and nature of future cases, together with the prospect of further new legacy inquests being directed by the Attorney General for Northern Ireland.

In terms of the impacts of dealing with the past, what emerges from fieldwork is that this, to varying extents, depends on the specific organisation. But, overall some core messages emerge. Among these is a general feeling that criminal justice agencies have not been structured to deal with these types of



issues and so 'absorb'¹ the costs and, for some, the reputational damage that this may entail. A good example in policing was that where the resources for the re-investigation of many of the most challenging and controversial matters was being borne by the Police Service of Northern Ireland (PSNI) Serious Crime Branch (SCB) from main grant funding, albeit that some HET funding had been ring-fenced for a period of time.² Similarly, the Public Prosecution Service for Northern Ireland (PPS) was also dealing with some significant high profile legacy cases within existing core resources. In other words and broadly speaking, these agencies did not have 'detached' funding for this type and scale of work.

Secondly, there was an equally strong feeling that in absorbing these costs and the impacts, this had a detrimental bearing on the quality of current service delivery. For example, senior police officers referred to difficult decisions in the resourcing of current enquiries where there was threat and risk of harm. This was balanced against resourcing some of the historical cases where the risk of harm was appreciably less. It was notable that some 40% of the PSNI overall serious crime capability³ was being used in legacy matters. There was also evidence of impact in the area of inquests with some being delayed for significant periods.

Thirdly, for a range of agencies, it was also a key factor in decision making that the overall numbers of staff or funding available was not the dominant issue. Rather, it was an issue of allocating the correct skilled resource to these legacy areas. This inevitably led to delays in the investigation and/or review of cases. It also calls into question whether the current arrangements are sufficient to meet the needs of families. It surely cannot be acceptable that some families, who have already waited considerable periods of time, may have to wait for further significant time for answers.

Linked to the issues of delay and resources, there was an equal belief, although not expressed in this way, that leaving the criminal justice system agencies to deal with the legacy issues without the agreed and properly resourced structures will continue to '*re-position the past in the context of the present*'⁴ and therefore continue to risk public confidence and the efficient and effective delivery of services currently and going forward. As McGrattan and Branniff put it '*the past remains a disruptive and disrupting influence on transitional societies*'.⁵

Inspectors also concluded that there was a lack of co-ordination across the criminal justice system in relation to legacy cases. This resulted in pressures being applied from one area to another, sometimes without any consultation or notice whatever. Inspectors considered that this kind of silo working, where it existed, did not assist overall in the progress of cases through the criminal justice system, nor did it support victims in terms of the potential for further delays and the risk that the criminal justice system would not be seen as connected.

Finally, it was also clear to Inspectors, as it was to the majority of senior leaders across the criminal justice system, that the criminal justice system is not of itself and never can be, a comprehensive solution to dealing with the past. Nonetheless, Inspectors found an absolute willingness and commitment on the part of those same leaders and their organisations to do their utmost to fully meet and manage their obligations. Inspectors were of the very clear view that a particular strength of many areas of the criminal justice system lay in its demand led approach. It therefore has the ability and willingness to adapt to circumstances and to cope with challenge and change - often in the face of adversity. That was largely evident in the context of legacy issues. While there clearly are remaining areas of concern and some areas for development, it is nonetheless

1 Barra McGrory QC, Director of Public Prosecutions for Northern Ireland quoted in the Belfast Telegraph on 11 December 2012.

2 £6.5m was ring-fenced within the PSNI budget for each of the years 2011-12 and 2012-13.

3 This is in addition to HET resources.

4 Dealing with the Past in Northern Ireland, Dr Cillian McGrattan and Dr Maire Braniff, January 2012 available at http://www.psa.ac.uk/journals/pdf/5/2012/532_195.pdf.

5 Ibid.



apparent that across the criminal justice system there is a real resolve to manage and meet its obligations. In recognition of this, Inspectors highlight a small number of areas for potential development. It is hoped these might in some small way assist in the absence of other agreed mechanisms to deal with the past. Key amongst these is the establishment of a

Legacy Executive Group with membership drawn from across the criminal justice system.

Among its objectives could be creating a criminal justice system wide legacy strategy. It could also address issues such as the prioritisation, co-ordination and progression of legacy cases.

Table 1: The cost and impact of the past on criminal justice organisations - overall estimate⁶ of costs

	Estimated costs per annum (based on current costs)	Five year (medium term) projected costs ⁷	Total known estimated costs ⁸	Explanations
PSNI	£25.1m	£132.4m	N/A	See paragraphs 2.43 - 2.46 for context.
HET	£6.01m	N/A	£59.7m	See paragraph 2.18 for context. In addition, five year costs are not included as the HET is due to finish its work in 2015. Costs are included in the final PSNI total.
SCB, PSNI	£8.65m	£45.5m	N/A	See paragraphs 2.19 - 2.31 for context. These figures are included in the overall PSNI total and do not form part of the final total.
Legal Services Department, PSNI	£2.13m	£11.24m	N/A	See paragraphs 2.32 - 2.37 for context. These figures are included in the overall PSNI total and do not form part of the final total.
Finance and Support Services Department, PSNI	£995,000	£7m	N/A	See paragraph 2.38 for context. These figures are included in the overall PSNI total and do not form part of the final total.
OPONI	£2.08m	£10.9m	N/A	See paragraphs 2.47 - 2.58 for context. The figure used is the business case cost, whereas actual running costs could be £2.26m per annum. However, together with other issues and context, these costs are likely to be significantly increased.
Forensic Science Northern Ireland (FSNI)	N/A	N/A	N/A	Costs are absorbed within other funding.
PPS	£342,500	£1.8m	N/A	See paragraphs 2.66 - 2.75 for context.

6 Estimates are an approximation only and subject to variation. In many instances these are current and/or flat rate costs not including future pay progression or pay awards.

7 Includes inflation at 2.7%.

8 This includes all known costs at the time of reporting.

	Estimated costs per annum (based on current costs)	Five year (medium term) projected costs ⁷	Total known estimated costs ⁸	Explanations
Northern Ireland Courts and Tribunals Service (NICTS), (including the exceptional Coroners Service)	N/A	N/A	Mean: £27.5m	See paragraphs 2.79 - 2.94 for context. This includes the overall total for the estimated costs of current known outstanding legacy inquests, including the estimate of grant legal aid for these inquests. This sum is included in the total in column 2.
Northern Ireland Legal Services Commission (NILSC)	Criminal Legal Aid costs: £32,000	£169,000	N/A	The estimated costs of legal aid in exceptional grant cases are included in the NICTS estimate above and are not therefore part of the total. However, estimates of the criminal legal aid costs are included in the total. See paragraphs 2.96 - 2.102 for context.
Criminal Cases Review Commission (CCRC)	£968,000	£4.8m	N/A	See paragraph 2.103 for context.
Appeal Court Hearings	£23,000	£115,700		See paragraphs 2.104 - 2.106 for context. Estimates are based on an average five hearings per annum. These costs will ultimately be borne by the NICTS and are included in the final NICTS totals.
Compensation Service	£29,500	£155,600	N/A	See paragraphs 2.108 - 2.109 for context.
Department of Justice (DoJ) Legacy Unit	£225,000	£1.18m	N/A	See paragraphs 2.110 - 2.111 for context.
Northern Ireland Prison Service (NIPS)	£1.8m	£6.2m	N/A	See paragraphs 2.113 - 2.115 for context.
Independent Commission for the Location of Victims Remains (ICLVR)			£2.7m	See paragraph 2.118 for context. This is the spend to date and does not form part of the final total in column 2. Projected costs are impracticable to estimate.
TOTALS	£30.6m	£187.62m⁹	N/A	NB: The final totals do not reflect a simple addition of the columns given the various explanations (above) and the context explained in the report.

⁹ Includes all known costs which it will be assumed will be discharged within the five year total and where a range has been estimated the mean of that range has been used.



Areas for Improvement

1

The DoJ should facilitate (but not lead) the establishment of a Legacy Executive Group incorporating senior representatives across the criminal justice system in order to share information and, as far as possible, co-ordinate their responses to legacy issues. The Group could consider agreeing a criminal justice system wide strategy for prioritising, co-ordinating and progressing legacy cases (paragraph 3.2).

2

Decisions about how best resources can be managed and/or re-allocated to meet the demands of legacy investigations within a reasonable timescale must be addressed now. Senior leaders in the criminal justice system should therefore review and reflect on demands in the specialist areas dealing with legacy issues and take appropriate prompt action where this might be required in liaison with criminal justice system partners (paragraph 3.7).

3

The PSNI should consider adopting a formal publicly available prioritisation model for legacy cases. This prioritisation model should be further supported by a clear communication strategy (paragraph 3.8).



Inspection Report



Introduction and context

- 1.1 Without question or doubt, how we as a society deal with the legacy of our troubled history in Northern Ireland is both emotive and challenging. It is inexorably linked in many of the discussions on the subject to the notion of transitional justice. Transitional justice is not a 'special' kind of justice, but an approach to achieving justice in times of transition from conflict. By trying to achieve accountability and redressing victims, transitional justice provides recognition of the rights of victims, promotes civic trust and strengthens the democratic rule of law. In the local context, many have observed that the remaining legacy issues must be dealt with and, for example, the Commission for Victims and Survivors Northern Ireland (CVSNI) have commented '*...there is a need for the British government, acting with the support of the Irish government, to press the political and civic leaders of Northern Ireland to agree structures to deal with the past, beyond the current arrangements of the Historical Enquiries Team and the Police Ombudsman.*'¹⁰
- 1.2 Axiomatically, within the notion of transitional justice, dealing with a range of issues such as human rights, victims and offenders is central to success. It is also accepted that there is no one single optimal process of transitional justice. Rather, it is widely acknowledged that building a bespoke model from the ground up stands the best chance of ultimate accomplishment, albeit that significant failure and disappointment may be apparent along the way. It is also the case that models of transitional justice may follow two distinct paths. The first establishes a 'ceasefire' and builds transitional justice. The second starts from the position of embedding truth and justice. What is clear from this limited review is that we as a society in Northern Ireland have not reached the final destination of transitional justice and, albeit that we have travelled a long way, our current position is not a justification for failing to complete the journey or avoiding the issues. Quite simply, the legacy issues will not just evaporate or 'wither on the vine'.
- 1.3 Clearly, as we allude to, in the context of the position in Northern Ireland, it may be argued that there has already been very considerable success in terms of a number of stages of transitional justice. What remains of most concern in terms of existing fissures surrounds the substantial numbers of victims/families who have not or do not feel they have adequately been provided with 'truth and justice' following the death of a loved one. Currently the considerable and challenging tasks which that presents is unavoidably being dealt with within the existing structures of the criminal justice system. As the Minister of Justice has commented recently, "*The justice system seems to be the only area of Government acting in relation to the past, whether through the work of the Historical Enquiries Team, the Police Ombudsman or legacy inquests. We need to face up to this issue and this requires everyone, including all of our political parties and the two Governments, to take on their responsibilities.*"¹¹

¹⁰ *Dealing with the Past*, Advice to Government, Commission for Victims and Survivors, June 2010.

¹¹ Statement by Justice Minister David Ford, *D Day + 1,000 = Justice for everyone*, DOJ, 6 February 2013.

- 1.4 Inspectors heard very clearly from many to whom they spoke during this inspection, that the final destination in terms of transitional justice had not been reached. This was manifest in different guises but the messages were clear and universally unanimous. As Bell put it, *'While containing a substantive human rights component, no mechanism for dealing with past abuses or "truth-telling" was established... The negotiated Belfast Agreement avoided addressing what caused the conflict or the longer term solution to it, in favour of a pragmatic compromise, aimed at living more peacefully while continuing to resolve these more difficult disputes. A piecemeal approach to the past can be argued to be not just a pragmatic necessity but the most appropriate way to continue these difficult deeper negotiations.'*¹² By way of further support for the notion of ground still to be travelled Bell also concludes, *'...human rights organisations, victims groups and investigative journalists all continue to raise a series of issues relating to accountability for the past with respect to state and non-state actors.'*
- 1.5 Consequently, in helping to understand the nature of the terrain as yet un-assailed, CJI set out to review the current costs and impacts of dealing with the past across the criminal justice sector. This inspection and report therefore seeks to provide a stepping stone towards understanding the costs and impacts for the criminal justice system. The report is not and should not be regarded in any sense as a commentary on whether the costs and impacts are either vindicated or unjustified or indeed as to whether current arrangements should be transformed. Rather, this report is an attempt to explore the known facts without providing any direction outside the scope of the criminal justice system alone.

Limitations

- 1.6 It must be noted that costs provided are estimates only and largely subject to significant qualifications. Readers should note for example that in reaching their overall assessments, Inspectors have made a number of assumptions and, in part, the costs are based on approximations and presumptions. Nonetheless, such assumptions remain the best way of supporting forward strategic planning and assessment in this area. Forecasting and scenario planning are accepted business planning and strategic planning methodologies. The data quoted in this review are taken from a range of sources and forecasting material as well as judicial statistics. While it has not always been possible to reconcile the material as precisely as we would like and we have not always attempted independent verification of it, we are confident that trends identified and conclusions drawn remain valid. Additionally, within this framework, Inspectors also recognise that the impacts identified and discussed are largely subjective.
- 1.7 It should also be emphasised that in conducting this review it was not the purpose of CJI, or this report, to decide on how the past should be approached and, to that extent, the inspection should not be viewed as influencing that debate in any particular direction. Nor is it to be viewed as being a negative commentary on the costs and impacts and consequently supporting any rationale to discontinue that work. In addition, in terms of the impacts of dealing with the past on criminal justice organisations, it is clear that there will also be consequences and concomitant impacts on others including a range of Non-Governmental Organisations (NGOs) and also for individual victims and survivors. However, again, it was not within the scope of this inspection to consider these impacts beyond those strategic influences and challenges affecting the criminal justice system.
- 1.8 The review did not incorporate those public enquiries already held, although these have incurred significant costs for the criminal justice agencies. Those costs have already been clearly set out by the then Secretary of State for Northern Ireland Mr Owen Patterson MP as follows: *'The four Northern Ireland*

¹² Bell C, *Dealing with the Past in Northern Ireland*, Fordham International Law Journal Volume 26, Issue 4 2002 Article 9.

public inquiries established by the previous Government have cost a total of £301.1 million over the last 10 years. The Bloody Sunday Inquiry closed in June 2010 and cost a total of £191.5 million. The Billy Wright Inquiry closed in September 2010 and cost £30.5 million. The Robert Hamill Inquiry closed in February 2011 and cost £33.0 million. The Rosemary Nelson Inquiry has cost £46.1 million to date.¹³

Rather, this review was focussed on the current and projected costs, in keeping with the terms of reference which were focussed on the present and the future. The review terms of reference are included at Appendix 1 while the inspection methodology is included at Appendix 2. Given the inspection topic and its exceptional character, we have not adopted the customary CJI inspection methodologies or structure.

Scale and volume

- 1.9 A brief overview of the scale of the issues is a constructive starting point for this review – both in terms of volume and the impacts arising. By way of example, the Lost Lives¹⁴ compendium records 3,633 deaths between 1969 and 1998. Also, the HET¹⁵ is charged with the investigation of 2,555 cases involving 3,260 victims. The OPONI had 150 historic cases relating to scores of victims. The Coroners Service¹⁶ was dealing with 34 inquests related to 52 conflict related deaths.¹⁷ In a number of areas, the volume and magnitude of cases are set to increase in the short to medium term.
- 1.10 One of the immediate impacts is that the volume and complex nature of many of these investigations and enquiries inevitably leads to delays – an issue of concern which Inspectors have continually raised in various reports ranging from that on *'The care and treatment of victims and witnesses'*¹⁸ and also in relation to *'Avoidable delay'*.¹⁹ These delays may also lead to significant legal challenge and there was further evidence of this at the time of inspection with the suspension of a number of legacy inquests while the scope of the legal powers of the Attorney General were questioned.²⁰ Although, on this latter point, there is no longer any dispute that the Attorney General had the power to direct the relevant inquests. While this particular delay has been removed, other delays such as that in the case of Arlene Arkinson are now becoming apparent with the Senior Coroner indicating in February 2013 that it would be a further two years before that inquest could be heard. However, Inspectors now understand that the delay will, in fact, be closer to one year.
- 1.11 An additional issue which was clear to Inspectors in conducting fieldwork for this report concerned the needs of victims. It was apparent that the needs were both complex and diverse and ranged from those who wanted to move on and required little by way of information or support, to those who felt the need for more formal and detailed processes of truth and justice. Within this broad range of needs are the procedural requirements of Article 2 European Convention on Human Rights (ECHR). The latter is critical to legacy issues and provides a series of practical and other requirements on how the work of the criminal justice system is conducted in these matters.

13 House of Commons Hansard, Written Answers to Questions, Thursday 31 March 2011.

14 *Lost Lives, The stories of the men, women and children who died as a result of the Northern Ireland Troubles*, McKitterick et al, CPI Bath Press, Edinburgh and London, 2004 edition.

15 The HET is a unit of the PSNI set up in September 2005 to investigate the 3,269 unsolved deaths during the Troubles (specifically between 1968 and 1998), http://en.wikipedia.org/wiki/Historical_Enquiries_Team.

16 The Coroners Service is part of the NICTS and inquires into deaths are reported to them. Coroners are independent judicial officers who are available to deal with matters relating to deaths that may require further investigation to establish the cause of death.

17 Figures as at March 2013 NICTS, 23 April 2013.

18 *The care and treatment of victims and witnesses in the criminal justice system in Northern Ireland*, December 2011, CJI.

19 *Avoidable delay - a progress report*, January 2011, CJI.

20 See Belfast Telegraph 15 November 2012, *Coroner suspends inquests over security fears*.

The impacts on victims

- 1.12 In terms of the impacts of dealing with the past, it is clear to Inspectors that these will have tangible consequences and a concomitant impression on others including a range of NGOs, victims' groups and also on individual victims and survivors. However, it is not within the scope of this inspection to consider impacts beyond those on the criminal justice organisations. The issue of the needs of victims and the impact of the past on victims is the subject of quite extensive research and bodies of work by a range of institutions. Among these is the recent CVSNI Comprehensive Needs Assessment,²¹ and the WAVE report, *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland*.²² Further examples include the work of Lawther²³ in researching the views of the 'police family'. Indeed, the CVSNI²⁴ also plays a key role in this area alongside the Victims and Survivors Service (VSS) which was established in April 2012.
- 1.13 Healing Through Remembering have also provided a most helpful treatise²⁵ in respect of the costs of the past and while some indicative costs are included in this work, it was apparent to Inspectors that one significant difficulty was in obtaining a coherent approach to an estimate of costs. Those issues were to some extent repeated in this review as many of the justice organisations do not routinely record separated data in respect of legacy matters.
- 1.14 The WAVE Trauma Centre equally have provided helpful research in relation to the needs of individuals and families injured as a result of the Troubles in Northern Ireland.²⁶ In its report of analogous title a number of areas in respect of justice are addressed and this includes a recommendation that the remit of the HET be re-examined to include those who suffered serious physical injury. This arises from the scope of the HET work being confined only to deaths during the period between 1969 and 1998.
- 1.15 As we have outlined, the process of dealing with the past is particularly difficult and complex for a variety of reasons. This includes, for example, the fact that victims and survivors are unique and may want different things from any processes. The CVSNI has also stated, *'The Commission firmly believes that we must deal urgently with the legacy of the conflict. Many victims and survivors have waited for many years for answers and assistance, many have died without having their needs met and for many more, their needs have been exacerbated as they age. We believe Government and society has a duty of care to these individuals, families and communities.'*²⁷
- 1.16 Arguably, the more serious issues arising are the social effects and the legacy that we leave the next generation in addressing (or failing to address) the past. Deep division, sectarianism, socio-economic deprivation, suspicion and segregation are among the legacies of the past. Thus, it is clear that the criminal justice system is not of itself and never can be a comprehensive solution to dealing with the past. This approach is supported by the CVSNI who have stated, *'The judicial system on its own cannot deliver*

21 *Comprehensive Needs Assessment, Final Report*, Commission for Victims and Survivors Northern Ireland, February 2012.

22 *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland*, Marie Breen-Smyth, In association with Northern Visions, Commissioned by WAVE, May 2012.

23 *British Journal of Criminology*, Volume 50 Number, 3 May 2010.

24 The CVSNI was established in May 2008, under the Victims and Survivors (Northern Ireland) Order 2006, as amended by the Commission for Victims and Survivors Act (Northern Ireland) 2008. It is a Non-Departmental Public Body (NDPB) of the Office of the First Minister and Deputy First Minister and falls within the scope of that Departmental boundary.

25 *Paper on dealing with the Past: Costs to Date and for 2010-2014*, September 2010 (prepared by Deloitte MCS Limited).

26 *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland*, University of Surrey in association with Northern Visions, Commissioned by WAVE Trauma Centre, May 2012.

27 *Dealing with The Past, advice to Government*, Commission for Victims and Survivors, June 2010.

*justice to victims or resolve all the issues of the past.*²⁸ Consequently, for Inspectors the most pressing issue surrounds how the criminal justice system can continue to address those legacy issues which remain within its domain; without causing victims additional distress and in as comprehensive a fashion as might be possible, in the climate of a continued challenging financial position. In other words, in the absence of a cohesive pan-executive approach, how best can the criminal justice system cope with the demands of the past?

- 1.17 We intend to deal with the issues by way of commentary on each of the core justice agencies addressing both costs and impacts for each before a concluding chapter on the overall position and Inspectors' assessments, where appropriate, of how improvements can be made within the context of the justice system.

28 Ibid.



Effects (costs and impacts)

2.1 This chapter discusses the effects of legacy issues across the criminal justice system, both in terms of their costs and their impacts. It follows the chronology of cases through their normal progress of cases from investigation, to prosecution to courts and beyond.

PSNI

2.2 The PSNI arguably carries one of the most significant workloads surrounding legacy matters in terms of the volume of investigations, the costs and indeed the impacts. One critical element of the latter is the bearing on community confidence in the PSNI both in terms of its ability to deal with the legacy of the past and the potential for erosion of confidence in policing today. In fact, Lawther notes, *'...the repeated intrusion of the past is damaging confidence in the PSNI, particularly in its ability to uphold Patten's recommendations and work as a reformed organisation.'*²⁹ Inspectors assessed that the impacts on community confidence are not just in the present, but also have the potential to affect confidence in the future. These impacts will mean that the PSNI will have to work doubly hard to achieve and maintain its positive position with regard to community confidence.³⁰

2.3 During the course of fieldwork Inspectors heard at all levels within the PSNI an absolute commitment to continuing to meet all of its obligations (legal and otherwise) in dealing with the past. It was acknowledged that, despite the difficulties and an apparent contradiction in terms of the potential for impaired confidence, doing so was in itself an 'essential element' in building community confidence.

2.4 As with many other criminal justice agencies, it is important to note that the PSNI has a range of legal obligations surrounding its response to the past and as we note later these obligations can, on occasion, be competing (but not contradictory) ones often creating difficult dilemmas for the PSNI. However, some of the existing legal obligations include:

- Section 32 of the Police Act Northern Ireland 2000 - a duty to bring offenders to justice where an offence has been committed;
- Articles 2, 6 and 8 of the ECHR - obligations to protect life, procedural obligations to investigate, the right to a fair trial and to respect the right for a private and family life;
- Public Enquiries Act 1959 - a duty to disclose material;
- Coroners Act 1959 - a duty to disclose material;

29 British Journal of Criminology, Volume 50 Number 3, Lawther C, *Securing The Past; Policing and the Contest over Truth in Northern Ireland*, May 2010.
30 According to the Northern Ireland Policing Board's Omnibus Survey, January 2012, 84% of people had some, a lot, or total confidence in the police's ability to provide an ordinary day-to-day policing service.

- Freedom of Information and Data Protection Acts – duties to provide information and to manage personal information in a proper way; and
- Public Interest Immunity – a common law duty to protect matters of national security which avoids real harm to the public interest.

2.5 It may also be said that no other police service in the United Kingdom faces the volume of historical cases for which the PSNI has responsibility. That responsibility currently extends to:

- 3,260 deaths attributed to the Troubles in Northern Ireland between 1969 and April 1998;
- dealing with requests surrounding legacy inquests; and
- dealing with tribunals and enquiries.

2.6 The scale and scope of the legacy work being undertaken by the PSNI presents significant challenges and this pressure inevitably falls primarily on specialist units such as those in the Crime Operations and Legal Services Departments. This is as a result of the expertise needed to address the issues arising.

PSNI structures

2.7 The PSNI has established a Legacy Gold Group to deal with matters concerning historical issues. This group which was established in 2010 considers a broader range of issues in its definition of legacy matters than did this review.³¹ However, the core matters described in the terms of reference for this review were incorporated within its remit. The strategy for this executive group, which is chaired by the Deputy Chief Constable, includes:

- to fulfil obligations under the Human Rights Act;
- to ensure legal obligations to the Coroners Service, Public Enquiries, OPONI, families, serving and retired colleagues and other concerned individuals are fulfilled;
- to allocate appropriate resources to this area of work and future planning for sustainability of legacy work;
- to establish standards, protocols and resources to support future legacy inquests and other structures established by Government to deal with the past;
- to maintain community and internal confidence in the PSNI; and
- to ensure appropriate and timely communication with concerned parties.

2.8 Inspectors considered that these high level and broad objectives were largely appropriate, but heard concerns about the operational delivery of some aspects at the time of inspection fieldwork. Primarily, these concerns centred on structures, the allocation/prioritisation of cases and attendant issues of confidence and communication. More recently it was apparent that this group had played a role in setting prioritisation principles and some issues of resource allocation. Inspectors have been advised that the Head of Legal Services Department acts as the Silver Commander for this group. However, Inspectors were concerned that the absence of some other key operational inputs had the potential to leave gaps and lead to a lack of co-ordination. It was apparent therefore that the balance of focus was toward the operational legal aspects of, for example, inquest and other related legal matters, rather than

³¹ The PSNI definition of legacy matters differs somewhat from that used in this report and includes, for example, matters prior to 1 March 2004 when the Crime Operations Department was established.

on comprehensive governance of the complete legacy picture. This could usefully be re-examined particularly in light of the linked findings at paragraph 2.31 and 3.7.

- 2.9 In addition to the Legacy Gold Group there are also a range of PSNI units and branches which are charged with dealing with the past. While legacy work is not exclusively dealt with within these units, which are documented post, they do represent the core of legacy work. What is apparent is that numerically the vast bulk of the review of cases is being progressed by the now relatively locally well known HET.

HET

- 2.10 The HET was established to review the investigations and circumstances of the 3,260 deaths attributed to the Troubles between 1968 and the signing of the Belfast Agreement in 1998. The HET considers all cases within this time period, not only the unsolved crimes. It is operationally responsible to the PSNI Chief Constable.
- 2.11 The mission for the HET is described as *'The HET works to provide as many answers as possible for families seeking information about their loved ones. It also hopes to identify new evidential opportunities especially where cases remain unresolved.'*³²
- 2.12 The Chief Constable of the PSNI introduces the work of the HET in the following manner: *'The Police Service of Northern Ireland is committed to achieving a safe and secure future for everyone living here. We will do that by providing a professional, effective policing service. But while we look with optimism to the future, few would suggest that we forget the past. Many people still have questions relating to violent deaths over a period of 30 years. These impact on our daily work as a police service, and on the lives of many hundreds, if not thousands of people. Families will sit at the heart of all of our enquiries. We have a simple message. We do care. We work in a determined and genuine way to meet our objective of bringing some measure of resolution to as many people as possible.'*³³
- 2.13 The HET is undoubtedly unique in policing and its work is also undoubtedly unprecedented. A considerable part of the HET's work crucially concerns the review of a case to answer family questions. However, when the HET identifies possible evidential opportunities which could lead to a criminal prosecution, the case is referred to the PSNI's SCB (see post) for criminal investigation. While the HET formerly followed up with some criminal prosecutions, this latter change was adopted in January 2010. At the time of fieldwork for this inspection the HET had referred 40 such cases to the SCB.
- 2.14 The HET allocates its work on the basis of chronological sequence, subject to exception, commencing with cases from 1968 and the early 1970's. It has 132 staff divided across nine teams. The latest polling commissioned and available at the time of inspection on the reaction of the families to HET work was very positive, despite some issues of concern continuing to be raised in some quarters. Over 90% said they were very satisfied or satisfied with the performance of the HET.³⁴ However, Inspectors also note and highlight the issues of concern underlined by HMIC in their inspection report on HET published in July 2013.

32 <http://www.psni.police.uk/historical-enquiries-team/het-background.htm>.

33 Matt Baggott, Chief Constable <http://www.psni.police.uk/historical-enquiries-team/het-introduction.htm>.

34 *Hansard*, 30 November 2011; Vol. 536, c. 919.

2.15 By the conclusion of fieldwork at the end of January 2013 of the initial 3,260 deaths subject to review by HET, 2,733 (or 83.9%) had been completed (or were in the course of completion). Of these the attributions were as follows:

- Republican - 1,594;
- Loyalist - 785;
- Security Forces - 313; and
- unknown - 41.

NB Please note the figures in relation to attribution in these deaths may change as reviews are completed.*

2.16 This leaves circa 527 (or 16%) of deaths to be started with cases commencing in 1984-85 being released for review around the time of fieldwork. Of course, this does not account for a number of previously reviewed cases in which there are ongoing issues. The latter was advised to amount to an additional 463 deaths. The total therefore remaining to be completed was 985 (at the end of January 2013).

HET impacts

2.17 Inspectors assessed that the impacts of the HET's work were two-fold:

- the issues arising for current policing from its work and primarily confidence in policing; and
- the satisfaction of substantial numbers of families who have been provided with answers and a measure of resolution.

Clearly, there are other impacts but these were considered to be more operational in nature and included, for example, the demand on the HET to provide additional information for inquests or for other legal purposes. While HET funding had been ring-fenced up until early 2013 funding at the time of reporting came from the PSNI's main grant. Cognizance of these continuing operational issues will have to be carefully assessed when the HET is due to have completed its review work and move off the stage in early 2015.

HET costs

2.18 In the financial year 2011-12 the costs of the HET were estimated at £5.85m and a similar cost in 2012-13 at £6.01m.³⁵ Funding for the HET was due to end in April 2013, however, recognising that the review of cases will not be completed by that deadline, an additional business case had been submitted at the time of fieldwork to extend the work until 2015. These additional two years are estimated to cost £13m after which all issues with the exception of ongoing criminal investigations, will transfer to the PSNI's Legacy Unit within the Legal Services Department. That brings the estimate of known costs going forward to £13m for 2013-14 and 2014-15 with £46.7m the cumulative HET expenditure to the end of the 2012-13 year. The grand total of expenditure is therefore estimated to be in the region of £59.7m. It may also be important to note that some significant costs related to the HET are absorbed by the PSNI and are not accounted for discretely. These include matters such as accommodation, security and transport. The hidden costs are likely to be considerable thus making the estimates of costs cautious.

³⁵ Figures as supplied by PSNI 1 May 2013.

Serious Crime Branch (SCB)

- 2.19 Responsibility for the re-investigation of legacy matters falls primarily to the PSNI's SCB. The SCB is customarily responsible for the investigation of all murders, stranger and adult rape offences, kidnaps, indecent images of children, terrorism investigations as well as all other 'complex and/or major' investigations referred to it. Clearly, this responsibility incorporates a high proportion of present-day risk of harm investigations. In doing so the SCB provides a 24/7 response capability. Consequently, the additional responsibility of large numbers of legacy investigations of the size and complexity of, for example, the Bloody Sunday enquiry, requires high levels of very specialist resourcing and can impact adversely on contemporary investigations and vice-versa.
- 2.20 The PSNI indicated to Inspectors that it allocates resources against threat, harm and risk. SCB reviews its priorities and resources on a monthly basis against these broad criteria which include the existence of live cases and the evidential opportunities existing alongside those legacy matters also under consideration. Senior officers responsible for this area pointed out to Inspectors that this was not simply a matter of allocating additional PSNI resources, but rather as a result of the need for specially trained officers with specific skill sets, prioritising among this small group of officers – primarily in the SCB. Inspectors found and saw clear evidence that such prioritisation required sometimes finely balanced decisions and very often competing demands. The PSNI decision making in this area was based primarily on the legal obligation to protect life from threat, risk and harm currently balanced against those legal obligations to investigate historical matters or disclose historical material. At the time of fieldwork, the PSNI was in the process of developing a prioritisation policy for its legacy investigations which Inspectors understand had been approved by the Legacy Gold Group. The policy was also subject to PSNI equality screening. However, Inspectors were also concerned that this was an introspective approach which failed to realise the benefits of broad stakeholder engagement and further to realise the benefits of public consultation, understanding and communication of the issues. This is also linked to the issues raised at paragraph 2.8.
- 2.21 While clearly not ruling out legacy matters for investigation, the evidence and implications were clear that legacy cases were unlikely to pose any current significant risks, whereas current cases and threats did so. Even within the realm of existing legacy cases, one senior officer referred to the dilemma of having to choose between the risks associated with Troubles-related legacy cases and other historical cases (for example, the murder of Inga Maria Hauser) in which it is clear that there is a risk of a serious sexual offender remaining at large while this case remains undetected. That is not of itself to question anything being done by the PSNI with regard to that particular case, but it does usefully highlight the kinds of dilemmas and operational decision making in which senior PSNI officers are regularly engaged.
- 2.22 In terms of resource allocation decisions it may also be helpful to consider some further case studies. One of these was the Claudy bomb investigation. Clearly, this was among the most serious and traumatic incidents of the Troubles in Northern Ireland. Its legacy in terms of the suffering of victims and their families is likely to be as real today as it was in 1972 when it occurred. However, SCB took over the investigation in early 2011 following a report by the OPONI. While some investigative work was undertaken and progress made, due to other ongoing work on 'live' cases the investigation was transferred to another PSNI unit in August 2012. At the time of inspection, the re-investigation remained open, but has since been suspended.
- 2.23 In the case of the murders of six men at The Heights Bar in Loughinisland in June 1994, one of the critical sub-units of SCB which reviews all murder investigations had been dedicated to conducting such a

review in this case. That review lasted almost 15 months. Consequently, no other reviews were being conducted during that time and this meant that a series of contemporary murder investigations had not had the benefit of such a review. This, it would seem, creates a significant risk that these contemporary cases will themselves become the legacy cases of tomorrow – a kind of zero sum choice for senior police leaders in the absence of the capacity (skilled human resources) to simultaneously manage these cases.

- 2.24 However, Inspectors also saw evidence that the difficulties and dilemmas were not unique to the PSNI. For example, Inspectors saw evidence in the case of one very large metropolitan force in England where no specific ‘cold case’ murder review unit exists and any re-investigations are undertaken alongside the work of the existing major investigation units. But importantly, and in common with the PSNI, giving priority to current investigations. By way of comparison in that force there were estimated to be some 666 murders for review in a 31-year period between 1980 and 2011 (or around 21 per annum). In another of the largest forces in Britain, the Major Crime Review Team (MCRT) was established to enable investigators to concentrate on unsolved serious crimes and ensure that current unsolved serious crimes were preserved evidentially for any future review/re-investigation. It was mainly responsible for reviewing and re-investigating undetected murders, serious sexual offences and other serious crime, for the whole force area. The MCRT in that case also had responsibility for reviewing current serious crime investigations, mainly murders, but also serious sexual assaults. Here the number of historical cases being looked at was 50 cases over 50 years (or one per annum). Whatever analysis is conducted, the key conclusion is that the level of review and re-investigation is unquestionably unprecedented for the PSNI.

Outcomes

- 2.25 Despite the unique challenges and bearing in mind the potential for delays and gaps in understanding for families, Inspectors would encourage the PSNI to examine how it can better communicate decisions and manage the expectations of the communities it serves. Such gaps are manifest in considering the public responses in a number of cases which simply referred to legacy cases being balanced against competing demands. The concerns arise in respect of the findings of Inspectors with regard to the absence of a publicly available policy which both sets out criteria for prioritisation and communicates decisions as to what the current priorities for legacy work might be. This includes their position in terms of current work and, secondly, within the overall framework of legacy related matters being considered by the PSNI. Inspectors were concerned that community confidence with regard to legacy matters was being adversely impacted by the absence of such a policy and its communication to the public.
- 2.26 One example concerned a fatal shooting referred by the Director of Public Prosecutions during Operation Motorman in 1972. The case was originally directed as no prosecution due to the available evidence being insufficient to meet the Evidential Test. However, following the subsequent inquest the PPS were, at the time of reporting, in the process of reviewing the decision and have requested the PSNI to carry out further investigations. Commenting on this case the PSNI were quoted by the BBC as saying the circumstances surrounding the fatal shooting must be ‘..balanced against the current workload of live investigations and the increased number of legacy cases under investigation.’ A similar statement was issued by the PSNI in respect of the continuing investigation into the Claudy bombings of 1972. The BBC reported for example, ‘Police say the investigation is still continuing but they say resources to complete the inquiry have to be balanced against competing current and historical demands within their caseload.’³⁶ Relatives were said to be ‘...angry that the police are not doing more to pursue the investigation’.

³⁶ BBC News, available at (<http://www.bbc.co.uk/news/uk-northern-ireland-19059183>).

- 2.27 Such comments and further evidence heard by Inspectors in interviews with a range of senior Officers clearly suggested that the absence of a clear prioritisation policy was a barrier to effectiveness. Inspectors found evidence of attempts in their various silos for different business areas to manage the demands, but there was a lack of corporate coherence and endorsement to this. This could illustrate the old adage that, *'If everything is a priority then nothing is a priority'*. Indeed, there has been some public criticism of the speed at which material was being supplied to the Coroners Service,³⁷ albeit at the time of fieldwork Inspectors were content that some steps had been taken to address the issues for the time being.
- 2.28 A number of conclusions can be drawn from PSNI statements on the example legacy cases above, not least the fact that the PSNI itself is recognising and attempting to advance the idea that the past is having an impact on current policing. Secondly, that the resources required to deal with these issues are insufficient to meet current operational demands and expectations. In terms of the prioritisation issue Inspectors draw attention to the fact that a possible model for prioritisation exists and has been put to public consultation by the OPONI. A further example is the CCRCs work *Priority Ranking and Ordering of Cases*.³⁸

Impacts

- 2.29 Following on from and supporting earlier comment, one senior Officer told Inspectors that the absence of a clear policy of prioritisation presented clear risks to public confidence. The same Officer referred to the impact on current ability to deal with the dissident republican threat when there was an expectation that the existing range of legacy work was also being addressed. Another senior Officer referred to the fact that as part of normal business planning and resource allocation, it was clear that resources were being applied to those areas where there was most risk of harm. There was also an emphasis that the kinds of specialist resources required were 'finite' and that the situation was not assisted by difficulties with the temporary re-employment of former detectives.
- 2.30 Many of the PSNI operational Officers spoken to referred Inspectors to the 'carousel' of legacy matters going round in a circle between investigation, the PPS, courts, inquest, and back to police for further investigation. This was often quoted as a serious impediment both to operational policing of current threats and confidence in the PSNI. This confidence was said to be particularly impacted by the difficulties with prosecution in historical cases (due to lack of evidence including the availability and credibility of witnesses). Another senior Officer referred to these legacy cases as *"quicksand"* in which the PSNI was continually being pulled down. The same Officer also commented in respect of legacy matters, *"This is an ever increasing operational demand"*. However, in balance, there was equal clarity from the PSNI regarding their intent to meet statutory and moral obligations to investigate serious crime. It was also recognised that there are case specific issues and legal obligations to be met.
- 2.31 The re-investigation of historical matters (including matters referred by the HET) are allocated amongst the existing Major Investigation Teams (MITs) and are conducted alongside other ongoing work with a split of roughly 60% current and 40% historical. SCB was estimated to spend circa £8.65m (40%) of its overall budget on historical matters which underpins the above estimate. The five year costs in this area are estimated at £45.5m. In addition, the most senior Officer in SCB estimated that some 50% or more of

37 See minutes of the meeting of the Policing Board's Human Rights and Professional Standards Committee meeting held on Thursday 8 November 2012 9.30am in Waterside Tower, Belfast.

38 Available at <http://www.justice.gov.uk/downloads/about/criminal-cases-review/policies-and-procedures/casework/priority-ranking-ordering-cases.pdf>.

his time was dedicated to the strategic management of legacy issues given their complexity and sensitivity. While the HET was segregated and funding had been subject to change, this was clearly not the case for SCB. Inspectors considered that this could be one of the causal factors in the continuing operational dilemmas on the prioritisation of cases between legacy and contemporary cases. A dedicated resource would remove such a predicament but, unless significantly further resourced, it would not of itself deal with delays. Considering these issues as a broader case study, Inspectors would encourage the various independent elements of the criminal justice system to consider how, within existing frameworks, work on legacy matters can be separated as far as possible and resources set aside to enable this work to be progressed without intrusion. Alternatively, strong intra-agency governance frameworks with single lines of reporting could assist. This observation may be linked to Inspectors assessment and area for improvement highlighted at paragraph 3.7.

PSNI Legal Services Department

2.32 The PSNI Legal Services Department is responsible for a number of distinct areas of work concerning legacy matters. These fall into two broad areas including:

- historical disclosure; and
- civil litigation.

2.33 The relevant requests for disclosure arise from a number of sources including:

- public inquiries/tribunals;
- the Coroners Service;
- the defence in criminal proceedings;
- civil litigation cases; and
- freedom of information requests.

2.34 The disclosure process itself is often a complex matter and, in common with investigations, competing obligations arise here too. The PSNI are obliged to disclose the material in many instances and also have to carefully consider all the material both individually and collectively against Article 2 risks and the common law duties concerning national security described earlier. For example, in one recent inquest material to be considered consisted of 30 boxes containing circa 75,000 pages. Staff working in this area who were consulted by Inspectors emphasised the need for consistency of approach to all requests and the fact that this was complicated by the PSNI having no control over the number and timing of such requests. Clearly, therefore the process is detailed and time-consuming as a result. As with other areas of work, this depends on a small number of skilled individuals with an in-depth knowledge of the issues at stake and the risks involved. At the time of fieldwork, the PSNI was dealing with disclosure in 45 legacy inquests, and two significant high profile tribunals/reviews.

2.35 In addition, the Legal Services Department provide a number of other services and, for example, has five lawyers and an administrative team, working on civil litigation cases. Many of the cases can be said to touch on legacy matters including post traumatic stress disorder and hearing loss. There is an additional cost in terms of the work of the PSNI Human Rights Legal Advisor who invariably spends a percentage of his overall time on legacy related issues.

2.36 The work of the Legal Services Department is prioritised and staff there advised that insofar as the disclosure of material is concerned, in addition to deadlines and time limits usually set through Judicial direction and the rules of the court, the PSNI imposed their own deadlines and precedence where appropriate. Operational legal advice is prioritised in the first instance and two legal staff are dedicated to this. It was also clear that staff saw a benefit in the work of the Legal Services Department being somewhat detached from the PSNI with legal staff acting in the first instance as ‘officers of the court’. Once again, in common with other areas Inspectors heard that the issue was not simply one of allocating additional staff, but rather one where the expertise of the limited staff meeting those requirements needed to be matched to the work.

Legal Services Department costs

2.37 Legacy support as part of the Legal Services Department incurs annual costs of £1.43m. It is reasonable to assume that similar costs will be incurred in the immediate future years (Comprehensive Spending Review (CSR) period). This is added to by other areas of the Legal Services Department at £0.7m bringing the current total estimated costs to £2.13m per annum.³⁹ Adding an inflationary figure of 2.7%⁴⁰ for future years the five-year costs would be £11.24m. Readers should note that these costs are incorporated in the overall PSNI estimates.

Other PSNI costs

2.38 The costs associated with the Murder Archive Store and a range of services and equipment in support of the HET are borne by the Finance and Support Services Department. In terms of the former it was estimated that some 85% of costs were related to legacy matters and totalled some £445,000. Overall costs in the Department, including the Murder Archive Store, totalled £995,000⁴¹ with projected five-year costs at £7m.

2.39 Inspectors found during the course of fieldwork and in consultation with some senior PSNI Officers, that a further additional un-assessed and hidden cost in terms of the PSNI self-assessment was that incurred in its district command structure. It was clear that in a number of instances the costs and the impacts are absorbed without fanfare as part of core business and in an effort to provide a comprehensive and responsive service. One good example concerned local police being contacted by the daughter of a man shot and injured in the early 1970s and who had recently died. Following a period of research, the local District Commander and Crime Manager met with the woman to provide her with some answers and a measure of closure. This was a case which would not have been dealt with by the HET given that its mandate is to investigate only matters where a death occurred.

2.40 A second feature of the work of district police is in facilitating requests for information from a range of sources regarding material connected to legacy cases. It was clearly the case that despite previous trawls and systems to recover material held by local police districts (or formerly sub-divisions), that requests to ensure all material sources of information were exhausted, there were continuing requests for searches which had to be completed.

39 PSNI self-assessment and report, *Policing the past, present and future – examining the past and keeping people safe today and in the future*, December 2012.

40 The Office for National Statistics, Consumer Prices Index (CPI) annual inflation stood at 2.7% on 15 January 2013.

41 PSNI self-assessment and report, *Policing the past, present and future – examining the past and keeping people safe today and in the future*, December 2012.

- 2.41 The costs associated with this were not addressed by the PSNI in its self-assessment for this review and are difficult for Inspectors to calculate, but would not be considered to be so significant as to warrant further work for this review. It is sufficient to note that this is a further cost which is un-assessed and unmet.
- 2.42 The most significant issue in terms of legacy matters for district policing was the impact on contemporary policing. The persistent intrusion of the past, insofar as public perception for many was concerned, and the related media reporting of it was clearly an issue for district policing. This manifested itself in tensions and difficulties in police engagement in already difficult and traumatised communities where existing pressures were intensified. Relationships within communities and with police were clearly not assisted by the reversion to history and a perception in some quarters of an unrepresentative focus in legacy cases. This is despite the satisfaction of the vast majority of those who come into contact with the HET. In other words, it was clear that current policing was being shaped by the tensions within and among communities created by how the past was being handled.

Overall PSNI costs

- 2.43 Inspectors were informed that the overall costs of legacy issues for PSNI 2012-13 were estimated at £25.1m per annum⁴² (and of course rising at current estimates of some 2.7%). That would bring a five year cost to £132.4m.
- 2.44 On the basis of the current allocated budget for 2012-13 of £843.2m⁴³ that represents an overall resource utilisation of very close to 3% (2.98% actual) per annum. However, there clearly is a much more acute and disproportionate impact on the much smaller resources of for example the SCB where, as we say, some 40% of capacity is being utilised on legacy matters, and of course in Legal Services Department too.
- 2.45 Inspectors were of the view that the actual costs were greater than the above estimate. For example, the PSNI estimates did not include overhead costs, opportunity costs or other costs in a range of areas. In addition to the costs of research being borne in Crime Operations Department and some limited district policing costs, there were also for example, the costs of senior staff who spend considerable amounts of time in these areas. There were also considered to be a range of other hidden costs although these are particularly difficult to calculate as often staff spend only part of their time working on legacy related matters. However, the cumulative effects could add some noteworthy additional costs overall. It is therefore fair to conclude that these estimates are moderate but not considerably misjudged.
- 2.46 Readers should note that the overall costs include the core funding costs for the HET. This is reflected in Table 1 to avoid double counting.

OPONI

- 2.47 The OPONI provides an independent, impartial system for the handling of complaints about the conduct of Police Officers. The Office was set up by the Police (Northern Ireland) Act 1998 in order to provide an independent system for investigating complaints against the police in Northern Ireland. The overall aim of the Police Ombudsman's Office is stated as '...to provide an independent and impartial police complaints service in which both the public and the police have confidence.'⁴⁴

42 PSNI self-assessment and report, Policing the past, present and future - examining the past and keeping people safe today and in the future, December 2012.

43 Northern Ireland Policing Board, 15 March 2012.

44 Management Statement for the OPONI available at <http://www.policeombudsman.org/Publications/uploads/MSFM.PDF>.

- 2.48 The OPONI deals with around 3,000 complaints per annum in respect of matters touching on policing both historical and contemporary. In respect of the historical matters dealt with by the OPONI it was clearly never envisaged on inception of the Office that it was to become so heavily involved in such matters. Indeed, Lawther⁴⁵ has stated, *'In the absence of a truth recovery process, Ellison (2007:261) has argued that the OPONI has assumed a 'dual mandate', taking on the role of a surrogate truth recovery vehicle' by launching a number of investigations into past RUC activities, alongside dealing with day-to-day complaints against the PSNI.'* The former Police Ombudsman in evidence to the Northern Ireland Assembly has also stated, *'...the Office of the Police Ombudsman was not set up to be a proxy for resolving the wider unresolved legacy issues, yet it finds itself cast in that role and driven in that direction by a lack of an agreed resolution on how to deal with the past.'*⁴⁶ Nonetheless, in common with other areas of the criminal justice system Inspectors found a manifest determination to deal with those legacy matters referred to the OPONI.
- 2.49 Overall, some 39 staff are dedicated to historical/legacy work in the History Directorate. They are further assisted by the other core structures of the OPONI including legal, media and corporate services as well as senior management. The OPONI Historical Enquiries Directorate has an average core funding revenue of circa £2.08m per annum with an estimated five-year cost of £10.9m. The current annual costs constitute some 28% of overall OPONI revenue (average £6.25m over the 2012-13 and 2014-15 period). This includes additional revenue provided on the request of the Police Ombudsman.⁴⁷ It was also clear to Inspectors that the transmission of work to the PPS from the OPONI investigations was limited. Few cases result in referrals and while the work of the OPONI Historical Directorate was suspended between September 2011 and January 2013, in the last three years only four cases have been referred for consideration. At the time of fieldwork three were awaiting decisions by the PPS while the remaining case will not proceed to prosecution.⁴⁸ It was also the case that no successful prosecutions had occurred relating to legacy investigations conducted by the OPONI.
- 2.50 The OPONI has had a dedicated resource looking specifically at historical matters since 2005-06. In order to deal with the numbers of historic investigations arising the OPONI created the structures described and were provided important additional funding. However, its full team of investigators were not in place until January 2013, following the submission of additional funding bids and the recruitment of specialist staff.
- 2.51 Only a small percentage of the overall number of complaints relate to historical matters with, for example, the Police Ombudsman stating there were some 150⁴⁹ such investigations in January 2013 (or circa 3-5% of overall totals).⁵⁰ However, given their nature and the complexity of many of these, the level of resources which need to be applied to them is disproportionate. For example, the proportion of cases is 3-5%, whereas the proportion of overall budget allocated to the History Directorate is around 28%.
- 2.52 While the current funding for the OPONI is predicated on a six-year period, the Office has advised Inspectors that it will deal with eight complex cases (incorporating an average of 12 linked matters) and

45 British Journal of Criminology, Volume 50 Number 3, Lawther C, Securing the past; policing and the contest over truth in Northern Ireland, May 2010.

46 Official Report (Hansard), Northern Ireland Assembly Justice Committee 8 September 2012 available at <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Committee-Minutes-of-Evidence/Session-2011-2012/September-2011/CJINI-Report-on-the-Police-Ombudsman-Ombudsman/>.

47 The business case for an enlarged Historic Investigations Directorate in the Police Ombudsman's Office was approved in March 2012.

48 A case not proceeding to prosecution will be as a result of not meeting the test for prosecution.

49 Some of these will be linked cases incorporated in one overall investigation, therefore actual case numbers are closer to 90.

50 Statement by the Police Ombudsman 23 January 2013 available at

http://www.policeombudsman.org/modules/press/press.cfm/Press_ID/329/action/detail/year/2013/month/1.

72 others within its six-year business case. The OPONI accepts that *'should the organisation attract a significant number of additional complaints or referrals relating to historic matters, this timescale may be unachievable.'*⁵¹ Inspectors emphasise that the OPONI is planning to complete the historical caseload within the life of the approved project (six years). However, Inspectors would emphasise that should there be any slippage to this (as is already being indicated by the increased number of historical complaints and issues reflected in paragraph 2.55), this would further raise concerns regarding the impact on victims/families most especially where significant time has already elapsed.

- 2.53 The OPONI was at the time of inspection developing a case prioritisation policy in recognition of the sensitivity of the issues arising for families. At the time of fieldwork a draft policy was available on the OPONI website.⁵² This had been in development for a significant period (prior to the current Police Ombudsman taking up post) and recognises that with the caseload currently in existence, it could take a significant number of years to complete the work required. However, Inspectors now understand that this prioritisation policy was formally adopted on 31 January 2013. This approach also follows the long standing OPONI desire of maintaining the quality of its investigations.
- 2.54 The OPONI has always acknowledged there would be costs beyond the period of its business cases and allocated funding. However, using the analysis of the full timeline of current legacy cases above and the annual average costs in CSR10 (and using a 2.7% inflationary rise but without any other fluctuations) the costs in respect of these legacy cases could reach over £13m (i.e. current average cost per annum [£2.08m] x 2.7% x six years). Clearly, these are significant ongoing costs and while funding has been allocated to the end of the current CSR period the work of the Historical Directorate will undoubtedly continue beyond that period meaning that these estimated costs are conservative and will be likely to prolong.
- 2.55 The OPONI has additionally indicated that the validity of assumptions made in respect of funding of the Historical Directorate in relation to the numbers of complaints received remain to be tested. OPONI staff have indicated that the average number of historical complaints received between 2001-08 was 10, whereas the number of complaints in 2012 was 55 representing a very substantial increase. There is also a pattern beginning to emerge of the re-opening and overturning of previous findings and investigations of the former Police Ombudsman⁵³ which will add to the investigative demands. Inspectors were also advised that the progress of historical investigations may also be significantly slowed by those where there is a need to conduct parallel investigations alongside the PSNI. Much of the latter is outwith the control of the OPONI, but it will nonetheless have to respond. In addition, Inspectors understand that the OPONI have sought some legislative changes which could, if agreed, bring a significant number of additional cases within its scope. The OPONI have themselves estimated that this could increase the overall caseload by some 30%. Consequently, Inspectors assessed that the current funding and timelines appear critically fragile.
- 2.56 In addition to the allocated costs outlined, there are further significant unallocated costs for the OPONI which include accommodation and the investment of time and resources of the executive staff of the Office of the Police Ombudsman. Inspectors were informed that a disproportionate amount of executive time is spent on these historic cases simply as a consequence of their complexity and the controversy which usually surrounds them. It is estimated that a considerable proportion of the time of senior staff

51 Ibid.

52 Available at <http://www.policeombudsman.org/publicationsuploads/Draft%20Historic%20Case%20Prioritisation%20Policy.pdf>.

53 The murders of six men at The Heights Bar in Loughinisland and the murder of Mr Denis Donaldson.

including the Police Ombudsman, the Chief Executive, the Legal Advisor and others is impacted in this way. This and other unallocated costs could reasonably be estimated to incur further costs beyond those described and in addition to the opportunity costs which will be discussed later. In addition, further business cases were also being prepared in relation to an investigation being conducted in conjunction with the PSNI concerning an assisting offender under the Serious Organised Crime and Police Act 2005.

- 2.57 As with many other public sector organisations, the OPONI is facing some budget cuts in the current CSR period and beyond. In addition, current budget allocations do not include any inflationary resilience and are therefore, in real terms, reducing.
- 2.58 In terms of opportunity costs it is clear, as we have already highlighted, that the structures of the OPONI were not designed to address the now significant (and growing) number of such cases being examined by that Office. The impacts and hence the opportunity costs can be demonstrated in terms, for example, of the time devoted by executive staff to the historical matters under investigation. This is not time spent on examining current cases and driving improvements to contemporary policing. It is also relevant to point out that the controversies of the past into which the Office is inevitably drawn risks the framing of that Office in the minds of the public as being concerned primarily with the past, rather than being about good policing today. Of course, there are also parallel risks in terms of policing as we have also earlier outlined.

FSNI

- 2.59 The FSNI is an agency within the DoJ and currently employs approximately 200 staff, all civil servants, of whom roughly 65% are scientists directly involved with casework. The mission of FSNI is to provide effective impartial forensic science to support justice.
- 2.60 In terms of dealing with 'the past', FSNI has a Memorandum of Understanding (MOU) with the PSNI's HET and this provides for one lead scientist (70% full time equivalent) dedicated to the work of the HET together with one scientific officer (as office manager) and one administrative assistant. These staff members are largely funded as additional under a memorandum of understanding with the HET, however, some backfill was required for other FSNI staff. In addition a 57% overhead is applied to include costs such as the use of financial, human resources and other integral FSNI staffing, as well as office space, furniture, heating and lighting etc. Forensic work is invoiced separately and is provided for within the overall HET budget. Consequently, there are no additional costs to FSNI or to the criminal justice system.
- 2.61 A number of other historical or legacy related costs are incurred by FSNI and these include matters such as the provision of files, papers, statements and repeat examinations and reporting of casework conducted by former staff as well as some court (including inquest) attendance. Included within this will be requests from a number of PSNI branches and sub-units. Also, historical or legacy inquests give rise to additional work for FSNI. This work and the costs are usually absorbed within either (a) the funding provided by PSNI or (b) as part of the funding from parent/sponsoring DoJ which stood at £1.22m⁵⁴ in 2011-12.
- 2.62 A further work-stream will include additional work requested by the PSNI's SCB in re- investigation of legacy matters referred to it. Usually, such requests will be dealt with in the context of core business and PSNI funding not separately accounted for.

⁵⁴ FSNI Annual report and Accounts 2011-12.

2.63 In terms of legacy costs, FSNI has indicated that the actual expenditure in 2011-12 was £176,945. The actual costs in 2012-13 were £199,704. Given the average of these costs plus and inflationary rise of 2.7% Inspectors have calculated that the FSNI costs for the next financial year will be circa £205,000 but FSNI staff have indicated that this is more likely to reach in excess of £300,000 given that more examinations items are expected to be available as the chronological processing of cases by the HET reaches later years where forensic exhibits are more readily available.

However, this does not take account of the additional costs absorbed within current funding and which are not separately accounted for. It is expected that these costs will be met within existing allocations under the HET MoU which has anticipated increasing forensic costs and has also been under-spent in previous years.

2.64 However, overall all costs are absorbed within funding streams already discussed and allocated elsewhere in this report. Nevertheless, they are highlighted above for the avoidance of doubt, but are not included in final summaries so as to avoid double counting. There are also some minor variances in the PSNI estimates of forensic spend and Inspectors have used data supplied by FSNI. The variances may be accounted for by forensic examinations conducted outside of FSNI or by work which straddles accounting years. In 2012-13 the variance was circa £20,000.

2.65 It is not anticipated that legacy matters will have a significant impact for FSNI going forward.

PPS

2.66 The PPS was established by the commencement of the Justice (Northern Ireland) Act 2002. The Act defines the PPS, its statutory duties and commitments, and the legislative framework within which it provides its services. The PPS decides whether or not to prosecute individuals for criminal offences. It decides what the correct charges should be and is also responsible for prosecuting the case at court.

2.67 In terms of its work on legacy matters the date of offence has no significant bearing on the obligations of the PPS. However, it is clear that in many of the legacy cases the subject of this report, that the high degree of controversy and complexity which surrounds them and the consequent public interest all mean that the prosecutorial work required will often be quite resource intensive. Frequently this may also mean the re-allocation of some resources.

In addition, PPS staff very often provide prosecutorial advice to police at an early stage of investigations. It is also common for independent Counsel to be engaged at this early stage. The complexities and resource issues can also be extended by the PPS investment in meeting families, dealing with the media and challenges to some decisions. Some case study examples which illustrate the costs and the complexities are presented post.

2.68 Once again, in common with a number of other areas of the criminal justice system, the PPS does not receive any direct funding for these legacy cases and absorbs the fluctuations in casework demand. Neither is the PPS structured in a way in which legacy matters can be isolated either in terms of costing or practically in terms of structure, albeit that the vast majority of legacy cases will be dealt with by its central functions such as central casework and the High Court and international sections, rather than in its regional offices.

- 2.69 The PPS has estimated that the current average cost of dealing with legacy issues is £342,500 per annum. The five-year costs plus inflation at 2.7% are estimated at £1.8m. This estimate is based solely on the staff resources employed to consider and support this work. The number of legacy cases that have proceeded to court while small, attract considerable costs and these have not been included in the annualised costings. For example, the cost of independent Counsel alone in the prosecution of R - v - Haddock and Others was £350,000⁵⁵ and was incurred in the year ended 2011-12. These costings will obviously be subject to fluctuations on the basis of the number and nature of future cases. The likelihood of future cases is itself subject to some conjecture, however, on the basis of current assessments it is likely that there will be a relatively small repository of legacy matters flowing through to the PPS. Examples of some such cases are reflected in case illustrations 1 and 2 post. It may also be expected that a small number of these will be of the sensitivity and magnitude requiring the re-allocation of resources and again examples are reflected in case illustrations 3 to 5 post. It was also clear to Inspectors that the complexities of many of these legacy cases are not included in the PPS average case costings; given that these issues are dealt with at senior management level – a common feature across the criminal justice system.
- 2.70 In terms of future cases, based on an estimate of the number of cases referred by the PSNI's HET and or SCB since its inception to date, Inspectors assess that only a very small number of cases are likely to be referred to the PPS. With some 1,025 cases left to review or remaining under investigation by the HET and SCB and a further 150 cases being investigated by the OPONI, the likelihood of 10% of these reaching the PPS would leave some 117 cases to be referred while 5% would see some 59 cases referred. However, on the basis of the actual numbers of HET cases referred as a percentage of those reviewed until the end of 2012 (at 0.2%), this would leave only three cases reaching the PPS. While it is impossible to be precise about the actual numbers, Inspectors considered that a 5% proportion would be a safer assumption. This is based on an experiential assessment and some knowledge of cases likely to be referred. Nonetheless, this would amount to no more than a 'trickle' and at 5% of the known caseload⁵⁶ would represent 0.6% of the overall serious caseload of the PPS. However, as we observe earlier the cases which do reach the PPS will tend to be complex and may require individual resourcing decisions. Further, those which proceed to court might well require considerable expenditure on the services of independent Counsel.
- 2.71 While the cost to the PPS is unexceptional in terms of the criminal justice system, it is also worthwhile noting that the PPS is facing challenging budget settlements in the current year and into the future. On the basis of a real terms reduction of 18% by the end of 2014-15 it is inevitable that reviews of expenditure and operational processes are required. In addition, it was clear that the numbers of Crown Court cases being referred to and prosecuted by the PPS are showing a noteworthy increase. Comparing the total of actual and outstanding cases for the period January - October 2011 and for the same period of 2008, it is clear that the increase was in the order of 27%.⁵⁷ However, the last available quarterly statistics indicated that there was a drop of 15.9% in indictable files in the first half of 2012-13.⁵⁸ While the statistical data will vary dependant upon what criteria are used, these issues and fluctuations, set against the fiscal pressures could have an impact on legacy matters and/or require further decisions regarding the re-allocation of resources. But, Inspectors did not consider that legacy matters alone would have any momentous bearing overall.

55 PPS estimate.

56 The total number of files received by the PPS in 2011-12 was 51,398 of which 5,847 were case weight categories 1-4 (in other words more serious, generally indictable, cases).

57 See Written Answers to Questions, Official Report (Hansard), AQW 18114/11-15, Northern Ireland Assembly.

58 PPS news release, 15 November 2012.

2.72 Of course a statistical analysis alone does not take into account the magnitude of some of these cases or the resources for the PPS, for example, in considering matters referred which do not result in prosecution but incur considerable time and effort. However, considering a varied range of cases (prosecution/no prosecution and cases under consideration), it may be instructive to reflect on some instances by way of example:

Case Illustration 1

Ms Eileen Doherty was shot dead by loyalists at Annadale Embankment on 30 September 1973. The case was reviewed by the HET and this resulted in the transfer of the case to PSNI's SCB and the charging of Robert James Shaw Rodgers with her murder. The PPS provided prosecutorial advice to police at key stages and given the historical nature of the case there were complex legal issues arising from the fact that some witnesses, including experts, had died. This also resulted in a number of legal hearings prior to the commencement of the trial.

In February 2013, Robert Rodgers was found guilty of the sectarian murder and sentenced to a tariff of 16 years. However, under the Belfast Agreement he is expected to serve around two years.

Case Illustration 2

On 3 February 1973 two gunmen entered the business premises of Mr Alfredo Fusco at York Road, Belfast and shot him through a door to a storeroom. Following review by the HET, re-investigation and prosecutorial advice from the PPS, Robert Clarke was charged with Mr Fusco's murder. The subsequent prosecution of the case involved a number of legal arguments including a submission by the defence that the bringing of proceedings constituted an abuse of process. However, following trial the defendant was convicted and sentenced to a minimum of 25 years in April 2011. This then led to an Appeal Court hearing citing, among other issues, the passage of time as the grounds for appeal. The appeal was unsuccessful.

The trial Judge noted in sentencing Clarke to a minimum of 25 years that under the Northern Ireland Sentences Act introduced as part of the Belfast Agreement he would be expected to serve substantially less than that (around two years).

Case Illustration 3

R -v- Haddock and Others

This was the prosecution of 13 defendants concerning the murder of Mr Thomas English and other associated offences arising from the evidence of two assisting offenders. The trial lasted for over six months and culminated in February 2012 in the acquittal of 12 defendants while one was convicted of possessing items intended for terrorism.

Notwithstanding the cost and resource issues for other agencies, in terms of prosecution, the PPS dedicated a Senior Public Prosecutor to work full time on this case for two years. This was the first time the evidence of an assisting offender was used in an historical case. The case involved complex disclosure issues without existing precedents and there were numerous legal arguments prior to the commencement of the trial.

*The overall estimated PPS costs for this case were £520,000**

* This does not take account of overhead costs (for example, accommodation etc) but does include Counsel fees. Other criminal justice costs were estimated to be circa £12m.

Case Illustration 4

The Stevens Enquiry

These were three inquiries led by Lord John Stevens concerning collusion in Northern Ireland. The inquiries generated over one million documents and was then the largest police investigation in the UK. The PPS assigned an Assistant Director to work on the prosecution issues arising from these inquiries; some of which were at the extremes of legal complexity. In total the resource was allocated for seven years and it is estimated that five years were full time work for this senior staff member. Eight prosecutions resulted.

*The estimated PPS costs for the final (Stevens III) case were £384,000.**

* This estimate does not include Counsel fees nor the costs of the resulting eight prosecutions. It is therefore a conservative estimate.

Case Illustration 5 The Saville Enquiry

The Bloody Sunday Inquiry, also known as the Saville Inquiry, was established in 1998 after campaigns for a second inquiry by families of those killed and injured in Derry/Londonderry on Bloody Sunday. Following the inquiry findings, the PPS considered the report to determine the nature and extent of police enquiries and investigations required to enable informed decisions as to prosecution to be taken. This resulted in an Assistant Director being assigned to this work continuously for a period of some 18 months.

* Given that PSNI are now re-investigating this matter it is likely that further considerable costs will be incurred in the future.

- 2.73 While the overall estimated average costs per annum for the PPS were £342,500 that represents 0.9% of the overall PPS budget. Once again, in common with other areas and bearing in mind earlier comments as to the allocation of legacy work, it is clear that the impacts are greater in specialist areas than such a figure would suggest. However, the overall PPS percentage of costs at approaching 1% is less than the PSNI at close to 3%, but considerably less than OPONI at over 13% of overall allocations.
- 2.74 Reflecting the issues and in particular the question of resource allocation, the Director of Public Prosecutions in Northern Ireland is on record as saying *'I think there is an imperative in the public interest that society finds a mechanism to deal with the past. Whether that simply be giving more resources to the investigators to get on with investigating, and then consequentially the prosecution service to prosecute cases if the evidence emerges, or whether or not society is ready for a solution to the past outside of the prosecutorial system, is a matter that I think society needs to confront. In my view the sooner it confronts it the better, but confront it, it needs to'*⁵⁹
- 2.75 To summarise this examination of the costs and impacts for the PPS, it is evident that the costs and impacts of legacy matters are currently absorbed within the existing frameworks and budgets. This means that fluctuations in demand are managed contemporaneously in the light of other work and budget pressures. The models in existence do not support either detailed costing or detached management. However, that is not a negative commentary suggesting any fundamental change. It does

59 Barra McGrory QC, Director of Public Prosecutions for Northern Ireland quoted in Belfast Telegraph, 2 February 2012.

inevitably point to the fact that managing these legacy cases in a structure which was not designed to do so and without impact on other core business while occasionally testing does not represent a critical dilemma.

Youth Justice Agency (YJA)

- 2.76 On 1 April 2003 the YJA was launched as an executive agency following the Criminal Justice Review 2000. It replaced the former Juvenile Justice Board. The YJA aims to make communities safer by helping children to stop offending. The Agency works with children aged 10-17 years who have offended or are at serious risk of offending. The Agency also provides a range of services, often delivered in partnership with others, to help children to address their offending behaviour, divert them from crime, assist their integration into the community and to meet the needs of victims of crime.
- 2.77 Given the nature of the Agency's mandate there are no implications in terms of legacy cases the subject of this report. Consequently, no costing or assessment of implications are applicable.

NICTS (including Coroners Service)

- 2.78 The NICTS is an Agency within the DoJ sponsored by the Access to Justice Directorate. The role of the NICTS is to:
- provide administrative support for Northern Ireland's courts and tribunals;
 - support an independent Judiciary;
 - provide advice to the Minister of Justice on matters relating to the operation of the courts and tribunals;
 - enforce civil court judgments through the Enforcement of Judgments Office;
 - manage funds held in court on behalf of minors and patients;
 - provide high quality courthouses and tribunal hearing centres; and
 - act as the Central Authority for the registration of judgments under certain international conventions.
- 2.79 Much of the work of the NICTS insofar as it relates to legacy matters touches primarily on two main areas:
- the court costs associated with the prosecution of legacy matters post investigation; and
 - legacy inquests dealt with by the Coroners Service.
- 2.80 One of the first issues to note in terms of the work of the Coroners Service and indeed the Courts Service insofar as legacy matters is concerned is the difficulty in estimating the numbers of cases with which it will have to deal. A second complexity is the nature of these cases. While it will be appropriate to suggest that the vast majority (if not all) prosecution cases will be matters to be dealt with in the Crown Courts, it is largely impractical to assess the nature of these cases and the time involved. In the Coroners Courts while it is somewhat more straightforward, it is not unproblematic.

Inquests

- 2.81 While the NICTS is able to estimate the numbers of legacy inquests outstanding at any given date there clearly are cases where the Attorney General may well direct new inquests to be held and the time required for each hearing are significant unknowns.

2.82 An examination of the Annual Report of the Attorney General for Northern Ireland indicates the following in respect of requests for fresh inquests and which is relevant in the context:

'When my 2010-11 annual report was published last year 23 requests were still under consideration. Of these the Coroner has now been directed to hold an inquest in 14 cases; in five cases I determined a fresh inquest was not advisable; two cases are still under consideration; and in the remaining two cases the initial notice of intent has never been progressed to a formal request for an inquest.

During 2011-12 I received 18 requests to direct an inquest under section 14 (1) of the 1959 Act. The Coroner was directed in two cases to hold an inquest; in four cases I determined a fresh inquest was not advisable; 11 cases are still under consideration; and one request was withdrawn. In a further five cases the initial notice of intent has not progressed to a formal request for an inquest.

In November 2011 I directed that new inquests be held into the deaths of 10 civilians killed in the course of Army activity in Ballymurphy in 1971. Following months spent examining extensive written submissions and other papers I decided that new inquests would be advisable.

As I observed in the preface to this report, inquests by themselves cannot provide a comprehensive solution to the troubled past of Northern Ireland. Inquests are undoubtedly valuable – and in some cases are clearly required by Article 2 ECHR – but they cannot, it seems to me, deliver satisfactory outcomes for families whose primary wish is to see successful prosecutions, nor can they offer an effective vehicle for the exploration of broader themes and factors that have shaped our recent past.⁶⁰

2.83 Clearly, while not all of these requests will be related to legacy matters, a reasonable assumption to be drawn from a cursory analysis confirms the view that there will continue to be a noteworthy work-stream insofar as new inquests are concerned. For example, the Attorney General has already ordered new inquests in a series of legacy cases including, for example, the following:

- death of Mr Francis Bradley near Toombridge in 1986;
- death of Mr Danny Doherty at Gransha Hospital in 1984;
- death of Mr Gerard Casey at Rasharkin in 1989; and
- death of Mr Gerard Slane at Falls Road, Belfast in 1998.

2.84 Indeed, Northern Ireland's Attorney General has commented that inquests will be *'...front and centre...'*⁶¹ in dealing with past. However, there are also some ongoing legal challenges the outcome of which may very well have implications for the inquest system.

2.85 However, bearing all these complexities in mind, it is nonetheless possible to forecast some costs on the basis of the present certainties. The NICTS has itself already looked at the issues surrounding the numbers of legacy inquests as yet unheard and has developed helpful 'high level overview' papers for discussion on the way forward insofar as these legacy inquests are concerned. Some of the extant difficulties surrounding inquests from a coronial point of view concern:

- delays in the disclosure of material by interested parties – this can for example raise issues regarding the Article 2 and 8 rights of other parties/individuals;

⁶⁰ Attorney General for Northern Ireland, Annual Report 2011-12 available at http://www.attorneygeneralni.gov.uk/annual_report_2011-12_final_.pdf.
⁶¹ The Detail TV, 19 June 2011.

- legal challenges and subsequent delays have inevitably been caused by satellite legal processes such as Judicial review. Many cases have led to legal challenges surrounding anonymity, screening, disclosure and indeed the impartiality of the Coroner. The latter all clearly impact on case progression:
- the adversarial nature of the proceedings lead to delays;
- witness availability and engagement;
- the need for facilities capable of dealing with significant amounts of protectively marked material;
- courtroom facilities to cope with the demands of a complex and long running inquest - and the impact on other court business as a result; and
- the need for digital evidence presentation facilities and the costs arising.

2.86 However, the NICTS estimate that to bring the current known legacy inquests to a conclusion over the following four years the headline costs were estimated at the time of reporting at £22.9m. This estimate of costs includes:

- personnel costs at £4.3m;
- shared costs (technology, document management and transcription) at £8m;
- individual case costs (including jury costs) at £5.1m;
- legal aid exceptional grant costs at £3.8m;
- witness costs at £1.2m; and
- other costs (e.g. forensic testing and other litigation) at £0.5m.

NB Inspectors note that further new inquests being directed, as discussed elsewhere, inquests heard with the potential for additional litigation including judicial reviews arising would be likely to change these overall estimates. Current indications are that there is likely to be a significant increase in the number of legacy inquest cases with resulting increases in costs. These may arise from HET enquiries and further referrals from the Attorney General. In addition, recent European Court of Human Rights judgements and judicial reviews may also impact on costs.*

2.87 The NICTS has also developed a cost model based on one controversial legacy inquest heard to date (Martin McCaughey and Desmond Grew) which itself is estimated (at time of writing) to have cost £1,356,180.⁶² When legal costs for the Ministry of Defence and PSNI are excluded this brings the NICTS costs to £672,917. Inspectors would emphasise that there is a significant series of variables in using this single model as a basis for costs moving forward. For example, it is estimated that this is perhaps one of the less resource intensive inquests as the volume of evidence in comparison to matters such as the Ballymurphy⁶³ cases and others is diminutive. Nevertheless, it does provide a qualified basis to estimate costs in the remaining outstanding cases. At the time of writing there were 42 such cases and hence the overall approximate costs could reach in the region of £28.3m. However, given the variable nature of these cases, this is indicative only and a range of costs may be expected.

2.88 In common with a number of other areas across the criminal justice system senior NICTS staff were at pains to point out that the cost of dealing with the past is 'unmet' – in other words agencies, including the NICTS, were expected to absorb the associated costs – albeit in the case of the NICTS they had the ability to apply to the DoJ for additional funding in the annual budget monitoring rounds. Indeed, this was

⁶² Analysis of Costs in the McCaughey and Grew Inquest, Northern Ireland Courts and Tribunals Service, August 2012.

⁶³ This refers to the decision by the Attorney General for Northern Ireland to order a new inquest into the deaths of 10 people shot dead by the British Army in west Belfast in 1971.

reflected by the Justice Minister in a written answer in the Northern Ireland Assembly when he referred to the 'pressures' created by legacy inquests and went on to say that 'Any future pressures highlighted by NICTS will be considered as part of the in-year monitoring round.' A further Assembly written question highlighted the issue thus 'To date the legacy inquest case workload has been delivered from within the NI Courts and Tribunals Service budget but the management of these cases has created pressures for the Coroners and Coroners service.... Any future pressures will be considered as part of the in year monitoring round process... there is potential for the number of legacy inquests cases to increase.'⁶⁴

- 2.89 It is not within the scope of this review to assess the best model on which to move forward and there was ample evidence of the difficulties in the scheduling of inquests.⁶⁵ However, despite the difficulties it was encouraging for Inspectors to note that the NICTS had developed detailed discussion papers and was actively considering the costs, the implications and the best way to move forward. Inspectors have also been provided with some internal NICTS documents in which there is discussion as to the appropriate model to follow in dealing with outstanding inquests. While a number of options are considered, in keeping with the general trend of this inspection, Inspectors have not commented on the efficacy of the approaches being taken but do point out that some of the issues arising might be discussed in a joint forum which is discussed at paragraph 3.3.

Coronial reform

- 2.90 The current legislative basis for the inquest system is the Coroners Act 1959; which itself has a basis in 19th century law. During the course of inspection it was clearly represented to Inspectors that, at least in part, some of the issues surrounding legacy cases were not assisted by the absence of a fundamental review of coronial law. Representatives of the Coroners Service referred Inspectors to a 'frustration' with the current coronial law which was seen as a further impediment to progress. It was also clear to Inspectors that both the Coroners Service and the DoJ seek to achieve that end, but differ as to the timescales and the approach to it. For their part, Inspectors would also wish to see reform which would ensure the needs of families and the public are addressed as soon as practicable and in a way which will avoid litigation, delay and confusion. It bodes well that there is common agreement of the need for such fundamental reform.

Other NICTS costs

- 2.91 The court costs associated with legacy cases in the courts system is difficult to calculate and no immediate basis for costing was available. However, based on the estimates of the numbers of cases remaining to be reviewed by the HET and being investigated by the SCB (total 1,025) together with the OPONI investigations (150) brings the total to 1,175. The vast majority of these, if prosecuted, would be likely to be heard in the Crown Court, and it is therefore possible to provide a scenario based forecast of costs.
- 2.92 Despite the previously highlighted difficulties, Inspectors considered it would be helpful to conduct some rudimentary scenario based estimates to help project the position going forward. Such methodologies are regularly used across a number of industries to identify risk and estimate programme costs. While usually based to a greater degree on activity based costs, it is regarded as helpful in the absence of any other method to predict the future shape of things with regard to legacy matters within the criminal

64 Northern Ireland Assembly AQW 13226 11-15, tabled 22/06/2012 available at <http://aims.niassembly.gov.uk/questions/printquestionssummary.aspx?docid=139860>.

65 See discussion of the matters arising from the scheduling of the inquest into the death of Arlene Arkinson reported by BBC on 6/2/13 available at <http://www.bbc.co.uk/news/uk-northern-ireland-21349164>.

justice system. While imperfect, this can give some degree of confidence going forward of the projected costs and the risks.

2.93 The estimates are based on the following provisos:

- the estimated number of legacy investigations being examined (1,175);
- the average cost of a Crown Court trial day was estimated by Inspectors to be £2,621⁶⁶ whereas an average court day in Northern Ireland was £1,768⁶⁷ (mean £2,194) x the estimated number of cases which are likely (see Table 2) providing a cost range; and
- the likely length of such trials which given their nature are expected to last on average four-five weeks (or 20-25 days hearing). Inspectors used the upper average of 25 days, but it must be acknowledged that some may be either shorter or longer.

Table 2: Scenario based assessment of court costs*

	Assessment of likelihood	Range of estimated costs of court hearings
Scenario 1: Circa 0.2% of cases will proceed to prosecution in the courts (i.e. three cases)	Inspectors assessed this as the most likely scenario based on research, fieldwork and past outcomes.	£132,000 - £196,000
Scenario 2: Circa 5% of cases will proceed to prosecution in the courts (59 cases)	Inspectors assessed this as a possible scenario based on research, fieldwork and past outcomes.	£2.60m - £3.86m
Scenario 3: Circa 10% of cases will proceed to prosecution in the courts (117 cases)	Inspectors assessed this scenario as possible but unlikely based on research, fieldwork and past outcomes.	£5.17m - £7.66m
Scenario 4: Circa 30% of cases will proceed to prosecution in the courts (352 cases)	Inspectors assessed this as an unlikely scenario based on research, fieldwork and past outcomes.	£15.55m - £23.06m
Scenario 5: Circa 45% of cases will proceed to prosecution in the courts (529 cases)	Inspectors assessed this as very highly unlikely scenario based on research, fieldwork and past outcomes.	£23.38m - £34.66m

2.94 In summary, the NICTS costs can be categorised in three distinct areas. The first is the estimated cost of inquests which currently range between £22.9m - £28.3m. (mean £25.6m). The second is for criminal prosecutions which stand at between £1.59m - £2.35m (mean £1.97m). Lastly, the costs of appeals referred from the CCRC at £256,000 over five years. Using the mean of the other costs the total therefore is estimated at £27.5m.

NILSC

2.95 The NILSC assumed responsibility on 1 November 2003 for the provision of publicly funded legal services in Northern Ireland. The Commission is an executive non-departmental public body that is sponsored by the DoJ.

⁶⁶ This was based on the full costing of one high profile trial lasting 16 days by NICTS at a total of £41,900.

⁶⁷ Inspection report on the adequacy of court estates, CJI, May 2012.

- 2.96 A significant cost in the criminal justice area is that concerning legal aid (both criminal and civil) and related to legacy matters. However, it is the Statutory Exceptional Grant power which is most often exercised in relation to legacy matters in respect of inquests.
- 2.97 NILSC staff who were consulted as part of the fieldwork for this inspection were particularly focussed on ensuring engagement with the Commission on legacy matters and, in particular, consultation regarding the numbers of such cases likely to be impacting on the legal aid funds. Inspectors agreed that the absence of consultation would be likely to hinder planning and in itself lead to delays when claims were being made with the potential for duplicate claims in a small number of cases. Inspectors suggest that a forum with other interested parties on the issue of legacy matters would enable the NILSC to forward plan more appropriately. Inspectors have recommended such a vehicle at Paragraph 3.3. This could address issues such as the enumeration of relevant documentation which itself would assist in the broader objective of set fee costs for the examination of case papers going forward.
- 2.98 The costs of exceptional grant legal aid at £3.1m over a four-year period are incorporated in the commentary and estimates in respect of the NICTS (see Table 1). It is anticipated that most families are likely to be granted legal aid to provide for representation as this has been the position in previous such inquests.
- 2.99 Given that these costs are incorporated in the overall NICTS estimates, they are not further reflected in Table 1 so as to avoid double counting.

Other legal aid costs

- 2.100 With regard to the numbers of legacy cases expected in the criminal courts in the future, once again Inspectors would emphasise that there are a considerable number of variables. However, a reasoned assessment can be made based on two main assumptions:
- the estimated numbers of future cases arising from HET work;⁶⁸ and
 - the average costs of criminal legal aid in the Crown Court.
- 2.101 The average legal aid costs for the Crown Court have been assessed as follows: In 2010-11 there were 1,271 cases completed in the Crown Court with 2,642 legal aid certificates issued and an overall cost of £29.5m.⁶⁹ However, it is not possible to equate cases nor certificates or indeed to payments in any one year. This is for a variety of reasons including the fact that a number of certificates may be issued in one case or for one defendant and the fact that payments for any year do not correspond with work in that year. However, the following table (Table 3) provides details of the average Crown Court payments for Counsel and Solicitors. Inspectors considered that in the majority of the kind of cases being considered in this review, the likelihood would be that a Solicitor and two Counsel would be certified. The combined legal aid costs, based on the average payments, would therefore equate to £10,791. This provides an average overall legal aid cost per case and these are reflected in a scenario based costing in Table 4. It is emphasised that these are average costs and there could undoubtedly be considerable variations.

⁶⁸ See table 2 at paragraph 2.94.

⁶⁹ Figures are drawn from Table 4 of The Report of the Access to Justice Review, August 2011.

Table 3: Crown Court Payment Averages⁷⁰

	2010-11	2011-12
Average Solicitor payments	£4,198	£4,223
Average Counsel payments	£3,681	£3,284

Table 4: Scenario based assessment of criminal legal aid costs

	Assessment of likelihood	Range of estimated costs of court hearings
Scenario 1: Circa 0.2% of cases will proceed to prosecution in the courts (i.e. three cases)	Inspectors assessed this as the most likely scenario based on research, fieldwork and past outcomes.	£32,000
Scenario 2: Circa 5% of cases will proceed to prosecution in the courts (59 cases)	Inspectors assessed this as a possible scenario based on research, fieldwork and past outcomes.	£636,000
Scenario 3: Circa 10% of cases will proceed to prosecution in the courts (117 cases)	Inspectors assessed this scenario as possible but unlikely based on research, fieldwork and past outcomes	£1.26m
Scenario 4: Circa 30% of cases will proceed to prosecution in the courts (352 cases)	Inspectors assessed this as an unlikely scenario based on research, fieldwork and past outcomes.	£3.79m
Scenario 5: Circa 45% of cases will proceed to prosecution in the courts (529 cases)	Inspectors assessed this as very highly unlikely scenario based on research, fieldwork and past outcomes	£5.70m

2.102 Therefore, based on the most likely scenario future criminal legal aid costs for legacy cases are estimated to be in the region of £32,000. This does not take account of inquests or other costs discussed elsewhere in this review.

CCRC

2.103 The CCRC is an independent public body that was set up in March 1997 by the Criminal Appeal Act 1995. Its purpose is to review possible miscarriages of justice in the criminal courts of England, Wales and Northern Ireland and refer appropriate cases to the appeal courts. In their preliminary research and consultations underpinning this inspection Inspectors' attention was drawn by a number of stakeholders to the potential for the CCRC cases to incur additional costs in respect of legacy cases. Consequently, Inspectors contacted the CCRC who, while outside the remit of CJI, kindly agreed to provide some data to include as part of this inspection. Inspectors learned that the CCRC do not track

⁷⁰ Derived from data supplied by the NILSC.

costs for individual cases, and consequently were unable to provide firm figures for budget spend on Northern Ireland cases. However, estimates of the costs of handling an application from beginning to end, based on the class of application were provided alongside data on the numbers of cases relating to Northern Ireland over a period of over 15 years between April 1997 and October 2012. While some early CCRC data may not be entirely reliable, it is possible from this time period to say that some 335 cases have related to Northern Ireland. On average then CCRC receives approximately 22.⁷¹ Northern Ireland cases per annum. Of course, not all of these cases will result in a referral to the Northern Ireland Court of Appeal and Inspectors were further advised that the vast majority of cases in Northern Ireland relate to more historical cases with complex issues and therefore were at the higher end of the average cost per case. The average CCRC cost for these higher cases is £44,000; meaning that the notional costs of Northern Ireland cases is in the area of £968,000 per annum. This would bring the five-year costs, including an inflationary element, to £4.8m. Readers should note that this is an estimate only and is based on a number of averages and so could be subject to some significant variations. It does not include the costs of hearing Appeal Court cases, however, such costs are discussed post.

- 2.104 The Court of Appeal normally sits at the Royal Courts of Justice in Belfast. The Judges of the Court of Appeal are the Lord Chief Justice (who is the President) and three Lord Justices of Appeal. The Court of Appeal hears appeals in criminal matters from the Crown Court and in civil matters from the High Court. It also hears appeals on points of law from the County Courts, Magistrates' Courts and certain Tribunals. A Court of Appeal case will usually be heard by three judges but can be heard by two. In 2011 the numbers of criminal appeals received was 74 with 61 court sitting days. Of those appeals 14 were against conviction and 17 were against both conviction and sentence. However, of these appeals only five were 'scheduled' cases where conviction and/or conviction and sentence were being appealed.⁷² There is a clear disparity therefore with the average 22 cases per annum calculated using the CCRC data. Inspectors have also learned that of 250 CCRC cases relevant to Northern Ireland conflict related convictions, 31 were referred to the Court of Appeal (or a rate of 12%).⁷³ However, it may be safer to conclude that the costs of appeal case hearings should be calculated on the numbers of scheduled cases entering the Appeal Courts (although plainly not all of these will be referred from the CCRC).
- 2.105 Inspectors have calculated that the average number of hearing days per case is 1.2. On this basis and bearing in mind the estimate of five 'scheduled' cases per annum, the costs of Appeal Court hearings would likely to be in the region of £23,000 per annum.⁷⁴ The five-year costs adding an inflationary element is estimated at £115,700. While these latter costs are borne by the NICTS and are included in the overall NICTS totals, they are reflected here in keeping with a natural chronology.
- 2.106 The PPS estimates its costs for the CCRC and legacy appeals was circa £8,000 per annum. However, this is included in the overall PPS estimates and, once again, is not replicated to avoid double counting.

The Compensation Service (formerly the Compensation Agency)

- 2.107 The Compensation Service is an executive agency of the DoJ. As of 1 April 2012, the agency has an estimated annual budget of approximately £29 million and approximately 70 staff located in Belfast. The purpose of the agency is to process claims for criminal injury and criminal damage, where the injury or damage has been sustained in Northern Ireland, in accordance with the relevant statutory schemes.

71 Figures are rounded up.

72 NICTS, Judicial Statistics 2011.

73 Research on Historical Investigations and Information Recovery, Prepared for the Commission for Victims and Survivors by Deloitte, March 2012.

74 Calculated using the daily rate for Lord Chief Justice and two Lord Justices of Appeal.

- 2.108 The Criminal Injuries Compensation Scheme 2002 and the Criminal Injuries Compensation Scheme 2009 (*the Tariff Schemes*) provide compensation to victims of violence in Northern Ireland. In total, £11.9m was paid in compensation under the Tariff Scheme in 2011-12. The 1988 Order Criminal Injuries Compensation Scheme applies to incidents which took place before 1 May 2002. The agency has continued to focus on clearing the remaining cases under this scheme. During the financial year decisions were reached in 71 of the outstanding cases and £4.2m was paid.⁷⁵
- 2.109 There are clearly some (albeit limited) overall costs and impacts of legacy matters which continue to be dealt within the Compensation Service. Following consultation with staff Inspectors heard from the Service that the impact of legacy matters entailed an assortment of work across various aspects of the Service which could not readily be ascertained. However, overall costs were equated with one full time Staff Officer post (at between £28,000 – £31,000 per annum). This primarily deals with administering the various compensation schemes and appeals arising from legacy matters. The issue of current and ongoing costs are unknown as the number of cases related to legacy issues outstanding will be unpredictable and dependant on individuals submitting claims.

DoJ Legacy Unit

- 2.110 The role of Legacy Branch, within the Policing, Policy and Strategy Division of the DoJ, is to support the Minister in providing an appropriate legal and resourcing framework for police complaints and investigations into past cases; and to act as the sponsor for legacy arms length bodies: the Police Rehabilitation and Retraining Trust, the Northern Ireland Police Fund and the OPONI.

Among its objectives are:

- to analyse reports on the operation and governance of the OPONI and the HET and provide advice to the Minister;
- develop and agree an implementation plan for agreed changes to OPONI's legal and administrative framework resulting from the future operation of the public consultation exercise by 31 March 2014; and
- provide an appropriate legal and resourcing framework for investigations into past cases.

- 2.111 Costs in 2012-13 were estimated at £225,000.⁷⁶ The five-year costs including inflation would be an estimated £1.18m.

NIPS

- 2.112 The NIPS would be expected to keep in custody those offenders adjudicated and sentenced by the courts in respect of legacy cases. The statement of purpose for the NIPS is to *'Improve public safety by reducing the risk of re-offending through the management and rehabilitation of offenders in custody'*.
- 2.113 In common with other areas across the criminal justice system estimates of costs in this area are particularly complex, not least because it is virtually impossible to predict the numbers of cases which may result in a sentence of imprisonment. Secondly, for the overwhelming majority of those who may be convicted, the sentences will usually reflect the Belfast Agreement. That is to say, under the

⁷⁵ The Compensation Agency, Annual Report and Accounts 2011-12.

⁷⁶ This estimate is a 'flat rate' cost and does not include, for example, pay progression or pay awards.

Northern Ireland (Sentences) Act 1998, many of those sentenced for a qualifying offence (usually one within the remit of this inspection) will be released after serving two years. In the absence of any clear estimate in this area, Inspectors used a hypothesis based on an experiential assessment grounded on the number of cases in which the HET have made referrals for re-investigation and on two cases which have already reached the courts following reviews by the HET. In addition, Inspectors took into account the conviction rate in the Crown Courts in Northern Ireland during 2011 which stood at circa 83%.⁷⁷ Based on that rationale it was calculated as being reasonable to assume that the numbers of convicted prisoners who might be expected to be convicted would not be in excess of single figures. While this is clearly inexact and, for example, one high profile case could scotch such estimates, Inspectors used the mid-point of the estimated range (at five). Each of these estimated prisoner numbers would serve two years.

- 2.114 Calculating the above at an annual average cost per prisoner place at £71,398⁷⁸ the overall forecast of costs would be in the region of £0.7m. Inspectors recognise that the cost per prisoner place is complicated in Northern Ireland by the cost of separated paramilitary prisoners. However, such additional costs may well be a feature of the forecasts for the purposes of this review. Inspectors also acknowledge that the annual cost per prisoner place has been reducing and that current further reduced targets are scheduled to be achieved.
- 2.115 In addition, the NIPS conducted an exercise to assess the numbers of prisoners currently held who would meet the criteria of this inspection.⁷⁹ At the time of fieldwork it was assessed that the NIPS held a total of 16 inmates who met the qualifying offence criteria. These were largely inmates whose licence had been breached resulting from other offending and who were returned to prison on foot of that licence. Consequently, they are included for the purposes of this review and the projected costs. Of the 16 inmates, six had an expected release date which, when combined, allowed Inspectors to calculate the totality of imprisonment at 29 years and one month (average just under five years). This would add a further £0.4m to the annual NIPS costs or £2.07m to the five-year (medium term) NIPS costs. For each year the remaining 10 are held will add a further £0.7m. However, while it is impossible to assess timelines for this element it would be reasonable to assume that this cost will be replicated in the medium term and hence an additional £0.7m is included in that assessment (see Table 1). That brings the total annual cost to an estimated £1.1m and with the inclusion of the additional £0.7m mentioned above this brings the five-year costs to £6.2m.

Probation Board for Northern Ireland (PBNI)

- 2.116 One of the main strands of the PBNI's work is to supervise offenders subject to a range of court orders and sentences. At any given time this could be in the region of 4,600. In addition, the PBNI provide approximately 10,000 reports each year to courts and Parole Commissioners. However, only a very small number of these would relate to legacy type cases and the cost to the PBNI is estimated at less than £1,000 per annum. In these cases the report would focus on the social history and current circumstances of the individual. At any given time the PBNI also supervise approximately 4,300 offenders subject to a range of court orders and licences. Again, a very small number of these would

77 Calculated by adding the total who pleaded guilty and found guilty on at least one charge as a percentage of the total outcomes for Crown Court defendants.

78 Northern Ireland Assembly, Answer to Written Question, AQW 18808/11-15.

79 Inspectors used qualifying criteria analogous to those in the Northern Ireland (Sentences) Act 1998 which were (a) date of offence 1 January 1969 - 10 April 1998 (b) sentence to life or five years imprisonment or more (c) a scheduled offence within the meaning of the Northern Ireland (Emergency Provisions) Act 1973, 1978, 1991 or 1996.

relate to legacy type cases and the focus of the PBNI's supervision would be on other offending, not related to legacy issues. Finally the PBNI provide a Victim Information Scheme to victims (or their families) of offenders subject to PBNI supervision but there are no cases related to legacy issues.

- 2.117 Once again, in common with many other areas of the criminal justice system, the PBNI did not receive distinct funding for legacy related matters and costs were not readily available. The costs of preparing reports or supervising offenders who may have legacy related convictions are absorbed as part of the overall work of the PBNI. There may be other areas where costs are incurred but overall impact on core business is insignificant and further detailed comment is regarded as superfluous.

ICLVR

- 2.118 The ICLVR was established by agreement between the two Governments of the United Kingdom and Ireland. It was underpinned by the Northern Ireland (Location of Victims Remains) Act 1999. Although not strictly part of the criminal justice architecture, for the sake of completeness, Inspectors considered that some commentary on the Commission would be useful in the context. This was so given that the Commission clearly has a mandate to deal with legacy related issues. Consequently, Inspectors met with Sir Kenneth Bloomfield, Commissioner for the ILCVR. However, having regard to the particular sensitivities involved in the Commission's work, Inspectors agreed that it would not be appropriate to investigate its operation given that the ICLVR is not within the mandate of the CJI to investigate. However, very kindly, the Commission did set out its costs of operation in order to assist this inspection appropriately.

The costs arising were estimated as follows:

- Department of Justice and Equality (Republic of Ireland) €4.04m; and
- Northern Ireland Office £573,000.

The combined spend (converted) would bring the expenditure to date to £2.7m

Miscellaneous

- 2.119 Inspectors invited a range of organisations whose work, while not subject to inspection by CJI, nonetheless touched on matters of criminal justice. This was in order to make the findings of this report as comprehensive as possible. It was unfortunate that a number felt unable to participate. However, Inspectors felt that this did not impact significantly on the overall conclusions and findings.



Conclusions

Common themes

- 3.1 It is apparent that across the criminal justice system there are a series of clear common themes and messages arising from this review, which include the following:
- The criminal justice system alone is neither constructed to deal with the broad issues of the past, nor is it able to deliver the comprehensive answers society demands. This is manifest when considering, for example, the numbers of legacy cases reaching the courts either from the Police Ombudsman's Office or from the PSNI. Inspectors recognise of course that prosecution is not the sole measure of success, but within the criminal justice arena it must be regarded as among the core objectives. Arguably, the attrition rates in legacy cases may not therefore be regarded in isolation as either an efficient or effective use of resources.
 - Significant issues regarding legacy cases remain including the continuing costs and the impacts both within and outside the criminal justice system.
 - The continuance of legacy cases progressing slowly through the criminal justice system creates risks of damaged confidence and to the ability of the agencies to deliver effective and efficient services for the present.
 - Linked to the above, the numbers of legacy cases remaining to be resolved coupled with the specialist resources required to manage these will inevitably create further delay and indeed further impact on victims/families.
 - The opportunity costs and impacts arising are noteworthy and on the estimates contained in this review mean that investments in other areas are being underdeveloped.
 - Within the overall context of the criminal justice system and its resources, the costs alone may not be regarded as a statistically substantial proportion. However, the pressures exert themselves at critical points - where specialist resources are required and the lead-in times for training and skilling are critical.
 - There are a number of areas where a lack of co-ordination across the criminal justice system could act as a barrier to the effective progress of cases within the existing systems and resources of the criminal justice system.
- 3.2 Linked to the above, ***the DoJ should facilitate (but not lead) the establishment of a Legacy Executive Group incorporating senior representatives across the criminal justice system in order to share information and, as far as possible, co-ordinate their responses to legacy issues. The Group could consider agreeing a criminal justice system wide strategy for prioritising, co-ordinating and progressing legacy cases.*** The chair of the Group could rotate amongst the core participants. The mission for this group could take a format similar to the following: *'To help co-ordinate the criminal justice*

responses to legacy cases in Northern Ireland by sharing relevant information and aiding a wider understanding of legacy work through a multi-agency partnership.’ This group should in no way interfere with the operational independence of those agencies involved. But, the sharing of information to avoid pinch points and address gaps would undoubtedly assist the objective of negating further delays.

- 3.3 Inspectors initially suggest that the Legacy Executive Group could meet on a quarterly basis, more often, by exception, where this is necessary. It might usefully address the co-ordination of legacy matters and in particular the issue of the prioritisation of cases across the criminal justice system given the pressure on specialist resources. It could also consider guidance similar to that issued by the Attorney General for both the State Pathologists Department and FSNI⁸⁰ which among other resourcing and accountability for legacy matters addresses delay. The group could also be assisted by the invitation of the Commissioner for Victims and Survivors to act as a critical friend or indeed others, by exception, where this might be considered helpful in a particular context.

Expectations

- 3.4 Many of those seen by Inspectors during the course of fieldwork at different levels referred to the impact of the current approach to legacy issues as creating a false expectation on the part of victims/families. This included, for example the ordering of a fresh inquest or the commencement of a new investigation. Inevitably, when this happens there is an expectation on the part of families that once such an announcement is made that the inquest/investigation will be commenced at once. However, in many instances that is not the case. Examples include the Claudy bomb and some recent Coroner’s inquest referrals. One very senior figure commented to Inspectors that managing expectations became impossible due to delays and the numbers of backlogged legacy inquests.
- 3.5 A key conclusion to all of this seems to Inspectors to be that, in the absence of any other mechanism to deal with the past, that the next best substitute to reaching a less controversial destination and secure stability is to provide the additional resources necessary for the prompt review and/or investigation of outstanding cases. In this way society might be better placed to move beyond the risks of the slow ‘drip, drip’ effect of the past on the present and perhaps more importantly better address the needs and expectations of victims and families. Clearly, this might entail additional investigative and other resources across the criminal justice system or their re-allocation, but this may be more beneficial in the longer term and be considered an invest to save initiative. Inspectors make a linked suggestion at paragraph 2.31 concerning separated resourcing and accountability for legacy matters where this might be feasible.
- 3.6 Also in terms of victim impact, Briege Gadd has commented on the issues and like many others has bemoaned the absence of any consensus in dealing with the past. In an article in the Irish News 11 October 2012, she helpfully outlined how the failures in this regard continued to touch the future in the context of possible prosecutions for past crimes and affiliated loyalist concerns. She stated *‘A formal agreed process for dealing with the past would have taken the whole emotionally charged matter of past crimes to a safer politically agreed place which enabled and secured involvement by all sides.’* This reflects a widely held view which was heard repeatedly by Inspectors that a piecemeal approach to dealing with legacy issues has the very real potential to destabilise the hard won political progress and damage confidence in the criminal justice system.

⁸⁰ See Guidance By The Attorney General For Northern Ireland pursuant to Section 8 of The Justice (Northern Ireland) Act 2004 for both Forensic Science Northern Ireland and the State Pathologist’s Department.

- 3.7 The subject of expectation is also considered a key issue in terms of the considerable delays in the investigation of legacy matters and Inspectors saw ample evidence of this in a number of areas across the criminal justice system. This ranged from police investigations to investigations being conducted by the OPONI, but the primary concern is in areas of specialist investigation where, as we have observed, particular pressures are manifest. Longer term resource allocation to these key areas of specialism (given the significant lead-in times) requires careful consideration. It is likely in the short to medium term that that legacy work will continue to present pressures and be a continuing feature of criminal justice system work. Consequently, decisions about how best resources can be managed and/or re-allocated to meet these demands, must be addressed now if continuing obligations are to be met without substantial delays. Examples here include the fact that some 40% of the PSNI's Serious Crime capability is currently being employed on legacy matters. Therefore, **decisions about how best resources can be managed and/or re- allocated to meet the demands of legacy investigations within a reasonable timescale must be addressed now. Senior leaders in the criminal justice system should therefore review and reflect on demands in the specialist areas dealing with legacy issues and take appropriate prompt action where this might be required in liaison with criminal justice system partners.** The aim should be to avoid longer term pressures and delays. This issue may also be linked with Inspectors observations at paragraph 2.31 and 3.5.
- 3.8 While in development, the issue of managing expectations could be further assisted by a more transparent approach to the issue of prioritisation for PSNI investigations. **The PSNI should consider adopting a formal publicly available prioritisation model for legacy cases.** It should have as its overall objective, a widely available and understood criteria for the prioritisation of legacy cases. **This prioritisation model should be further supported by a clear communication strategy.**

Reflection on costs

- 3.9 As we observe earlier estimated annual expenditure across the justice system on legacy matters is in excess of £30m with the five-year spend in the region of £187m. Putting the overall costs in context, in January 2013 the Education Minister announced a £220m package to re-build 14 new primary and six post-primary schools. The Downe Hospital in Downpatrick which provides inpatient services, including mental health and dementia services, a consultant-led emergency department, day procedure unit, outpatients, rehabilitation and maternity services, opened in June 2009. The cost was £64million.⁸¹ The cost of a proposed new dual carriageway between Derry/Londonderry and Strabane was estimated at £170m. Many may find the outlay in legacy cases concerning but, for Inspectors, the costs and impacts while undoubtedly of great consequence, were appreciably less than general perception might otherwise indicate. The criminal justice spend may also contrast with the expenditure on victims services which (on combining the funding for both the CVSNI which co-ordinates and allocates funding) equates to a total annual outlay in the region of £11m.
- 3.10 Rather than an upper limit to the costs, as has been the case with some other research and analysis, this review has taken the opposite and conservative approach. Hence the overall costs revealed here at approaching an estimated £31m per annum are more likely to be the lower level costs. As we reflect, some significant costs are absorbed elsewhere, for example, in overheads and opportunity costs. Neither does this estimate include the costs of previously held public enquiries where there has been considerable debate regarding the expenditure. To the extent that the issues of cost and impact are

81 Department of Health, Social Service and Public Safety Press Office, June 2010 news releases.

surfaced here, it is hoped that this review might assist in framing the debate on a more sound basis, despite its limitations.

Criminal justice system commitment

3.11 In credit to the agencies of the criminal justice system Inspectors were left with the very clear impression that there was no lack of commitment to dealing with the past - however difficult that may be. It was also the clear view of Inspectors that a particular strength of many areas of the criminal justice system lay in its demand led approach. It therefore has the ability and willingness to adapt to circumstances and to cope with change – often in the face of adversity. That is largely evident in the context of legacy issues. While there clearly are areas for development it is nonetheless apparent that across the criminal justice system there was a real resolve to do the best that it could. Within the overall context Inspectors saw scope to make some improvements. These fell primarily into two areas:

- cross co-ordination, co-operation and communication; and
- management of expectation, scheduling of cases and family contact.



Appendices



Appendix 1: Terms of reference

A thematic inspection of the cost and impact of dealing with the past on criminal justice organisations

Introduction

It seems clear that there is widespread debate concerning the costs and impacts of dealing with Northern Ireland's troubled history (the past). For some, the costs and impacts of the past are said to have a serious detrimental effect on the current work and effectiveness of many of the criminal justice organisations.

The costs and impacts of dealing with the past are clearly wide ranging and in addition to observable costs, for example in policing, must ultimately take account of the wider aspects of dealing with the past. Examples here include, dealing with legacy inquests, prosecutions and all their associated costs.

However, the costs and impacts of the past have not been articulated in a coherent and conjoined way across the criminal justice system. Criminal Justice Inspection Northern Ireland (CJI) therefore proposes to examine the costs and impacts on criminal justice organisations of dealing with the past.

Context

For a variety of reasons it is important that there is a precise understanding of the costs and impacts of dealing with the past insofar as they relate to criminal justice organisations. A unified narrative may assist in developing longer term strategic planning for the criminal justice organisations and for the funding of those organisations that are charged with dealing with the past.

There is no homogeneous agreed definition of the past. Consequently CJI Inspectors considered that a working definition to aid this inspection would be used. The definition CJI propose to use is:

'All processes of inquiry, review, investigation and other related activities conducted by criminal justice organisations associated with the Troubles in Northern Ireland between 1969 and the signing of the Belfast Agreement in 1998.'

This will include:

- the current costs and impacts of investigations/enquiries/reviews;
- the current costs and impacts of delivering justice connected to the above; and
- the current costs and impacts of legacy inquests and enquiries.

Aims of the inspection

The primary aim of the inspection will be to examine and document the current costs and impacts of dealing with the past on criminal justice organisations. This will be achieved by providing a coherent, conjoined and contemporaneous account of the issues insofar as they relate to criminal justice organisations. This will take two distinct parts:

- costs; and
- impacts

The purpose in doing so is to:

- provide a single unified narrative of the costs and impacts of dealing with the past on criminal justice organisations;
- document and where possible validate the costs and impacts of dealing with the past; and
- help inform and assist strategic planning and objective setting for those who are charged with dealing with the past.

It is not the purpose of CJI or this report to decide on how the past should be approached and to that extent the inspection is not to be viewed as influencing that debate in any particular direction. Nor is it to be viewed as being a negative commentary on the costs and impacts and consequently supporting any rationale to discontinue that work. In addition, in terms of the impacts of dealing with the past on criminal justice organisations, it is clear that there will be consequences and concomitant impacts on others including a range of NGO's and also for individual victims and survivors. However, it is not within the scope of this inspection to consider those impacts beyond those strategic influences and challenges affecting the criminal justice system.

Methodology

The inspection will seek to engage with all criminal justice agencies to assess and document the costs and impacts of dealing with the past for each organisation.

The following methodology is proposed.

There will be a five phase approach to inspection as follows:

- Phase 1 - Design and planning (including development of terms of reference);
- Phase II - Delivery (fieldwork);
- Phase III - Assessment and review;
- Phase IV - Factual accuracy checks; and
- Phase V - Publication and closure.



Design and planning

Preliminary research has been undertaken by Inspectors to inform these terms of reference. In addition, some preliminary meetings have been held with key stakeholders as a means to finalise these terms of reference.

Research will be undertaken into the current and projected costs and impacts. Data analysis will also form a key part of this process. Inspected agencies and stakeholders will be asked to supply relevant documentation including financial allocations. Inspectors will review these alongside documentation from the Department of Justice and publicly available information.

Contact with agencies

The agencies of the criminal justice system inspected will include:

- the PSNI (including the work of HET and the Legacy Unit);
- the PPS;
- FSNI;
- the NICTS (including the Coroners Service),⁸²
- the PBNI;
- the Compensation Service;
- the Youth Justice Agency;
- the NIPS;
- the NILSC; and
- the OPONI.

A number of other agencies while not formally subject to inspection by CJI will be asked to participate. For illustration these will include, for example:

- Criminal Cases Review Commission;
- The Independent Commission for the Recovery of Victims Remains; and
- the Department of Justice.

Delivery

Stakeholder consultation

Key stakeholders (including those from the voluntary and community sector) will be consulted with regard to the strategic impacts of dealing with the past, but specific to criminal justice organisations. This will include a range of institutions, for example:

- CVSNI;
- Victim Support Northern Ireland; and
- Northern Ireland Policing Board.

⁸² Subject to the exceptions and limitations imposed in Section 47 (6A) of the Justice Act (Northern Ireland) 2002.

Fieldwork plan

Inspection fieldwork is scheduled to occur during September, October and November 2012. CJI will agree with each agency and all relevant stakeholders an outline programme detailing single points of contact, consultee's and agree relevant meetings. Data analysis will occur during fieldwork to inform other aspects of the inspection and also in the post assessment phase following the completion of fieldwork.

Fieldwork will consist of interviews with appropriate stakeholders and an examination of appropriate documentation and management information.

The fieldwork may at any time consider other issues relevant to the costs and impacts of the past and which arise as the inspection progresses.

Assessment and review

Following the completion of fieldwork Inspectors will take a number of weeks during November and December to assess and review evidence collected during fieldwork, together with research findings. Emerging findings will be discussed with the criminal justice agencies post completion of fieldwork and assessment phases. Also during this phase a draft inspection report will be developed. This work is scheduled to commence in late November 2012 and is anticipated to be completed by the end of January 2013.

Factual accuracy checks

Once available, a draft inspection report will be provided to the criminal justice organisations for factual accuracy review prior to the report being provided to the Minister of Justice seeking permission to publish.

Publication and closure

CJI intend to circulate a draft inspection report for factual accuracy checks in late 2012/early 2013. Publication will follow, pending receipt of permission from the Minister of Justice in Northern Ireland. This is expected to occur before the end of March 2013.



Appendix 2: Methodology

The main methodology for this inspection comprised three main strands as follows:

- literature review;
- agency self-assessments; and
- stakeholder interviews.

Literature review

A desktop review was also conducted of appropriate literature including those concerning the position of victims. This included the following:

- *Dealing with the Past in Northern Ireland*, Dr Cillian McGrattan and Dr Máire Braniff, January 2012.
- *Dealing with the past, advice to Government, Commission for Victims and Survivors*, June 2010.
- Bell C, *Dealing with the past in Northern Ireland*, Fordham International Law Journal Volume 26, Issue 4 2002 Article 9.
- Research on Historical Investigations and Information Recovery, Prepared for the Commission for Victims and Survivors by Deloitte, March 2012.
- *Comprehensive Needs Assessment, First Interim Report*, Commission for Victims and Survivors, September 2010.
- *The needs of individuals and their families injured as a result of the Troubles in Northern Ireland*, Marie Breen-Smyth, in association with Northern Visions, Commissioned by WAVE, May 2012.
- British Journal of Criminology, Volume 50 Number, 3 May 2010.
- *Paper on Dealing with the Past: Costs to Date and for 2010-2014*, September 2010 (prepared by Deloitte MCS Limited).
- Access to Justice Review, August 2011.
- *Dealing with the Legacy - a human rights perspective*, submission from the Committee on the Administration of Justice (CAJ) to the Consultative Group on the Past, September 2008.
- *Looking back at our past with impunity?* Gemma McKeown, CAJ.
- *A Review of the Office of the Police Ombudsman for Northern Ireland*, CAJ, June 2011.
- Submission to the Committee of Ministers from the Committee on the Administration of Justice (CAJ) in relation to the supervision of the cases concerning the action of the security forces in Northern Ireland, November 2012.
- *Dealing with the past in Northern Ireland 'from below' - an evaluation*, Brian Gormally and Kieran McEvoy, The Community Foundation for Northern Ireland, September 2009.
- House of Commons Northern Ireland Affairs Committee *Ways of dealing with Northern Ireland's past: interim report - victims and survivors*, tenth report of Session 2004–05.
- *Consultation Paper: Dealing with the past in Northern Ireland: the recommendations of the consultative group on the past*, Northern Ireland Office, June 2009.
- *The costs of the Troubles study: Report on the Northern Ireland Survey: the experience and impact of violence*, Morrissey et al, University of Ulster, 1999.
- *Truth, justice and dealing with the legacy of the past in Northern Ireland, 1998-2008*, Patricia Lundy and Mark McGovern, University of Ulster, Northern Ireland December 2009.
- *Research into the financial cost of the Northern Ireland divide*, Deloitte, April 2007.

- *Healing through remembering, paper of dealing with the past: costs to date and for 2010 - 2014*, September 2010.
- *Healing through remembering, principles on dealing with the past*, 25 January 2008.
- *Negotiating Justice? Human Rights and Peace Agreements*, 2006 International Council on Human Rights Policy.
- *The Legacy of the Troubles: Experience of the Troubles, mental health and social attitudes*, Muldoon et al, Queens University, Belfast.
- *Can the past be policed?: Lessons from the Historical Enquiries Team Northern Ireland*, Lundy, P, Journal of Law and Social Challenges, Vol.11, 2009.
- *Dealing with the Past*, Northern Ireland assembly, Research and Library Service Briefing Paper, Paper 129/10, 22 September 2010.
- House of Commons Northern Ireland Affairs Committee, *Policing and Criminal Justice in Northern Ireland: the Cost of Policing the Past*, Third Report of Session 2007–08.
- *A conceptual framework for dealing with the past, holism in principle and practice*, Working paper 2, Swisspeace, 2012.
- *The Troubles aren't history yet, young people's understanding of the past*, John Bell, Ulf Hansson and Nick McCaffery, Community Relations Council, October 2010.
- Research into the financial cost of the Northern Ireland divide, Deloitte, April 2007.

Agency self-assessments

Each of the core agencies were asked to conduct a self-assessment of the costs and impacts of dealing with the past and were provided with a series of core headings for the purposes of this exercise. Inspectors then further considered these assessments using same in stakeholder interviews and, where appropriate, using the material to develop checks and areas for validation.

Stakeholder interviews

A series of interviews with key staff in each of the core criminal justice agencies and bodies associated with oversight. This included the following:

- Criminal Cases Review Commission (2 August 2012).
- Assistant Chief Constable Crime Operations, PSNI (10 August 2012).
- Chief Executive, FSNI (15 August 2012).
- PSNI Executive Support (22 August 2012).
- Director of Finance, PSNI (28 August 2012).
- PSNI Human Rights Legal Advisor, (11 September 2012).
- Director Safer Communities, DoJ (12 September 2012).
- PSNI, Head of Intelligence (13 September 2012).
- PSNI, Head of Organised Crime (19 September 2012).
- Sir Kenneth Bloomfield, ICLVR (25 September 2012).
- PSNI, Head of Serious Crime (26 September 2012).
- PSNI, Head of HET (27 September 2012).
- Head of Legacy Unit, Department of Justice (2 October 2012).
- Public Prosecution Service (22 October 2012).
- Assistant Chief Constable District Policing Rural, PSNI (22 October 2012).
- Head of Court Operations, NICTS (23 October 2012).
- Victims Commissioner, CVSNI (26 October 2012).



- Head of Historical Enquiries and Head of Corporate Services, Office of the Police Ombudsman (6 November 2012).
- Senior Presiding Judge, Coroners Service for Northern Ireland (7 November 2012).
- Attorney General's Article 2 Colloquium (9 November 2012).
- Chief Executive and Director of Criminal Defence Services, Northern Ireland Legal Services Commission (19 November 2012).
- Victim Support Northern Ireland (4 January 2013).
- PSNI District Commanders (21 and 24 January 2013).
- Northern Ireland Prison Service (23 January 2013).
- Probation Board for Northern Ireland (25 January 2013).
- Commission for Victims and Survivors, Monthly Seminar – Historical Investigations and Information Recovery (14 February 2013).

In addition to the above, a range of further contacts and consultations took place as the inspection fieldwork and assessment developed.



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